Erik Göretzlehner

Maritime Cross-Border Insolvency

An Analysis for Germany, England & Wales and the USA

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To RFG

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Abbreviations

11 U.S.C.	Title 11 United States Bankruptcy Code
28 U.S.C.	Title 28 United States Code—Judiciary and Judicial Procedure
34 & 35 Henry VIII, c. 4	1542 Statute of Bankrupts c. 4—An Act against such Persons as do make Bankrupt
4 & 5 Anne, c. 17	1705 Bankruptcy Act
7th Cir.	United States Court of Appeals for the Seventh Circuit
AC	Appeal Cases
AG	*Amtsgericht* (Local Court in Germany)
ALI	American Law Institute
ALR	Australian Law Reports
AMC	American Maritime Cases
Art.	Article
B.C.	Before Christ
B.C.C.	British Company Law Cases
B.C.L.C.	Butterworth's Company Law Cases
B.R.	West's Bankruptcy Reporter
Bankr. S.D.N.Y.	United States Bankruptcy Court for the Southern District of New York
Bankr. S.D.Tex.	United States Bankruptcy Court for the Southern District of Texas
Bankr. W.D.N.Y.	United States Bankruptcy Court for the Western District of New York
BCCI	Bank of Credit and Commerce International
Beschl. v.	*Beschluss vom* (German court order on)
BGB	*Bürgerliches Gesetzbuch* (German Civil Code)

BGBl.	*Bundesgesetzblatt* (German Federal Law Gazette)
BGH	*Bundesgerichtshof* (German Federal Court of Justice)
BGHZ	Entscheidungen des Bundesgerichtshofs in Zivilsachen
BinSchG	*Binnenschifffahrtsgesetz* (German Code for Inland Waterway Transport)
BT-Drs.	*Bundestagsdrucksache* (Document of the German Parliament)
BVerfG	*Bundesverfassungsgericht* (Federal Constitutional Court of Germany)
C.A.	Court of Appeal
CBI Agreement	Cross-Border Insolvency Agreement
CBIR	Cross-Border Insolvency Regulations 2006
Ch.	Chancery Division
CJEU	Court of Justice of the European Union
CMI	*Comité Maritime International*
Cmnd	Command paper by the British Government
COMI	Centre of Main Interest
CVA	Company Voluntary Agreement
D. Md.	District of Maryland
dwt	Deadweight tonnage
E.C.R.	European Court Reports
ed.	Edition
Eds.	Editors
EGBGB	*Einführungsgesetz zum Bürgerlichen Gesetzbuche* (German Introductory Act to the Civil Code)
EU	European Union
EUR	Euro (€)
EWHC	High Court of Justice of England and Wales
EwiR	Entscheidungen zum Wirtschaftsrecht
F.	Federal Reporter
F. 2d	Federal Reporter 2nd series
F. 3d	Federal Reporter 3rd series
F. Supp.	Federal Supplement
FC	Federal Court (Canada)
FCA	Federal Court of Australia
FCR	Federal Court Reports (Australia)
fn.	Footnote
GBP	Great Britain Pound (£)
GVG	*Gerichtsverfassungsgesetz* (German Courts Constitution Act)
Hanjin	Hanjin Shipping Corporation

HGB	*Handelsgesetzbuch* (German Commercial Code)
H.L.	House of Lords
H.R. Doc No. 137, 82d Cong., Sess.	House Report Document, United States Congressional Serial Set
IA 1986	Insolvency Act 1986
IDW PS 800	Institut der Wirtschaftsprüfer in Deutschland e.V. Prüfungsstandard 800 – *Beurteilung eingetretener oder drohender Zahlungsunfähigkeit bei Unternehmen*
III	International Insolvency Institute
IMO	International Maritime Organization
InsO	*Insolvenzordnung* (German Insolvency Code)
IWG	International Working Group of the Comité Maritime International
J.	Judge
LG	*Landgericht* (Regional Court in Germany)
LJ	Lord Justice of Appeal (England and Wales)
Ll. L. Rep.	Lloyd's Law Reports
marg. no.	Marginal Number
Moo. N.S.	Moore New Series
Moo. P.C.	Moore's Reports Privy Council Cases
NJW	Neue Juristische Wochenschrift
NZI	Neue Zeitschrift für Insolvenz- und Sanierungsrecht
OHADA	Organisation pour l'Harmonisation en Afrique du Droit des Affaires
OLG	*Oberlandesgericht* (Higher Regional Court in Germany)
p.	Page
P. D.	Law Reports: Probate, Divorce and Admiralty Division
para.	Paragraph
Q.B.	Queen's Bench
RG	*Reichsgericht* (Imperial Court of Justice in Germany from 1879 to 1945)
RGZ	Entscheidungen des Reichsgerichts in Zivilsachen
Rn.	*Randnummer* (marginal number)
S.D.N.Y.	Southern District of New York
Sch.	Schedule
SCR	Supreme Court Reports (Canada)
sec.	Section
seq.	*Sequens* (the following one)

seqq.	*Sequentes* (the following ones)
SGHC	Singapore High Court (unreported judgments)
SLR	Singapore Law Reports
Suppl. Rule	Supplemental Rule
TEU	Twenty-foot Equivalent Unit (unit to describe the capacity of container ships and container terminals)
TranspR	Transportrecht
Tul. L. Rev.	Tulane Law Review
USA	United States of America
USD	US Dollar ($)
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Commission for Trade and Development
US Code Cong. & Admin. News	United States Code Congressional and Administrative News
VDR	Verband Deutscher Reeder (German Shipowners' Association)
VersR	Zeitschrift für Versicherungsrecht, Haftungs- und Schadensrecht
ZInsO	Zeitschrift für das gesamte Insolvenzrecht
ZIP	Zeitschrift für Wirtschaftsrecht
ZPO	*Zivilprozessordnung* (German Code of Civil Procedure)
ZVG	*Zwangsversteigerungsgesetz* (German Enforcement Code)

Chapter 1
Introduction

Admiralty law - the Flying Dutchman of cross-border insolvency[1]

The headline of Rares' article may sound catchy when bearing in mind that the Flying Dutchman in maritime mythology stands for a ghost ship that can never reach its destination and is fated to sail the seven seas in eternity. But as drastic as this comparison might sound, it seems to be very appropriate. This book will be guided by the question whether insolvency law and maritime law[2] are separated by fundamentally different legal concepts and policies[3] or whether harmonisation can be achieved to some extent. In other words, will the Flying Dutchman continue to sail aimlessly or is there a chance to guide this doomed ship into known and safe waters?

On 15 December 1997, during the 1997 to 1999 Asian financial crisis, the UN adopted the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Cross-Border Insolvency. This Model Law was the result of a process started in 1992.[4] The Asian financial crisis marked one of the first international economic crises, which involved insolvencies of international enterprises. Obviously UNCITRAL was not designed to hinder new economic crises, but neither could it smoothen the problems of international insolvencies. Indeed, there was no successful international legal approach to companies in debt or already insolvent.

The economic impact of the 2007/2008 financial crisis affected many branches of business. Banks and insurers struggled and quite a few of them fell into insolvency followed by liquidation.[5] Furthermore, the financial crisis led to an unprecedented

[1] Rares (2010), p. 246.

[2] The terms 'admiralty' or 'maritime' law are used interchangeably in the legal terminology of the Anglo-American law tradition and they have the same meaning. Maritime law in legal categorisation does not include the Law of the Sea, as this forms part of public international law.

[3] McCullough (2007/2008), p. 458 states: *Maritime lawyers have a general belief that bankruptcy and maritime laws in the United States are* "antithetical".

[4] See UNCITRAL (1992), A/CN.9/398, Annexure A.

[5] *E.g.* the insolvency and following liquidation of Lehman Brothers Holdings Inc.

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crisis in the shipping industry as well.[6] This crisis started in 2008 and lasts now for more than 8 years; the charter rates for ships fell because the volume of world trade shrank massively due to the financial crisis. At the same time and in the following years until today, a high number of new and bigger ships were completed and commissioned for their purposes, which kept especially the container shipping market under pressure.[7] The low charter rates made most of the ships unprofitable and in combination with banks' new precautious demand for higher securities for their loans, as the value of the vessels dropped accordingly and could not bear the loan securities required by the financing banks, many shipping companies had to file for insolvency.

These insolvency filings confronted and continue to confront courts with legal issues that were and are not limited to their home jurisdiction. Often, not only the creditors of the shipping companies were from different countries but also the company's owners and debtors. This situation leads to confusion on the side of the courts as to which law is applicable, and on the creditors' side as to which court is in charge for insolvency proceedings. The lack of a global insolvency regime leads to business harming uncertainty, respectively unpredictability. The seaborne trade has always tried to establish international regimes beyond regional or country based codes of law and the maritime industry already recognised the problems of cross-border insolvencies. The shipping industry and its associated institutions, in particular the 1897 established private organisation Comité Maritime International (CMI), are making efforts to overcome such uncertainty. In 2010, the CMI installed an international working group on cross-border insolvencies and set up a Questionnaire,[8] which was send out in May 2012 to the National Maritime Law Associations, members of the CMI, to find a basis for a comparative law analysis to promote harmonisation of the cross-border insolvency law and to reach a practical compatibility between maritime and insolvency law.[9] The work of the CMI on cross-border insolvency is still in progress.

This phase of an ongoing shipping crisis and international efforts to solve legal issues in this surrounding is very exciting and offers the chance to examine, firstly, whether states or supranational organisations can provide adequate solutions for the demands of a global industry and secondly, whether the industry can help itself by means outside the classic idea of national law.

The legal issues of an international maritime insolvency are numerous and occur in all phases of the proceeding. Furthermore, the interplay of insolvency and maritime law adds another legally problematic layer to the complex area of international insolvency.

The book starts with an outline of the fundamental principles of insolvency law in Germany, England & Wales and the USA to examine the unifying and separating

[6] See for this and the following sentence VDR (2014), p. 12.

[7] See PricewaterhouseCoopers (2013), p. 9.

[8] The CMI Questionnaire is available at http://www.comitemaritime.org/Cross-Border-Insolvency/0,27129,112932,00.html (last visited on 10 June 2018).

[9] See Gombrii (2012), pp. 366, 367.

concepts of insolvency law in each of these three jurisdictions. In the next step, the law of international insolvency and the underlying concepts are presented in order to display the progress that has been made in the field of international or cross-border insolvency. The jurisdictions of Germany, England & Wales and the USA are of particular interest, as all three are main players in the international commerce and maritime trade.

The third chapter adds the field of maritime law to this book. The maritime industry and its legal concepts have their roots in ancient times. This background and the peculiarities of the maritime industry in comparison to other industries are discussed to give an understanding for the legal concepts that had to evolve to meet the needs of this naturally international industry. The maritime security interest of maritime liens is the main subject here. The maritime lien causes legal turmoil for internationally operating shipping companies and legal practitioners. Only the concept of security interest of maritime liens is examined for the three jurisdictions of Germany, England & Wales and the USA and not the ship mortgage, because the lien concept has been interpreted differently in those three jurisdictions and especially the catalogues of claims that can be secured by a maritime lien differ strongly. This is not the case for ship mortgages and therefore the mortgage will not be examined.

The fourth and final chapter brings together the legal fields of insolvency and maritime law and focuses on maritime insolvencies. This chapter shows how important it is to understand both international insolvency law as well as the particularities of maritime law to handle maritime insolvency cases. But as often as these insolvencies may occur, the interplay of insolvency and maritime law is still complex, uncertain and can be rather troublesome for all parties involved, as the cases almost never involve just one jurisdiction. With these legal challenges in mind, the last part of the fourth chapter turns to the question whether cross-border maritime insolvencies can be simplified or smoothened in their proceedings by harmonisation of international insolvency law and maritime law. The existing efforts of harmonisation are examined with regard to their effectiveness and alternative approaches shall be evaluated, which strive to bring the public policy of insolvency law in balance with the ancient concepts of maritime law.

The focus on the three jurisdictions of Germany, England & Wales and the USA allows a comparison of three leading nations in the maritime industry. Germany has the fourth largest merchant shipping fleet in the world,[10] England, especially London, is the traditional centre of ship financing and ship brokering and the USA have a strong maritime industry with a focus on ship repair services and logistics. Germany and England & Wales may have different legal foundations in Civil Law and Common Law, but they are up to now well integrated in the economic and legal community of the European Union and therefore share the EU Insolvency Regulation.[11] The comparative legal analysis is widened to the USA, as this jurisdic-

[10] See UNCTAD *Review of Maritime Transport* (2015), on p. 36.

[11] Following the referendum on 23 June 2016, the majority of British people voted for the United Kingdom to exit the EU. The consequences that will follow from this referendum, triggering the exit process of the United Kingdom, cannot be determined to its full extent yet.

tion has much in common with England & Wales, but lacks the European integration. The choice of Germany and the USA as the antagonists and England & Wales as the bridging jurisdiction offers the chance to examine how supposedly clashing jurisdictions can be integrated and possibly be harmonised for the benefit of global trade and business, here for the maritime industry, which is under constant threat of cross-border insolvencies.

The intention is to provide an overview of the legal phenomenon of maritime cross-border insolvency, and to give some insight into how the industry and the financing banks deal with the challenges of maritime and insolvency law and of course with their interplay in the event of a shipping company filing for insolvency. The focus on maritime liens allows an examination of a traditional and uniquely maritime security interest, which may exist in all jurisdictions, but differs in its arrangement.

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Chapter 2
Cross-Border Insolvencies

> Merchants have no country. The mere spot they stand on does not constitute so strong an attachment as that from which they draw their gains.[1]

Jefferson's timeless statement is more appropriate than ever before. There has always been international commerce, but in the last decades the volume of international trade has reached unprecedented highs[2] and the trends are globally set for growth as world exports continue to grow.[3] Moreover, nowadays the merchants and their trade companies are replaced by globally operating international enterprises, which install subsidiaries and joint-ventures under complicated liability-limiting and tax-avoiding company structures all over the world. Furthermore, the USA and the European Union are currently negotiating the Transatlantic Trade and Investment Partnership (TTIP) to overcome the remaining, relatively low, economic barriers to further promote the trans-atlantic commerce.[4]

The world spanning nets of internationally operating companies, with their highly efficient system of carrying goods and their digital transfer of information, made the world smaller and grew connections between markets and regions which had been isolated for centuries from foreign influence. The process of globalisation is driven by economic interests of merchants, suppliers and producers striving for new sources of goods, cheaper places of production and markets. The benefits of a

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[1] Statement by Thomas Jefferson in his letter to Horatio G. Spafford in 1814.

[2] See World Trade Organization *International Trade Statistics 2014*, Table A1a *World merchandise exports 1950*-2013 available at https://www.wto.org/english/res_e/statis_e/its2014_e/its14_appendix_e.htm (last visited on 10 June 2018).

[3] The International Monetary Fund (IMF) projects an increase of the world's gross domestic product (GDP) from 75,213 billion US Dollars in 2016 to 93,599 billion US Dollars in 2020, available at http://statisticstimes.com/economy/countries-by-projected-gdp.php (last visited on 10 June 2018).

[4] See European Commission *Final Report High Level Working Group on Jobs and Growth, February 11, 2013* available at http://trade.ec.europa.eu/doclib/docs/2013/february/tradoc_150519.pdf (last visited on 10 June 2018).

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globalised world are not only of economic kind: in the wake of the exchange of goods, political and cultural achievements are now spreading out to every corner of the world.

Nevertheless, globalisation is not a remedy for the risk of economic downturns or crises. The rise of transnational business groups leads consequently to the phenomenon of transnational, border-crossing insolvencies.[5] Therefore, economic crises are no longer only affecting the market where they started. The shock waves of financial crises of 1999 in Asia or the 2007/2008 subprime crisis could not be contained to their regions, but spread out to other regions, where they hit the markets with the same disastrous consequences.[6] The most recent global economic crisis of 2007/2008 revealed the wide gap between economic globalisation and traditionally state-based insolvency systems and procedures. The legal systems on both sides of the Atlantic Ocean did not and possibly could not keep pace with the fast development of cross-continent business transactions.

How the laws of insolvency evolved on both sides of the Atlantic Ocean will be displayed in the following part. In order to lay a foundation for the examination of maritime cross-border insolvencies, it is necessary to give a short introduction to the laws of insolvency, especially their history and general principles in the chosen jurisdictions of Germany, the USA and England & Wales. These introductory remarks shall give the basic background to be able to examine the legal challenges of cross-border insolvency in this chapter.

2.1 Insolvency Laws

Insolvency law deals with economic failure and is the basis for commercial and financial law.[7] The rules of insolvency make decisions about the ranking of creditors and the future chances of the insolvent company. These decisions are necessary, because only in very few cases there are sufficient debtor assets to satisfy all existing creditors. Therefore the rules of creditor ranking in each national insolvency law are overshadowing the law of commerce and finance with their credit agreements and collaterals.

The terminologies of the insolvency regulations of the USA, England & Wales and Germany are neither in line nor tantamount and the terms of ‘insolvency’ and ‘bankruptcy’ are used with very different meanings. England & Wales’ IA 1986 differentiates between the insolvency of a company (The First Group of Parts Company Insolvency—Insolvency Act) and the insolvency of an individual, whose creditors may present a petition of bankruptcy (The Second Group of Parts Insolvency of Individuals; Bankruptcy—Insolvency Act). Despite this legal distinction, in daily

[5] See Westbrook (1991), p. 457.

[6] On the crisis in the Asian economic markets, see Radelet and Sachs (1998), pp. 1231–1239.

[7] See for this and the following Wood (2007b), p. 1.

life the terms of 'bankruptcy' and 'insolvency' are used synonymously,[8] which leads to further confusion. On the other hand, Germany and the USA do not have such a distinction in their insolvency terminology. In Germany the term 'insolvency' applies to both individuals and companies. In the USA bankruptcy describes the state of an individual as well as corporate debtor.

To prevent confusion, the term 'insolvency' will be used for the insolvency of companies and the term 'bankruptcy' for the insolvency of individuals throughout this book, regardless of which national insolvency regulation will be analysed.

2.1.1 History of Insolvency Law

Nowadays, debts and financial obligations are treated objectively and unemotionally. Courts try to balance the interests of the debtor and his creditors in the same way. This approach can be seen as a result of the evolution of humanity, because the roots of all modern insolvency laws lie in criminal proceedings with harsh and often bloody punishments for the debtors. The history of insolvency law can be traced back as far as to the ancient Babylon in 2250 B.C. and the Code of Hammurabi, which stated that a debtor, who is unable to repay his debts, could be sold as a slave to satisfy his creditors.[9]

As many fields of law in Civil Law and Common Law jurisdictions, today's laws of insolvency have their roots in antic Roman codifications. The insolvent debtor in ancient Roman society, which was governed by the rules of the Twelve Tables (*leges duodecim tabularum*), had to face the creditors' remedy of *manus iniectio*, where the debtor was brought in front of the judge and could be sentenced to death if he was not able to repay his debts.[10] This cruel remedy was replaced by the *venditio bonorum* (a forced public auction for the sale of the debtor's whole property). The debtor's creditors then received the auction's revenue proportionate to their open claims.[11] This system already resembled modern insolvency regulations and their concept of equal treatment of the creditors. It was further developed, when the *distractio bonorum*, was introduced. In the process of the *distractio bonorum* a trustee (*emptor bonorum*) sold single parts of the debtor's property and then distributed the revenue to the debtor's creditors.[12] This system had already many features of modern insolvency law. For example, each of the insolvency codes of Germany, the USA and England & Wales know the office of the *emptor bonorum*, the insolvency administrator in Germany and England & Wales, respectively the trustee in bankruptcy in the USA.[13]

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[8] See Fletcher (2009), p. 6.

[9] See Levinthal (1918), p. 230.

[10] See Treiman (1927), p. 30.

[11] See Frege et al. (2015), p. 7.

[12] See Dalhuisen (1968), on pp. 6–8; Treiman (1927), p. 34.

[13] See for Germany: § 80 InsO; for England & Wales: sec. 14 IA 1986; for the USA: 11 U.S.C. § 704.

These early legal achievements in dealing with an insolvent debtor and satisfying his creditors most effectively fell into oblivion during the middle ages. The Church banned the system of credits as unchristian. When a person was in debt and insolvent, he had to either fear his execution or was excommunicated which meant his social and legal repudiation by society.[14] Only in the northern Italian merchant cities the ideas of Roman jurisprudence and the concepts of insolvency survived.[15] Unsurprisingly, the word 'bankruptcy' stems from the Italian words "*banca rotta*", which were used to describe that the bank of a moneylender was destroyed due to his fraudulent insolvency.[16]

For the following outline of historical developments of insolvency laws, it is necessary to differentiate between the Civil Law jurisdiction of Germany and the Common Law jurisdictions of the USA and England & Wales. The short history of insolvency law in these three jurisdictions will show that they have similar roots but evolved in different directions. Those differences can only be explained by different public policies on the central question of all insolvency laws: how to deal with someone who cannot meet and repay his obligations?

2.1.1.1 Germany

From the Middle Age to the nineteenth century, Germany was split up in many kingdoms, duchies and free cities.[17] Each such entity had its own insolvency regime and most of them were influenced by the concepts of Roman law. The cities of the Hanseatic League, for example Lübeck, Hamburg and Bremen, used the Italian model of an administrator who collected and sold the assets of the debtor to distribute them among the debtor's creditors. This basic concept was kept until the introduction of the *Reichs-konkursordnung* (German Empire Bankruptcy Law) in 1877. The *Reichskonkursordnung* was based on the concept of *'concursus creditorum*', which stands for the get-together of the creditors for the collective satisfaction of their claims out of the debtor's assets. The Spaniard Salgado de Somoza established "*Concursus creditorum"* in 1646.[18] The term '*concursus*', or '*Konkurs*' in German, was used officially to describe the insolvency proceedings until 1999, when the new *Insolvenzordnung* (German Insolvency Law) was enacted. In the *Reichskonkursordnung*, the German laws of insolvency did not differentiate between the insolvency of a merchant and the insolvency of a private person.[19] However, with the enactment of the *Insolvenzordnung*, a section of *Verbraucherinsolvenzverfahren* (consumer insolvency proceedings) was introduced and partially ended this German particularity.

[14] See Levinthal (1918), p. 241.

[15] See Levinthal (1918), p. 241.

[16] See Dalhuisen (1968), p. 13.

[17] See for this and the following sentence Dalhuisen (1968), p. 16.

[18] See Frege et al. (2015), p. 8.

[19] See Jaeger (1931), p. XXII (Einheitskonkurs).

2.1.1.2 Common Law: England & Wales and USA

England & Wales and the USA share the system of Common Law, which the British Empire established in its North American colonies. Therefore the history of insolvency laws of England & Wales shall be presented at first. Then, the book continues with the development of that particular field of law in the USA from its independence from the British Empire in the late eighteenth century onwards till today's rules.

2.1.1.2.1 England & Wales

Unlike the development on the European Continent, the legal system of England & Wales evolved mostly independent from the influence of Roman law. Therefore, it took longer than in Civil Law countries to establish common rules for the event of insolvency. As an exception from the Common Law system, which is traditionally derived from judge-made case law, the rules of bankruptcy and later insolvency have always been based on statute law, illustrated by the following short display of the evolution of insolvency law in England & Wales.

England & Wales enacted the first Bankruptcy Act in 1542 as "*Statute of Bankrupts*" (34 & 35 Henry VIII, c. 4) and it was designed to deal with the absconding debtor, who was seen as an offender.[20] The 1542-Act already codified the principles of modern insolvency law, namely the equal treatment of all creditors and the *pro rata* distribution of the debtor's assets.[21] From then on, the laws of bankruptcy were further developed and soon covered various "*acts of bankruptcy*".[22] A milestone in the history of bankruptcy law in England & Wales was the Bankruptcy Act 1705 (4 & 5 Anne, c. 17), which codified the instrument of discharge from debts for the first time.[23] The Lord Chancellor granted this discharge to those debtors who were able to present a certificate of full disclosure and adherence to the bankruptcy commissioners.[24] The concept of discharge from debt for the 'obedient' debtor has since then been an integral part of both England & Wales' and the USA's insolvency respectively bankruptcy reasoning and laws. Nevertheless, all those modern-fashioned statutes on bankruptcy were limited to traders and therefore only this profession benefited from an organised and fair bankruptcy proceeding with the aim to settle the debts of the trader and the compelling aim to receive a discharge. At the same time all non-traders who faced financial difficulties and became insolvent were exposed to such harsh creditor's remedies as imprisonment.[25]

[20] See Fletcher (2009), p. 9.

[21] See Fletcher (2009), p. 9.

[22] See Dalhuisen (1968), p. 18.

[23] See Goode (2011), p. 10.

[24] See Keay and Walton (2012), p. 9.

[25] See Keay and Walton (2012), p. 8.

The first statute to also deal with non-traders was the Bankruptcy Act 1861, which explicitly stated its design for "*all debtors, whether traders or not*" (sec. 69 of the Bankruptcy Act 1861). This Act brought insolvency legislation fairly close to today's insolvency law codification.[26] Nevertheless, all bankruptcy Acts did not deal with the insolvency of companies. It was the Joint Stock Companies Winding-Up Act 1844, which for the first time gave the creditors of a company the right to go against a company in insolvency "*in like manner as against any other bankrupt*" (sec. 1). Sec. 2 acknowledged the concept of limited liability of the company, even though the concept of limited liability was not pursued strictly, and therefore a protection of the members of the company was not guaranteed.[27]

Today's insolvency laws of England & Wales are based on the IA 1986, which still strictly differentiates between the bankruptcy of individuals and the insolvency of companies.[28]

2.1.1.2.2 USA

In colonial times up to the declaration of independence in 1776, the English colonies in North America were governed by English law and therefore the English insolvency laws applied there as well. The estimation that almost half of the white immigrants to the USA were indentured,[29] leads *Buchbinder* to state: "*America is a nation of debtors*".[30] And indeed, the development of the US insolvency law is characterised by its distinct and vivid economical culture. The foundation for all US insolvency laws, all referred to as Bankruptcy Acts, is the US Constitution of 1789. Its Art. I Sec. 8, clause 4 states:

> The Congress shall have the power…
>
> 4. to establish a uniform rule of naturalization, and uniform laws on the subject of bankruptcy throughout the United States.

Therefore from the start, the US legal system decided upon a uniform federal bankruptcy code for the whole of the US and against a decentralised state-based codification. This decision has to be understood against the background that the single states of the United States were already economically integrated and a decentralised bankruptcy code would have lead to cross-border issues from the beginning. The federal power was used for the first time in forming the Bankruptcy Act 1800 in

[26] See for this and the following Goode (2011), p. 11.

[27] See Fletcher (2009), p. 13.

[28] See Fletcher (2009), pp. 14, 15.

[29] See Countryman (1983), p. 813. "*Indenture was an alternative to serving debt-imprisonment. The employers in the English colonies in America paid for the passage and subsistence of the immigrants, who were in return obliged to work-off these costs in their first four or five years in America*".

[30] Buchbinder (1991), p. 11.

response to panics in the years 1792 and 1797 due to a "*wild wave of speculation*"[31] in nearly all fields of economy of this young nation. Only 3 years later, this first Bankruptcy Act was repealed, as it was too centred on the distant Federal Courts, the dividend rates paid out to the creditors were too low and many debtors were either imprisoned or prominent and rich debtors used the Act to easily receive a discharge from their debts.[32]

The same destiny of ephemerality befell the Bankruptcy Act 1841, repealed in 1843, and the Bankruptcy Act 1867, repealed in 1878. Nevertheless, the 1867-Act already carried the distinct US features of insolvency law, such as regulations comparable to today's proceedings of reorganisation of Chapter 11 or 13 and full discharge of the debtor from his debts issued by court, which need not be approved by the creditors or earned through the payment of a dividend.[33] This far-reaching and privileged treatment of the debtor was only known before in the Bible's Old Testament, where the debts of every man were eliminated every 7 years.

All three US Bankruptcy Acts between 1800 and 1867 share the background that they were enacted in reaction to economic crisis and that they were repealed as soon as the economic situation had recovered.[34] Those Acts were constructed as tools to clean up the economic chaos caused by economic downturns and were not meant to be lasting legislation. It explains why they were repealed so quickly, however in a short sighted manner, as every economy is facing regular up- and downturns.

Unlike the previous three Bankruptcy Acts, the Bankruptcy Act 1898 was not a reaction to an economic crisis but was based on the "*fresh financial start principle*",[35] and provided for regulations of debtor's liquidation and discharge. The Bankruptcy Act 1898 focused very much on the liquidation of the debtor. In 1938, the 'fresh financial start principle' was extended by the Amendatory Act, which contained the famous chapters 11 and 13 with their concepts of corporate reorganisation. Thereby the Amendatory Act, usually referred to as Chandler Act, gave the debtor a fresh financial start combined with the privilege of not being forced to start from scratch but to use the Chapter 11 reorganisation procedure for continuing his business debt free.

The amended Bankruptcy Act 1898 remained in force until 1978, when President Carter signed the Bankruptcy Reform Act of 1978 (prepared by a Reform Commission[36]). The new Act, which is with some amendments still in force today, mirrored the changes in US society where credit cards were frequently used and fast-paced businesses needed more effective debt-reorganisation procedures to be

[31] Warren (1935), pp. 10, 12.

[32] See Warren (1935), pp. 19, 20.

[33] See for this and the following Buchbinder (1991), p. 12.

[34] See Dreher et al. (2014), p. 3.

[35] Kennedy and Clift (2000), p. 175. The term "*fresh start*" was coined by the US Supreme Court in *Local Loan Co. v. Hunt* [1934] *292 U.S. 234* to describe the debtor friendly discharge regulations of the Bankruptcy Act 1898.

[36] Report of the Reform Commission on the Bankruptcy Laws of the United States, H.R. Doc. No. 137, 82d Cong., 1st Sess., pt. I, ch. 17 (1973).

competitive.[37] The Reform Act 1978 brought about dramatic changes: the Act introduced bankruptcy judges with wider competences on supervising the liquidation or reorganisation proceeding of the debtor, it replaced the former bankruptcy referees and streamlined the whole insolvency proceeding by allocating it to only one court, the newly formed bankruptcy court.[38] The new structure helped to establish a specialised court-branch with experienced bankruptcy judges who are able to deal with insolvency proceedings much more efficiently than the preceding bankruptcy referees.

2.1.1.3 Summary

This short introduction on the history of insolvency laws in Germany and the common law jurisdictions of England & Wales and the USA respectively showed that insolvency is not a new phenomenon but rather old and always subject to changes, depending on the legal, economic and political views *en vogue*. Looking at the history of insolvency laws in the USA and England & Wales, the similarities on the one hand are obvious, as both legal systems still differentiate between the insolvency of individuals and corporations and heavily rely on the debtor's discharge. On the other hand the USA were far more liberal from the beginning and emphasised the 'fresh financial start principle' and the Chapter 11 procedures. Both approaches reflect the 'second-chance' mentality of the US society whereas the term 'insolvency' in Germany and England & Wales still resonates negative images and the fear of stigmatisation.[39]

2.1.2 Insolvency Law Principles and Basic Features Compared

The Black's Law Dictionary defines insolvency [bankruptcy] as

> a statutory procedure by which a debtor obtains financial relief and undergoes a judicially supervised reorganization or liquidation of the debtor's assets for the benefit of creditors.[40]

From this short definition, it becomes clear that insolvency law has to serve three functions: firstly, it has to provide a definition of who is considered to be an insolvent debtor, profiting from the advantages of insolvency law like financial relief and reorganisation. Secondly, it has to acknowledge the creditors of the insolvent person. And thirdly, it needs to regulate the distribution of the assets of the insolvent person or company. The UNCITRAL Legislative Guide gives a similar definition for insolvency proceedings: "*Insolvency proceedings are collective proceedings,*

[37] See Dreher et al. (2014), p. 5.

[38] See Dreher et al. (2014), pp. 6, 7.

[39] See on the changing approach taken in German insolvency legislation Vallender (2010), p. 838.

[40] Black's Law Dictionary (Garner 2014).

subject to court supervision, for either reorganisation or liquidation".[41] This definition adds the court as a state institution to supervise the orderly and fair performance of the insolvency proceedings.

In order to understand the following examination of whether a harmonisation of insolvency proceedings is necessary and accomplishable, it is vital to display the guiding insolvency law principles of the three jurisdictions of Germany, England & Wales and the USA. To narrow this wide field, this display shall concentrate on each jurisdiction's main principles on the insolvency of business entities like companies. Furthermore, the insolvency priority schemes will be compared. These schemes are of particular interest for the question what impact an insolvency proceeding has on the traditional ranking of maritime claims (Chap. 3) and whether these two different systems collide and could be harmonised (Chap. 4).

2.1.2.1 Principles and Basic Features in Germany

Sec. 1 of the Insolvenzordnung (InsO) codifies the guiding principles of the German insolvency law. It states:

> The insolvency proceeding shall serve the purpose of collective satisfaction of a debtor's creditors by liquidation of the debtor's assets and by distribution of the proceeds, or by reaching an arrangement in an insolvency plan, particularly in order to maintain the enterprise. Honest debtors shall be given the opportunity to achieve discharge of residual debt.[42]

This sec. 1 InsO sets out the objectives of German corporate insolvency proceedings: *Best possible satisfaction of the creditors (a)*, *collective satisfaction of a debtor's creditors (b)*, *encouragement of reorganisation (d)* and *protection of the debtor*. The principle of protection of the debtor with the opportunity to achieve discharge of residual debt, according to sec. 1 s. 2 InsO, is only available for individuals' insolvencies and does not apply to corporate insolvencies, therefore this principle will not be discussed. Beyond those guiding principles in sec. 1 InsO, the following important principles and approaches of the German insolvency law shall be displayed: the *insolvency priority scheme (c)*, the *reason to open insolvency proceedings (e)*, the *insolvency court (f)*, *creditor autonomy (g)*, and the *insolvency administrator (h)*.

[41] UNCITRAL Legislative Guide (2004), para. 12, under B "Glossary, Terms and definitions" available at https://www.uncitral.org/pdf/english/texts/insolven/05-80722_Ebook.pdf (last visited on 10 June 2018) and UNCITRAL Practice Guide (2009), under B "Glossary", in "2. Terms and explanations" available at http://www.uncitral.org/pdf/english/texts/insolven/Practice_Guide_english.pdf (last visited on 10 June 2018).

[42] The translation of the German insolvency code (InsO) is provided by the German Ministry of Justice available at http://www.gesetze-im-internet.de/englisch_inso/ (last visited on 10 June 2018). All following English translation of the German InsO are derived from this source.

2.1.2.1.1 Best Possible Satisfaction of a Debtor's Creditors

The German Federal Constitutional Court (*Bundesverfassungsgericht*) determined the principle of best possible satisfaction of a debtor's creditors as the primary goal of German insolvency proceedings.[43] Source for the best possible satisfaction of the creditors are the debtor's assets, which form the insolvency estate (*Insolvenzmasse*). The preceding law of the InsO, the *Konkursordnung,* already followed this purpose and in that tradition, the InsO still upholds the idea that the debtor's creditors should be satisfied to the maximum with no regard to the destiny of the debtor, as usually the most predictable, certain and therefore best possible satisfaction of the debtor's creditors is accomplished by complete liquidation of the remaining assets of the debtor, followed by the distribution of those revenues.[44] It is a clear decision of the German lawmaker to sacrifice the debtor for the good of the creditors. Nevertheless, at the same time the enactment of the InsO was a move away from this creditor-oriented system, as will be illustrated in the following below (d).

2.1.2.1.2 Collective Satisfaction of a Debtor's Creditors

What would happen if the debtor's creditors find out about his financial difficulties? A creditors race for the debtor's assets through individual compulsory enforcement would commence.[45] To prevent such a race, which inevitably leads to the unfair situation that in most cases only the fastest creditor has a chance to fully satisfy his claims and the following creditors will come away empty-handed, German insolvency law, again codified in sec. 1 InsO, defines the guiding principle of collective satisfaction of a debtor's creditors to maintain public order and fairness.[46] The proceeds generated by the liquidation of the debtor's assets are partially distributed among the creditors. The amount each creditor receives depends on the value of his claim, as every creditor receives the same quota on his claims. This quota-system, treating all creditors equally, reflects the principle of collective satisfaction and the decision of German insolvency law not to favour a single creditor over the others.

The principle of collective satisfaction cannot be claimed to be a *pari passu* system. In fact, the term collective satisfaction is misleading, as the quota system for the creditors only works for the creditors of the same group. There are different groups of creditors and these groups rank differently on the priority scheme of German insolvency law.

[43] See BVerfG, Beschl. v. 23.5.2006—1 BvR 2530/04, NJW (2006), pp. 2613, 2614.

[44] See Gres and Frege (2002), p. 5.

[45] See Stürner (1986), p. 326.

[46] See for this and the following Ganter/Lohmann in Kirchhof et al. (2013), § 1 marg. no. 51, 52.

2.1.2.1.3 Insolvency Priority Scheme

The groups of creditors of an insolvent company rank under German insolvency law in the following priority scheme[47]:

1. Creditors with a right of separation (*Aussonderungsrecht*);
2. Creditors with a right of separate satisfaction (*Absonderungsrecht*);
3. Creditors of the insolvency estate;
4. Insolvency creditors;
5. Lower-ranking insolvency creditors.

Neither the creditors with a right of separation nor the creditors with a right of separate satisfaction dogmatically form part of the insolvency proceeding. As sec. 47 InsO stipulates, the creditors are entitled to claim the separation of an object from the insolvency estate, if they are for example owner, seller under retention of the title clause or lessor of equipment.[48] The creditors with a right of separate satisfaction are for example mortgagors and lienholders of both land property as well as maritime vessels[49] (sec. 49 InsO), other statutory lienholders (sec. 50 InsO) and those creditors with ownership transferred by way of security as a fiduciary transfer (*Sicherungseigentum*) (sec. 51 no. 1 InsO). Maritime lienholders, as creditors with rights to separation, thus rank among the group of creditors with the highest priority.[50] The right of separate satisfaction privileges the creditor as his claim does not form part of the insolvency estate and hence his claim is not subject to reductions, which are the usual case in a *pro rata* satisfaction. Creditors of the insolvency estate are among others the insolvency administrator, who can claim his incurred costs and expenses, and employees of the insolvent company.

2.1.2.1.4 Encouragement of Reorganisation

Insolvency law in Germany traditionally focuses on liquidating the debtor's assets to gain as much revenue as possible for the insolvency estate out of which the creditors receive their *pro rata* payments.[51] This guiding principle is repugnant to the concept of allowing the reorganisation of the debtor in a 'second-chance mentality'. The approach, of not seeing the insolvency of a corporate debtor as the end of his existence is fairly new to German insolvency law and was introduced with the enactment of the InsO in 1999.

The current sec. 1 InsO states that the maintenance is an available way in German insolvency law to achieve best possible creditor satisfaction. In order to open the

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[47] See Wood (2013), p. 231.

[48] See Wood (2013), p. 231.

[49] See H. Ganter in Kirchhof et al. (2013), § 49 marg. no. 5, 7, ships are treated as immovable objects under German law.

[50] See H. Ganter in Kirchhof et al. (2013), Vor §§ 49 bis 52 marg. no. 76.

[51] See above at Sect. 2.1.2.1.2.

way for restructurings and maintenance of the debtor, the InsO introduced the new legal instruments of the insolvency plan (*Insolvenzplan*, secc. 217-269 InsO) and the debtor-in-possession management (*Eigenverwaltung*, secc. 270-285 InsO).

The insolvency plan enables the insolvency administrator together with the debtor's creditors to find alternatives to the liquidation or winding-up of the company. Those alternatives can be the selling or the continuation of the company, combined with corporate actions to reorganise the enterprise. The intended structure and route of the reorganisation has to be laid down in a plan (secc. 217-234 InsO). This plan has to be accepted by the majority of the debtor's creditors (secc. 235-253 InsO) to take full effect with possible supervision of the goal attainment (secc. 254-269 InsO).[52]

In the reorganisation proceeding of debtor-in-possession management, as the name suggests, the debtor stays in control and continues to manage the company instead of the usually installed insolvency administrator (*Insolvenzverwalter*). Only an insolvency monitor (*Sachwalter*), who does not have the far reaching competence of an insolvency administrator, is installed to make sure that the proceeding is not used to reorganise the enterprise to the disadvantage of the debtor's creditors, because no matter how desirable it is to encourage the continuation of an enterprise to save jobs and assets, the guiding principle of best possible satisfaction of a debtor's creditors prevails over it.

Enacted with the good intention to encourage the reorganisation of companies in financial difficulties, the InsO 1999 did not go far enough to change the "*culture of insolvency*".[53] This is particularly true for the debtor-in-possession management, celebrated as the new revolutionary approach of German insolvency law. Looking at statistics, from 1999 to 2005, only around 800 cases where the insolvency instrument of debtor-in-possession management was used were reported. This number represents 6‰ of all opened insolvency proceedings.[54] This small number illustrates well how much the traditional German concept of insolvency as a mere liquidation proceeding dominated and that the new instruments at hand were not effective to change it. For this very reason, the German legislator made a second attempt in 2011 and introduced an amendment to the InsO to further facilitate the reorganisation of companies.[55] Basically, this amendment builds on the existing law and tries to overcome the weaknesses of the prior law. On one hand, the amendment facilitates companies' access to reorganisation instruments, on the other hand, it dissolves the blocking powers of minorities of the debtor's creditors.[56] The German legislator officially states that the US American bankruptcy law and particularly the Chapter 11 procedure functioned as a model for the German insolvency law

[52] See T. Thies in Schmitd (2017), Vorbem. zu §§ 217 ff., marg. no. 15, 16.

[53] See Vallender (2010), p. 838.

[54] See Hölzle (2011), p. 124, fn. 3.

[55] Gesetz zur weiteren Erleichterung der Sanierung von Unternehmen, BGBl. 2011, Teil 1 Nr. 64, p. 2582.

[56] See BT-Drs. 17/5712, p. 17.

amendment.[57] In trying to change their insolvency culture, the German legislator acknowledges the long standing 'insolvency culture' of the USA. This is well illustrated when looking at what changes the 2012 amendment brought for the insolvency plan as a reorganisation instrument. The introduction of sec. 225a InsO now makes 'debt-equity-swaps' feasible on the basis of an insolvency plan.[58] This new instrument is meant to serve both debtors' and creditors' interests.

Reliable figures on the effects of the 2012 amendment are not yet available, but the reforming amendment makes clear that the German legislator is determined to establish a new 'insolvency culture', in which the reorganisation of the company in financial distress is not only encouraged but facilitated.

2.1.2.1.5 Reasons to Open Insolvency Proceedings

The opening of an insolvency proceeding under the InsO can be requested by the debtor as well as a debtor's creditor according to sec. 13 (1) s. 2 InsO. The insolvency proceeding is a privilege for the debtor, as it stops all individual compulsory enforcements of its creditors. Therefore there has to be a reason to open the insolvency proceeding. The three reasons accepted by law allowing a company to file for insolvency are conclusively codified in secc. 17-19 InsO.

An insolvency proceeding has to be opened according to sec. 17 (1) InsO if the debtor is *illiquid*. Sec. 17 (2) InsO gives the following definition of illiquidity:

> The debtor shall be deemed illiquid if he is unable to meet his mature obligations to pay. Illiquidity shall be presumed as a rule if the debtor has stopped payments.

This is on one hand a straightforward definition and on the other hand a debtor-status where the chance of reorganisation is already missed. If the illiquidity of the debtor is not apparent from documents he hands in, like past financial plans or balance sheets, the insolvency court decides on the opening of the insolvency proceeding on the grounds of an expert opinion (usually an experienced insolvency administrator) on the financial status of the debtor.

In order to pursue the goal of encouragement of reorganisation, sec. 18 (1) InsO contains the opening reason of *imminent illiquidity*. Sec. 18 (2) InsO defines imminent illiquidity,

> The debtor is facing imminent illiquidity if he is likely to be unable to meet his existing obligations to pay on the date of their maturity.

This reason to open an insolvency proceeding gives the debtor the chance to use the insolvency law's reorganisation-instruments for his company in order to regain liquidity. The request to open the insolvency proceeding for the reason of imminent illiquidity requires the debtor to provide the insolvency court with a financial plan.

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[57] See BT-Drs. 17/5712, p. 18.

[58] See Schäfer and Frischemeier (2012), p. 195. For a detailed discussion of debt-equity-swap under German insolvency law see Pühl (2016).

The court will not decide on the status quo as under sec. 17 InsO, but has to make a prognosis based on the financial plan provided, which necessarily has to include a detailed list of the financial obligations of the debtor.[59] If the debtor does not initially provide such plan, the court can either order him to do so, according to sec. 20 InsO—Obligation of Disclosure and Cooperation During the Opening Proceedings—or the court obtains an expert opinion on the debtor's financial status, which disadvantageously costs precious time in the course of the debtor's effort to reorganise his enterprise.

The third opening reason is *over-indebtedness* according to sec. 19 (1) InsO. Only corporations may demand opening of insolvency proceedings based on such ground, as sec. 19 (2) InsO defines the over-indebtedness as follows:

> Over-indebtedness shall exist if the debtor's assets no longer cover his existing obligations to pay, unless it is highly likely, considering the circumstances that the enterprise will continue to exist.

For determining whether the insolvency court may open the insolvency proceeding for the applying corporation, two questions have to be answered. Firstly, the corporation's liquidation value must result in a value below its financial obligations.[60] This financial status is again most appropriately disclosed by a financial plan, with an emphasis on the liquidation value of the corporation's assets. Secondly, the corporation needs a positive continuation-prognosis, based on the financial situation of the company and the general market situation and development.[61] The German Federal Court of Justice held that a positive continuation-prognosis can be seen where the debtor has the will to continue the company and the financial plan of the company shows a conclusive and feasible business plan for an appropriate time in the future.[62] The period the prognosis shall cover is usually determined as the ongoing and the following accounting year.[63]

2.1.2.1.6 Insolvency Court

The insolvency court has a central function in the German insolvency proceeding as it guides and leads the proceeding.[64] The guiding function of the court begins with its decision on the debtor's or creditor's request to open insolvency proceedings according to secc. 13, 27 InsO and ends where the insolvency court decides to either terminate or discontinue the insolvency proceeding according to secc. 200, 207 InsO.

[59] See J. Drukarczyk in Kirchhof et al. (2013), § 18 marg. no. 23; IDW PS 800, marg. no. 20-23.

[60] See BT-Ds. 16/10600, p. 13.

[61] See J. Schröder in Schmitd (2017), § 19, marg. no. 6.

[62] See BGH (2010) ZInsO, on p. 2396.

[63] See OLG Hamburg (2013) ZInsO, on p. 2449; Bork (2000), p. 1710.

[64] See Frege et al. (2015), p. 358, marg. no. 808.

If the insolvency court decides to open the insolvency proceeding over the debtor's assets, it has to immediately appoint an insolvency administrator according to sec. 27 (1) s. 1 InsO. The role and function of the insolvency administrator will be discussed under *(8)*.

The insolvency court not only appoints the administrator, but also and more importantly supervises him in his office execution. The court's duty of supervision is set forth in sec. 58 (1) s. 1 InsO. In practice, the court exercises its supervising duty by requiring the insolvency administrator to either give specific information or to report on the progress of the proceeding and on the management, according to sec. 58 (1) s. 2 InsO. The court may require those actions at any time. All actions and steps the insolvency administrator undertakes during the insolvency proceeding are measured against the guiding insolvency principles of best possible satisfaction and collective satisfaction of the debtor's creditors. If the court comes to the conclusion that the insolvency administrator does not follow his obligations to report[65] or his measures favour specific groups of creditors and therefore the principle of collective satisfaction is violated,[66] the insolvency court may dismiss the insolvency administrator according to sec. 59 (1) s. 1 InsO.[67] This is a very severe measure of the court, as the dismissal interrupts or at least disturbs the insolvency proceeding and thus endangers its success. Sec. 59 (1) s. 1 InsO provides that the insolvency administrator may be dismissed only for important reasons. There is extended case law on the question of what forms an important reason for the dismissal of the insolvency administrator.[68] Nevertheless, the dismissal of the insolvency administrator should always be the last resort for the insolvency court[69]; a new administrator needs time to come to grips with the insolvency proceeding and often this time is not available for a crisis-ridden company that has already filed for insolvency.

The insolvency court, in its role to guide and lead the insolvency proceeding, convenes the creditors' assembly according to sec. 74 (1) s. 1 InsO. The role and function of this assembly will be discussed in depth under *(7)*. The insolvency court fulfils its leading function by presiding over the creditors' assembly according to sec. 76 (1) InsO.

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[65] See LG Göttingen (2003) NZI, p. 499.

[66] See OLG Zweibrücken (2000) NZI, p. 373, where the dismissed insolvency administrator was administrator of two conflicting insolvency proceedings and favoured the creditors of one proceeding over the creditors of the other proceeding; AG Hamburg (2004) ZInsO, p. 102.

[67] The benchmark of "*important reason*" for the dismissal of the insolvency administrator was set by the pre-InsO court decision of OLG Köln (1986) ZIP, p. 1261.

[68] Examples of important reasons justifying the dismissal of an insolvency administrator are: Inability of the insolvency administrator (LG Halle (1995) EWiR, p. 1091), deficiency of accessibility of the insolvency administrator, as his office is not manned or his telephone number is not available (AG Göttingen (2003) NZI, p. 267), criminal offences of the insolvency administrator (BGH (2011) NZI, p. 282).

[69] See F. Frind in Schmitd (2017), § 59, marg. no. 3; BGH (2009) ZInsO, on p. 1491, held, that the reason for the dismissal of the insolvency administrator has to be due to an indefensible breach of duty and furthermore BGH (2006) ZInsO, on p. 147 held, that the dismissal has to be proportionate to the breach of duty.

2.1.2.1.7 Creditors' Autonomy

The strengthening of the creditors' autonomy was one of the main aims of the 1999 *Insolvenzordnung* and the whole insolvency proceeding is ruled by the principle of creditors' autonomy.[70] The German insolvency code is based on the conception that the creditors should autonomously decide on the type and form of the insolvency proceeding, since their assets and claims are at stake.[71] The decision on the type of insolvency proceeding concerns the central question whether the insolvent company should be liquidated or reorganised. Also, if the creditors decide to reorganise the debtor's enterprise, they have to determine its form, either with or without the structure of an insolvency plan (*Insolvenzplan*, secc. 217-269 InsO). To enable the debtor's creditors to exercise their given autonomy and to make their decisions most effective, the *Insolvenzordnung* introduced the creditors' assembly (*Gläubigerversammlung*, sec. 74 (1) s. 2 InsO) as the basic organ exercising the creditors' autonomy during the insolvency proceeding,[72] and the creditors' committee (*Gläubigerausschuss*, sec. 67 (2) InsO), which cooperates with the insolvency administrator. These two administrative bodies of the creditors' autonomy will be displayed in the following.

2.1.2.1.7.1 Creditors' Assembly

The creditors' assembly is the highest body of the insolvency proceeding.[73] According to sec. 74 (1) s. 2 InsO, the assembly comprises all creditors with a right to separate satisfaction, all insolvency creditors, the insolvency administrator, the members of the creditors' committee and the debtor. All members are entitled to attend the assembly. The assembly brings together different creditors with different interests and to avoid conflicts in the assembly, the meetings of the creditors' assembly are convened (sec. 74 (1) s. 1 InsO) and presided (sec. 76 (1) InsO) by the insolvency court. The German insolvency law provides specific rules for the most important creditors' assembly meeting, starting with the report meeting (sec. 156 InsO), where the insolvency administrator shall report on the economic situation of the debtor and the causes for the debtor's insolvency. At the verification meeting (sec. 176 InsO) the filed claims of the creditors shall be verified in respect to their amount and rank. If the insolvency proceeding is started to achieve a reorganisation of the insolvent company, the discussion and voting meeting (sec. 235 InsO) is held, where the insolvency plan, as the central instrument of reorganisation, is debated and decided on. The final meeting (sec. 197 InsO) serves to distribute the final assets among the creditors and the insolvency proceeding is officially closed.

[70] See Pape in Uhlenbruck – *Insolvenzordung* (2015), § 1, marg. no. 13.

[71] See Ganter/Lohmann in Kirchhof et al. (2013), § 1 marg. no. 53; BT-Ds. 12/2443, p. 100.

[72] Pape/Uhlenbruck/Voigt-Saulus in *Pape/Uhlenbruck/Voigt-Saulus Insolvenzrecht* (2010), Chapter 16, marg. no. 2.

[73] See Ganter/Lohmann in Kirchhof et al. (2013), § 1 marg. no. 56.

Sec. 76 (2) InsO stipulates that a decision of the creditors' assembly shall be valid if the sum of the claims held by backing creditors exceeds one half of the sum of claims held by the creditors with voting rights. The most important decision of the creditors' assembly is whether the insolvent company should be liquidated or reorganised. The assembly further approves of the court-chosen insolvency administrator (sec. 57 InsO) and elects the creditors' committee (sec. 68 InsO).

2.1.2.1.7.2 Creditors' Committee

The institution of a creditors' committee by decision of the creditors' assembly is optional. In complex insolvency proceedings, the creditors' assembly usually decides to install a creditor's committee to have a smaller executive body, which serves the function to support and monitor the insolvency administrator's execution of his office (sec. 69 InsO). The creditors' committee comprises a minimum of two persons.[74] Its members are usually the representatives of the creditors with a right to separate satisfaction, of the insolvency creditors holding the maximum claims, of the small sum creditors and, if existing, of the debtor's employees.

2.1.2.1.8 Insolvency Administrator

The German insolvency proceeding takes away the sovereignty of the creditors over their claims and institutionalises the liquidation or reorganisation of the debtor. At the same time, the insolvency proceeding gives the debtor the privilege of an orderly liquidation or even better, the privilege of reorganisation, which is often coupled with a partial waiver of the debts of the insolvent company at the cost of its creditors. To strengthen the trust of the creditors in the legally and economically far-reaching insolvency proceeding and to protect the interests of the debtor as well, the German insolvency law installs the insolvency administrator as the central and independent figure of the insolvency proceeding.

The formal and legal position of the insolvency administrator is straightforward. As soon as the insolvency court opens the insolvency proceeding over the debtor's enterprise and assets (the insolvency estate), the administrator takes over the right to manage and transfer the insolvency estate (sec. 80 (1) InsO). This means the administrator legally enters the position of the debtor and acquires the rights and obligations formerly held by the debtor.[75] On entering the position of the debtor, the insolvency administrator totally replaces the debtor, which increases the trust of the creditors, as it was the debtor who manoeuvred the company into financial difficulty, resulting in its insolvency.

The central and trustful position of the insolvency administrator makes the decision on whom to appoint as administrator very important. The task of selecting the

[74] See BGH (2009) ZIP, p. 727.

[75] See RG (1902) 52 RGZ, p. 407.

appropriate insolvency administrator lies with the insolvency court. Sec. 56 (1) s. 1 InsO regulates:

> From among all those persons prepared to take on insolvency administration work the insolvency court shall select and appoint as insolvency administrator an independent natural person who is suited to the case at hand, who is particularly experienced in business affairs and independent of the creditors and of the debtor.

This wording is not very clear and does not provide well-defined rules on the selection of an insolvency administrator. As a result, much power lies in the hands of German insolvency courts. The courts have established a system of insolvency administrator lists (*Vorauswahlliste*), from which the insolvency judges choose the most fitting professional for the insolvency proceeding in question.[76] The fitness of a professional, mostly lawyers or public accountants, comprises his experience as an administrator and in the particular field of business the filing company was active in. Such a nomination procedure for insolvency administrators might seem to be highly court discretional,[77] but it has the advantage that the proceedings are administered by experienced, well-trained and established legal and restructuring expert-practitioners.[78]

Even though the insolvency court selects the insolvency administrator, the central principle of creditors' autonomy is still upheld. The court makes the first selection, but the creditors' committee must be given the opportunity to comment on the professional and personal requirements to be met by the administrator (sec. 56a (1) InsO). The creditors may even reject the court-selected administrator. On their first meeting after the appointment of the insolvency administrator, the creditors may elect by a majority vote a different person to replace the administrator (sec. 57 ss. 1, 2 InsO). This election of a different insolvency administrator is binding for the insolvency court, unless the creditor-elected administrator is unqualified to assume the office (sec. 57 s. 3 InsO).

The insolvency administrator is free to decide on how he manages the insolvency estate, especially how he continues to run the business of the insolvent company.[79] Upon doing so, he shall only ensure that his course of actions is in accordance with the careful actions of a proper and diligent insolvency administrator (sec. 60 (1) s. 2 InsO). The insolvency court supervises the administrator and can call on him at any time to either give specific information or report on the progress of the insolvency proceeding and on the management of the insolvency estate (sec. 58 (1) ss. 1, 2 InsO). Nevertheless, this right to supervision does not give courts the right to guide the insolvency administrator in his actions; it only serves as an instrument of control.[80]

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[76] See Delhaes in *Nerlich/Römermann, Insolvenzordnung* (2014), § 56 marg. no. 8.

[77] The allocation of a broad discretional power of the German insolvency courts has been confirmed by the German Constitutional Court (Bundesverfassungsgericht) in BVerfG, Beschl. v. 3. 8. 2004—1 BvR 135/00, NJW (2004), p. 2725.

[78] See Frind and Schmidt (2004), p. 536.

[79] See for this and the following sentence Wittkowski/Kruth in Nerlich et al. (2014), § 80 marg. no. 41.

[80] See F. Frind in Schmitd (2017), § 58, marg. no. 3b.

2.1.2.2 Principles and Basic Features in England & Wales

Unlike German insolvency law, the codified insolvency rules of England & Wales, mainly the IA 1986, do not provide an enumeration of the principles of corporate insolvency law.[81] Nevertheless, there is a lively debate between numerous commentators on which approach should be taken towards insolvent companies and what should be the main goal of an insolvency proceeding. This debate is led on a theoretical basis, which is uncommon for the usually pragmatic approach taken by the courts and legislators of England & Wales.[82]

A helpful source for the determination of the aims and objectives of the corporate insolvency laws of England & Wales is the *Report of the Review Committee on Insolvency Law and Practice*, usually referred to as the Cork (Committee) Report of 1982.[83] When installed, the Cork Committee had to review an English insolvency law system that was split into individual's bankruptcy and corporate insolvency, set out in different Acts and the liquidation proceedings at that time where tarnished by incidents of office-abuse by the liquidators, which led to a fading confidence of the public in the rules and proceedings of corporate insolvency.[84] To respond to those negative developments and ideally vanquish them, the Cork Committee described a number of "*aims of a good modern insolvency law*".[85] Those aims are for example a fair and orderly insolvency proceeding, a timesaving handling of the insolvency matter and the provision of instruments for the nearly insolvent company to be saved before it reaches a desperate state.[86] Especially the last aim, to facilitate a rescue culture, has been defined as basic to most of the later introduced provisions of the IA 1986.[87]

In order to keep this passage rather short and focused, this section shall start with a discussion of the main principles of England & Wales' corporate insolvency law and will display then the two primary tests of inability to pay debts, followed by the relevant corporate insolvency proceedings. The selection of those principles is based on the analysis of *Goode*[88] and *Keay & Walton*.[89]

[81] See Goode (2011), p. 93.

[82] For an extensive discussion on the theories underpinning the insolvency law of England & Wales see Finch (1997), p. 227; Finch (2009), pp. 29 et seqq.; Keay and Walton (2012), pp. 26 et seqq.

[83] *Report of the Review Committee on Insolvency Law and Practice* (Cmnd 8558, 1982). The Cork Committee was chaired by Kenneth Cork and was installed by the Labour government in 1977.

[84] See Finch (1997), p. 228.

[85] Cork Report (1982), para. 198; Finch (2009), pp. 29, 30 a list of those aims is provided.

[86] See Keay and Walton (2012), p. 24.

[87] See *Powdrill v Watson* [1995] 2 AC 394, per Lord Browne-Wilkinson.

[88] See Goode (2011), pp. 93–107.

[89] See Keay and Walton (2012), p. 23.

2.1.2.2.1 The Pari Passu Principle

The Latin phrase *pari passu* stands for the concept that the assets of the insolvent company should be distributed equally and rateably. As a downside of the *pari passu* principle, the insolvency-caused losses suffered by the creditors are shared as well. The principle of *pari passu* applies where the insolvent company is wound up in liquidation. The liquidator realises the company's assets in order to subsequently distribute the assets among the insolvent company's creditors. Similar to the German principle of collective satisfaction of a debtor's creditors, the insolvency law of England & Wales is based on the principle of *paris passu*. This is not surprising, as the principle of collectivity enjoys international recognition.[90] The importance of an equal treatment of the insolvent's creditors to the insolvency law of England & Wales was highlighted by the High Court, when it held,

> that in an English liquidation of a foreign company, the court had no power to direct the liquidator to transfer funds for distribution in the principal liquidation if the scheme for pari passu distribution in that liquidation was not substantially the same as that under English law applied.[91]

It might go too far to argue that the *pari passu* principle is a myth,[92] but it is true that there are several exceptions to this basic principle.[93] On the *pari passu* principle a general legal problem crystallises, namely the conflict between insolvency law which serves the public interest and private law which upholds the outstanding principle of freedom of contract. Institutional creditors like banks or insurance companies grant money or services and ask for securities in exchange. Within the principle of freedom of contract, those creditors secure their claims and in case of insolvency of the company they are not subject to the *pari passu* principle. On the contrary, those secured creditors skip the line of equal creditors and receive their revenue prior to other creditors. Furthermore, as their claims are dealt with outside of the insolvency proceeding, secured creditors do not receive their payments *pro rata*, but fully, which reduces the insolvency estate available for the *pro rata* satisfaction of the unsecured creditors of the insolvency proceeding. Sec 248 of the IA 1986 defines secured creditors as follows:

> In this Group of Parts, except in so far as the context otherwise requires—
>
> (a) "secured creditor", in relation to a company, means a creditor of the company who holds in respect of his debt a security over property of the company, and "unsecured creditor" is to be read accordingly; and
> (b) "security" means—
> (i) in relation to England and Wales, any mortgage, charge, lien or other security, and
> (ii) in relation to Scotland, any security (whether heritable or moveable), any floating charge and any right of lien or preference and any right of retention (other than a right of compensation or set off).

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[90] See Fletcher (2005), pp. 8, 9.

[91] Re HIH Casualty and General Insurance Ltd [2005] EWHC 2125.

[92] So does Mokal (2001), p. 581.

[93] See Keay and Walton (2012), p. 507.

The favouring of the secured creditors was labelled by Fletcher as the "*principle of respect for pre-bankruptcy rights*".[94] Besides those contractually secured creditors, further deviation from the *pari passu* principle is made when it comes to the distribution of the debtor's assets. From the rules of the IA 1986 accrues a priority of distribution of assets. Secc. 115 (in case of voluntary winding-up) and 156 (in case of court-ordered winding-up) of the 1986 Act provide that the costs and expenses of the liquidation are satisfied by payment out of the company's assets prior to all other creditors and claims.[95] The remaining assets are then paid out to the next ranking group of preferential debts. Those debts are not secured by contractual agreement, but enjoy priority over ordinary debts by reference to sec. 175 (1) to sec. 386 (1) of the Insolvency Act, which refers to the list of preferential debts in Schedule 6 of the 1986 Act. This Schedule 6 applies to both bankruptcy of individuals and insolvency of corporations. It contains a list of debts treated as preferential, because there exists a public interest that debts to public authorities, like debts to Inland Revenue and Customs and Excise, and contributions to social security and occupational pension schemes as well as remuneration of employees are satisfied prior to other, ordinary debts.[96] Sec. 175 (2) (b) further specifies that these preferential debts rank above holders of debentures secured by floating charges created by the company.[97]

In order to be part of the distribution of the assets generated by the liquidation of the company, the creditors have to set up their rights in those distributable assets by a procedure called 'proof of debt'.[98]

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[94] See Fletcher (2005), p. 10.

[95] See Fletcher (2009), p. 775.

[96] See Fletcher (2009), pp. 343–345.

[97] A detailed discussion of the nature of floating charges would go beyond the scope of this book, but for a better understanding the following: In the field of corporate borrowing, the most common forms of charges to secure the interests of the money lender are the fixed and the floating charge. Whereas the fixed charge, as the name tells, ascribes immediately to the property in question, the floating charge attaches to a "*shifting fund of assets*" (*Re Cimex Tissues Ltd* [1994] B.C.C. 626), *e.g.* stock in trade or receivables. Until the floating charge crystallises by repayment default or other stipulated events, the company is free to deal with its assets. On crystallisation the floating becomes a fixed charge over the remaining assets of the company. Slade J refined the characteristics of a floating charge in *Re Bond Worth Ltd* ([1980] Ch. 228) that it "*remains unattached to any particular property and leaves the company with a licence to deal with, and even sell, the assets falling within its ambit in the ordinary course of business, as if the charge had not been given, until …it is said to 'crystallise' …*". The differences of the fixed and the floating charge lies therefore in the uncertainty of the creditor secured by a floating charge, as he cannot foresee which assets will be available for the satisfaction of his claim. This uncertainty leads to an economically less valuable security and is mirrored in the proceedings of receivership and liquidation, where the holder of a floating charge ranks below the one secured by a fixed charge, and below other secured creditors.

[98] See Fletcher (2009), p. 753.

2.1.2.2.2 Insolvency Priority Scheme

The deviations from the *pari passu* principle can be transferred into an insolvency ladder of priority[99]:

1. Super-priority creditors;
2. Priority creditors;
3. *Pari passu* creditors;
4. Subordinated creditors.

The super-priority creditors are creditors secured by a security interest, like mortgage, floating charge, pledge or lien.[100] The priority creditors are among others those with tax claims and obligations to pension trustees.[101]

2.1.2.2.3 Insolvency Tests

For the insolvency law of England & Wales to apply, the company in question has to be insolvent. As straightforward as this may sound, the reason behind the requirement 'insolvent' is that the recognised insolvent debtor benefits from an orderly liquidation procedure or even reorganisation. To determine whether a company is insolvent or not, the legislature and the courts apply two tests for insolvency: the 'cash flow' and the 'balance sheet' insolvency test.[102] The cash flow test rates a company as insolvent "*when it is unable to pay its debts as they fall due*".[103] In contrast to the cash flow test, under the balance sheet test a company is insolvent when it may be able to pay its due debts, but its mid- and long-term liabilities exceed its assets.[104] The cash flow test is codified under sec. 123 (1)(e) IA 1986 followed by the balance sheet test under sec. 123 (2) IA 1986.

If the ailing company is classified as insolvent, there are two main ways to deal with it. The company can either enter immediate liquidation or it has the chance to attempt redemption through means of administration, company voluntary arrangement or organising a scheme of arrangement.[105]

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[99] See Wood (2007b), p. 237.

[100] See Wood (2007b), p. 240.

[101] See Wood (2013), p. 227.

[102] See Goode (2011), p. 112; Keay and Walton (2012), pp. 16, 17.

[103] Goode (2011), p. 114.

[104] See Keay and Walton (2012), p. 16.

[105] See for this paragraph Goode (2011), pp. 379, 380.

2.1.2.2.4 Liquidation

The insolvency of a company is the main reason for the start of a liquidation or winding-up proceeding.[106] When there is no positive prognosis for the company to continue its business or the degree of indebtedness is too high, an attempt to rescue the company becomes obsolete. The aim of company liquidation lies in distributing its assets fairly between the creditors.[107] Furthermore and beyond the event of a single company's insolvency, liquidation has the important function to clear the market from over indebted companies for the benefit of the whole economic market. If there were no liquidations of insolvent companies, the credit-giving players of economic markets would be more reluctant to issue credits, as uncertainty of creditworthiness would rise in such circumstances. There are two main liquidation proceedings to wind up a company under English insolvency law, the compulsory winding-up and the creditors' voluntary winding-up.[108]

As the name of "compulsory winding-up" indicates, the liquidation is not based on the decision of the company but on a winding-up order obtained from the court by a creditor, shareholder or director. Those persons, permitted under sec. 124(1) IA 1986, are commonest to petition to courts for a winding-up order on the grounds enumerated in sec. 122(1) IA 1986.

Following a winding-up order of the court, the ownership of property remains with the company. But the company is deprived of the power to dispose over its property (sec. 127 IA 1986). This power is vested with the liquidator. The liquidator, after making a statement of the affairs of the company (sec. 131(1) IA 1986) and collecting the property (sec. 144(1) IA 1986), starts the realisation of the company's assets by selling or otherwise disposing of all property (para. 6 Schedule 4 IA 1986). In this, the English liquidator and the German *Insolvenzverwalter* are very similar.

The creditors' voluntary winding-up on the other hand is an "*extra-judicial procedure*".[109] It starts with a resolution of the members of the company.[110] According to sec. 84(1) IA 1986, the members have to assemble to pass the resolution to voluntarily wind up the company. As soon as possible, however at least within 14 days after the meeting of the members, another meeting has to be held. This time the creditors of the company convene (sec. 98 (1A) IA 1986) and a company's director gives a statement of affairs. At that meeting the creditors appoint a liquidator, who supersedes the directors of the company. In contrast to the compulsory liquidation, the liquidator is controlled by the creditors and does not need any court approval to

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[106] See Keay and Walton (2012), p. 46.

[107] See for this and the following Keay and Walton (2012), p. 235.

[108] From January to March 2015 there were 3385 company liquidations in England & Wales of which 904 were compulsory liquidations, see The Insolvency Service's *Insolvency Statistics – January to March 2015 (Q1 2015)* available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/424345/Q1_2015_statistics_release_-_web.pdf (last visited on 10 June 2018).

[109] Keay and Walton (2012), p. 240.

[110] See Goode (2011), p. 156.

exercise his powers.[111] The biggest difference between the compulsory and the voluntary winding-up lies in the effect the opening of the procedure has on proceedings against the company.[112] Where the court order of a compulsory winding-up leads to an automatic stay, meaning all creditor claim enforcement proceedings against the company are halted or prohibited, the voluntary winding-up procedure does not induce such a stay. Nevertheless, the liquidator in the voluntary winding-up procedure can apply to court for such a stay, which prevents the already troubled company from ending up in parallel proceedings of liquidation and litigation.

Even though a voluntary winding-up procedure has been started, creditors can still petition the court to order a compulsory winding-up.[113] It is then a discretionary decision of the court whether to interfere with the voluntary winding-up or not. The standard for the exercise of the court's discretion was set out by Lawrence Collins J in *Re Zirceram Ltd.*[114] Usually, the court would only hamper the voluntary proceeding where the proceeding is either inadequately performed or the company's business and transactions need to be investigated for alleged economic offences.[115]

In both procedures of liquidation the liquidator is the central figure. He acknowledges or refuses proof of debt, assembles the meetings of creditors and realises the company's assets for the final distribution among the creditors.[116]

2.1.2.2.5 Rescue of the Insolvent Company

The Cork Report described the rescue and rehabilitation of companies in financial distress as a new and modern aim of insolvency law. Companies in financial difficulties often cannot help themselves out of this situation and rescue instruments, which go further than the usual business management measures are needed.[117] The idea to rescue an insolvent company, instead of liquidating it, can clash with the general insolvency law principle of best possible satisfaction of the debtor's creditors or the idea of "*creditor wealth maximisation*".[118] However, the Cork Report's proposal of a new rescue culture was not simply based on the reasoning that the debtor's position should be strengthened. In fact, the reform was based on the understanding that the former concentration on the maximisation of the creditors' satisfaction was too one-sided. Explaining the now more open approach to the insolvency of a company the Cork Report prominently stated:

[111] See Goode (2011), p. 158.

[112] See for this and the following Goode (2011), p. 158.

[113] See Goode (2011), p. 161.

[114] Re Zirceram Ltd. [2000] 1 B.C.L.C. 751 at 24 seqq.

[115] See Goode (2011), p. 161.

[116] See Goode (2011), p. 159.

[117] See Finch (2009), p. 243.

[118] Finch (2009), pp. 32, 245.

> We believe that a concern for the livelihood and well-being of those dependent upon an enterprise which may well be the lifeblood of a whole town or even region is a legitimate factor to which a modern law of insolvency must have regard. The chain reaction consequences upon any given failure can potentially be so disastrous to creditors, employees and the community that it must not be overlooked.[119]

In order to facilitate this new rescue culture the IA 1986 introduced the new "*rescue procedures*"[120] of administration and company voluntary agreement. The *House of Lords* testified: "*The Rescue Culture, which seeks to preserve viable business, was and is fundamental to much of the (Insolvency) Act of 1986*".[121] The route of the IA 1986 was continued with the Enterprise Act 2002, which further strengthened the idea of rescuing troubled companies.[122] As a main change, it introduced time limits of eight respectively 10 weeks for the administrator to make his proposal of how he plans to achieve the aims of the administration (Sch. B1, para. 49 (5) IA 1986) and to summon the creditors in a meeting (Sch. B1, para. 51 (2) IA 1986). Those time limits force the party who appoints the administrator, most often the main creditor of the struggling company, to plan the process of administration carefully ahead. This planning, which should start as early as possible and ideally includes an auditing of the company, should result in a so-called 'pre-packed plan' of administration, which promotes the success and the efficiency of the restructuring of the company and its debts and therefore raises the chance of rescue.[123] Totally outside of the insolvency law of England & Wales but in accordance with its rescuing culture has the Companies Act 2006 introduced the rescue tool of 'scheme of arrangement' also known as scheme of reconstruction.

A short display of the rescue means of administration, company voluntary agreement and scheme of arrangement is set out in the following.

2.1.2.2.5.1 Administration

Administration starts with the appointment of an administrator, who must be a qualified insolvency practitioner (secc. 388-398 IA 1986). The administrator takes over the position of the company's directors as an agent of the company and assumes full power to manage and administer it.[124] The central feature of administration lies in the establishment of a moratorium on actions against the company.[125] The moratorium does not only protect the company from its creditors enforcing their rights.[126] According to Schedule B1, paras. 40-43, pending winding-up petitions, the dismissal of administrative and other receivers, and other insolvency proceedings are

[119] Cork Report (1982), para. 204.

[120] Hunter (1999), p. 441.

[121] Powdrill v. Watson [1995] H.L. 2 Appeal Case 394, 442.

[122] See Finch (2009), pp. 254, 255.

[123] See Finch (2009), p. 255.

[124] See Keay and Walton (2012), p. 122.

[125] See Keay and Walton (2012), p. 87.

[126] See for this and the following Bailey and Groves (2007), p. 377.

all halted by the moratorium. The moratorium grants the administrator valuable time to consider the path the administration should take and which strategy should be taken to the best interest of all parties involved. There are essentially two ways the administrator can pursue the administration in accordance with the creditors. Firstly, the administration can be the foundation for the restructuring and rescuing of the company, *e.g.*, by way of selling assets, the restructuring of existing loan agreements or the acquisition of new investors under a voluntary agreement.[127] Alternatively, the administration provides time for the winding-up of the company on terms chosen by the company itself or its main creditors. Indeed, the administration often sets the path for a "*quasi liquidation*"[128] and Goode states:

> Administration is commonly described as a restructuring procedure but this is not the case. In practice, by far the most commonly achieved purpose of administration to date has been a more advantageous realisation of the company's assets than would be effected on a winding-up.[129]

But it is still correct to classify administration as a tool of rescue, because even if it might not serve to save the existing company, there is still the aim and the legal capacity to maintain the business and save the jobs connected to it by selling the whole assets to another company.[130]

Never foreseen by the legislature, administration has developed a new way of rescuing the company or at least its business by using a so-called 'pre-packaged administration'.[131] Before a creditor or the company's directors apply for the appointment of an administrator, a deal between the major creditors and the company is prepared to sell the company as soon as the administration is started. The advantages of a pre-packaged administration are quickness, no negative stigmatising "*insolvency-publicity*", lower expenditures for professionals and often a better bargain on the sale of the company.[132] An analysis published in 2007 on pre-packaged administration showed that the number of these particular administrations has increased considerably.[133] The analysis also found out that pre-packaged sales are more effective to save jobs.[134] But the pre-packaged administration faces some criticism, as it serves the secured creditors to either acquire the company themselves or to raise their return rate on the purchase price, as unsecured creditors are often overlooked in the whole proceeding.[135] The 2007 analysis revealed that compared to regular administration business sales, the secured creditors in pre-packaged administration receive 59.1% versus 27.5%, so substantially better, whereas the return rate

[127] See for this and the following sentence Keay and Walton (2012), p. 90.

[128] See Re Kaupthing Singer & Friedlander Ltd. (No. 2) [2011] 1 B.C.L.C. 12.

[129] See Goode (2011), p. 393.

[130] See Goode (2011), pp. 397, 398.

[131] See Keay and Walton (2012), pp. 127, 129; Goode (2011), p. 412.

[132] See Goode (2011), pp. 412, 413; Finch (2009), pp. 456, 457.

[133] See Frisby (2007), p. 16.

[134] See for this and the following Frisby (2007), p. 72.

[135] See Finch (2009), pp. 462, 463.

for unsecured creditors is cut to half in this comparison from 4% to 2%.[136] These numbers further illustrate why pre-packaged administrations have become so popular: they favour the main secured creditors, who are often the first to be informed about the company's financial difficulties and therefore can react quicker and work out solutions with the directors of the company, with the device of pre-packaged administration even more effectively.

2.1.2.2.5.2 Company Voluntary Arrangement

The idea behind a Company Voluntary Agreement (CVA) lies in rescuing the company instead of winding it up. This is achieved by a binding arrangement of the company with its creditors.[137] The CVA was described by the Cork Committee to be a rescue procedure for "*small companies urgently seeking a straightforward composition or moratorium*".[138] The sections regulating the CVA are codified in Part I IA 1986. The sec. 1 (1) of Part I of the IA 1986 states that a voluntary arrangement is a proposal to the company and its creditors for a composition in satisfaction of its debts or a scheme of arrangement of its affairs. To form an all-creditors-binding arrangement, the company needs the approval of three-quarter of its creditors. Hence, the situation can occur that one-quarter of the company's creditors voted against the agreement but are still bound by it. This majority rule guarantees the effectiveness of the agreement as it prohibits single creditors from obstructing it by petitioning to the insolvency court.[139]

The CVA may take two forms, a 'composition of debts' or a 'scheme of arrangement' according to Part I sec. 1 (1) IA 1986. A composition in satisfaction of the company's debts is an agreement where the company on one hand is ready to pay a certain rate of its debts and on the other hand the creditors remit the remaining amount of debt.[140] Instead of remitting the debt they can even accept a later date of the partial payment,[141] allowing the company some time to breath and to get back on its feet. The idea behind the composition is that creditors accept a reduced amount paid to them because otherwise a liquidation would leave them with even lower *pro rata* satisfaction or as Jacob J put it: "*It is better to keep the show on the road than close it down even if the creditors have to accept less than their nominal (but not achievable) entitlement*".[142]

In contrast, if the CVA takes the form of a scheme of arrangement, the company's creditors are satisfied fully but not at the due date originally stipulated, but with a modified schedule of payment.[143] Additionally, the scheme can take steps to

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[136] See Frisby (2007), pp. 53–64.

[137] See Bailey and Groves (2007), p. 191.

[138] Cork Report (1982), para. 430.

[139] See Keay and Walton (2012), pp. 146, 147.

[140] See Bailey (2007), p. 10; Keay and Walton (2012), p. 148.

[141] See Brown (1996), p. 546.

[142] RA Securities v Mercantile Credit Co. Ltd [1994] 2 B.C.L.C. 721.

[143] See Goode (2011), p. 500.

pay-off the creditors by granting them shares or interests in the company, *e.g.* in the manner of a 'debt-equity-swap'.[144]

The CVA is introduced to the creditors as a proposal by the company's directors or by the administrator.[145] To further the confidence of both the company as well as the creditors in the CVA, the proposal of the CVA has to suggest a person, the nominee, who has special expertise in insolvency matters and the restructuring of companies.[146] The nominee as a neutral third person supervises the commencement and realisation of the CVA. For example, in a composition form of the CVA, the nominee will collect the money to then distribute it to the creditors *pro rata*.[147]

Despite its good intentions and its relative flexibility, the rescue procedure of CVA is not often used.[148] The main reason for this is that the CVA has to propose a full satisfaction of the secured creditors, because the CVA cannot prohibit the secured creditor, who has not consented to the CVA, from enforcing his security by court action. This enforcement may likely lead to the winding-up of the company, which then makes the whole CVA obsolete. The lack of a moratorium with something like a stay of proceedings, preventing such actions, has been criticised a long time ago,[149] but reforms were timid. There is now the chance to provide a moratorium for the CVA, but this possibility is only open to 'small companies' according to Sch. 1A paras. 2-4 IA 1986.[150] A 'small company' is defined in secc. 382 and 465 Companies Act 2006 and is accepted under the following requirements: turnover not more than GBP 6.5 million; balance sheet total not more than GBP 3.26 million; and no more than 50 employees. The reasoning behind this restricted availability of a CVA profiting from a moratorium is the fear of abuse of this rescuing procedure. This reasoning can be countered when bearing in mind that the CVA, whatever clauses for a moratorium, waiver of debts or deferment of payment it may provide, cannot come into effect without the approval of a three-quarter majority of the company's creditors. This voting requirement provides enough checks on the fairness and non-abusiveness of the CVA.

2.1.2.2.5.3 Scheme of Arrangement

The rescue procedure 'scheme of arrangement' has its statutory background not in insolvency law but under Part 26 of the Companies Act 2006. In contrast to the CVA, the scheme of arrangement embodies a purely contractual solution for the company to restructure its debts. Furthermore, the initiation of a scheme of arrangement does not require any special insolvency test or other procedure opening reasons. For these reasons the scheme of arrangement cannot be found in the Annex A

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[144] For a detailed display of 'debt-equity-swap' as a financial restructuring tool in Germany as well as England &Wales see: Hagemann (2014) and Schwarz (2015).

[145] Keay and Walton (2012), pp. 148, 149.

[146] See Bailey and Groves (2007), p. 201.

[147] See Keay and Walton (2012), p. 148.

[148] See for this and the following Keay and Walton (2012), p. 147.

[149] See Brown (1996), p. 544.

[150] See Goode (2011), p. 501.

of the EU Insolvency Regulation, which provides a list of English insolvency procedures for which the Regulation shall apply.[151] The scheme of arrangement offers a very flexible proceeding and gives companies the opportunity to start measures of restructuring, especially debt restructuring, without being even close to insolvency. Such measures range from simple debt waivers to more complex arrangements like debt-equity swaps or business transfers.[152]

Due to the freedom of contract, the scheme of arrangement allows the company to 'cram down' those secured creditors who oppose the scheme.[153] The scheme of arrangement binds all creditors of the company, including the secured creditors in distinction to the CVA.[154] In order to have this binding effect on all creditors or just classes of creditors, the scheme must be approved by court.[155] On achieving the court's approval, the scheme of arrangement has to go through a rather complex procedure regarding the volume of clauses and the classification of all creditors of the company. Therefore thorough consideration and preparation is needed to set up an approvable scheme of arrangement, which results in high costs for the company.[156] As a result, scheme of arrangements are fairly unattractive for smaller companies and are more often found in the rescuing or restructuring of large corporations. Chadwick LJ set out three stages the proposed scheme of arrangement has to go through.[157] Firstly, those creditors affected by the scheme have to be informed duly in a meeting summoned by the court, where they have "*a proper opportunity of being present*". At the second stage, the court has to ensure that the proposed scheme of arrangement receives the votes of a majority of creditors, "*representing three-fourths in value, of those who take the opportunity of being present*". Thirdly, the court observes that the interests of those creditors not voting for the scheme "*receive impartial consideration*" to make sure that the minority interests are not treated unfairly. This third stage, known as the 'sanction hearing', gives the court the chance to exercise its discretion.[158] This discretion has to be guided by the interests of the creditors, or as an English court already in the nineteenth century held,

> if the creditors are acting on sufficient information and with time to consider what they are about, and are acting honestly, they are, I apprehend, much better judges of what is to their commercial advantage than the court can be.[159]

The Companies Act 2006 does not define who classifies as a 'creditor' and courts filled this term with its ordinary meaning as "*every person having pecuniary*

[151] See for this and the following sentence Paulus (2011), p. 1077.

[152] See Paulus (2011), p. 1078.

[153] See Goode (2011), p. 484.

[154] See Keay and Walton (2012), p. 204.

[155] See Goode (2011), p. 484.

[156] See Goode (2011), p. 484.

[157] See for this and the following Re Hawk Insurance Co Ltd [2001] 2 B.C.L.C. 480, para. 12.

[158] See for this and the following Olivares-Caminal et al. (2011), p. 162.

[159] Re English, Scottish and Australian Chartered Bank [1893] 3 Ch. 385.

claims against the company".[160] The scheme of arrangement modifies the existing contractual agreements the company has with its creditors. As there are different kinds of creditors, (preferential, secured, unsecured), different classes have to be formed.[161] For each class of creditors the company has to convene a meeting where the creditors decide on the scheme to fulfil the requirements of the necessary court approval.

In addition to the high flexibility and contractual freedom, the scheme of arrangement offers companies a restructuring procedure that is not dealt with in the usual insolvency legislation and court procedure, hence the stigmatisation of insolvency procedures can be avoided. The avoidance of a stigmatisation and other 'insolvency publicity' often prevents a domino effect happening to the company, where creditors and suppliers freeze their payments or deliveries, which in the end usually leads to a winding-up of the company.[162] This explains the high attraction of the scheme for foreign companies to strive for an English scheme of arrangement procedure.

Furthermore, the scheme of arrangement does not fall under the scope of the EU Insolvency Regulation, where the localisation of an insolvency proceeding follows the principle of COMI. For the scheme of arrangement, courts in England & Wales have accepted that "*sufficient connection*" with England & Wales is enough to start a scheme under the 2006 Companies Act.[163] Prominent and successful examples of foreign companies' restructurings under the scheme of arrangement are: La Seda de Barcelona[164] (Spain), Rodenstock,[165] Apcoa Parking Holdings[166] and Tele Columbus[167] (all Germany). The scheme of arrangement procedure gives the English legal market a clear advantage compared to the German restructuring systems, because German insolvency law does not allow a solvent company to enter a restructuring proceeding at the cost of creditors by way of a 'cram down' proceeding.[168]

After all, the scheme of arrangement does not offer a moratorium and creditors are not hindered to enforce their security rights during the restructuring phase. As a result the company seeking a scheme of arrangement is very much dependent on the cooperation of its secured creditors.[169] This is a further indicator that only companies

[160] Re Midland Coal, Coke & Iron Co [1895] 1 Ch. 267.

[161] See Goode (2011), p. 488.

[162] See Paulus (2011), p. 1083; with an exhaustive discussion of the features of scheme of arrangement and which aspects could be implemented in German insolvency law: Mankowski (2011), pp. 1201 seqq.

[163] In re DAP Holding NV [2005] EWHC 2092 (Ch.) the "*sufficient connection with England & Wales*" was accepted by Lewison J, even though the respective Dutch Companies did not have their COMI or any establishment in England & Wales.

[164] Re La Seda De Barcelona Sa [2010] EWHC 1364 (Ch.).

[165] Re Rodenstock GmbH [2011] EWHC 1104 (Ch.).

[166] Re Apcoa Parking Holdings GmbH [2014] EWHC 3849 (Ch.).

[167] In re Tele Columbus GmbH [2014] EWHC 249 (Ch.) the court accepted the scheme of arrangement for a German company's debt restructuring worth more than one billion EUR.

[168] See Bork (2012), p. 282.

[169] See Bork (2012), p. 202.

with positive economic prospects and enough financial clout can successfully go through a scheme of arrangement.

2.1.2.3 Principles and Basic Features in the USA

The Bankruptcy Code of the USA is codified in Title 11 of the United States Code. Title 11 is divided into Chapters. The Chapters 1, 3 and 5 present provisions with general effect to all bankruptcy cases and procedures.[170] Chapter 15 was introduced in 2005 and embodies the US incorporation of the UNCITRAL Model Law on Cross-Border Insolvency.[171] The remaining Chapters cover different situations and subjects in insolvency. In contrast to the more creditor-orientated jurisdictions of Germany and England & Wales, although the 'debtor-friendly' rescue culture is being established more and more in those jurisdictions, the US insolvency law has a long tradition of debtor rehabilitation[172] and still serves as an example of a vivid rescue culture. In the increasingly international context of insolvency cases it is important to note that the USA are adhering to the concept of universalism.[173] This approach is most appropriately illustrated by 11 U.S.C. § 541, which stipulates that the insolvency estate will contain all property, "*wherever located*".[174]

2.1.2.3.1 The Bankruptcy Court

Installed by the Bankruptcy Reform Act 1978, all insolvency procedures are dealt with by the bankruptcy court. The bankruptcy court exercises equity in civil matters and forms a specialised branch of the US court system.[175] Art. I § 8 of the US Constitution gives Congress the power to "*establish laws relating to Bankruptcies*". This power was exercised with the Bankruptcy Reform Act 1978 and the establishment of US bankruptcy courts is based on this Art. I-power.[176] The bankruptcy court's rooting in Art. I has caused vivid debates about its status and its power and jurisdiction compared to the district and federal courts of the USA, because the ordinary courts' establishment and the judges' position is based on Art. III of the US Constitution. This constitutional difference is the reason why bankruptcy court judges do not have life tenure like the Art. III-judges, which leads to the argumentation that they are less independent and therefore more restricted in their ability to exercise their jurisdiction over cases which are usually dealt with by the district

[170] See for this and the following Baird (2014), p. 6.

[171] The US Bankruptcy Code's Chapter 15 is displayed below in Sect. 2.2.3.1.3.

[172] See Bailey and Groves (2007), p. 1349.

[173] The different concepts of international insolvency law are discussed from p. 54 onwards.

[174] See Couwenberg and Lubben (2015), p. 719.

[175] See Aaron (2014), p. 145.

[176] See for this and the following sentence Gorman (2014/2015), p. 102.

courts.[177] Contrary to their colleagues with a lifelong tenure at the district courts, the judges of the bankruptcy court are appointed only for 14 years under 11 U.S.C. § 152 (a) (1).[178] In the sphere of maritime cases especially the right to deal with *in rem* procedures and to sell the vessel free of security interests is only vested in ordinary Art. III courts and not in bankruptcy courts.[179]

11 U.S.C. § 105 gives the bankruptcy judge the power to "*issue any order, process or judgement that is necessary or appropriate to carry out the provisions*" of the Bankruptcy Code.[180] The insolvency proceedings have to be filed in the federal state where the company is incorporated.[181] The bankruptcy court exercises exclusive jurisdiction over the debtor's assets as soon as the insolvency has been filed. The concentration on the bankruptcy court is based on the idea that the reorganisation of the debtor's business and its continuation "*requires the supervision of a single court*".[182]

2.1.2.3.2 Pari Passu

The US insolvency system adheres to the *pari passu* principle or the concept of equal distribution of the debtor's assets among his creditors.[183] But in the following it can be observed, that the satisfaction of the debtor's creditors does not form the heart of US insolvency law. Instead, the Chapter 11 procedure focuses on keeping the debtor's business alive, even if the creditors have to renounce claims against the debtor, because from the US insolvency perspective this continuation serves best to satisfy the creditors in the future and reflects more a second-chance mentality.

2.1.2.3.3 Insolvency Priority Scheme

When it comes to a liquidation procedure and the distribution of the proceeds of debtor's assets, US insolvency law has established the following scheme of priority:

1. Preservation costs of the estate, 11 U.S.C. § 506 (c);
2. Secured creditors, like mortgagor and lienholders, 11 U.S.C. § 507 (b);
3. Priority creditors, 11 U.S.C. § 507 (a);
4. Unsecured creditors of tort obligations.[184]

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[177] See Peck (2013), p. 960.

[178] See Bailey and Groves (2007), p. 1372.

[179] The conflict between the jurisdictions of bankruptcy and admiralty courts over the vessel—the central asset of a defaulting ship-owner—will be discussed below in Chap. 4.

[180] See for this and the following Baird (2014), p. 6.

[181] See for this and the following Baird (2014), p. 23.

[182] Landers (1971/72), p. 509.

[183] See Bailey and Groves (2007), p. 1350.

[184] See Wood (2013), p. 226.

2.1.2.3.4 Initiation of the Insolvency Proceeding and Automatic Stay

11 U.S.C. § 109 gives the guidelines for debtors to qualify for an insolvency proceeding and hence to profit from US insolvency law's debtor-orientated regulations.[185] It is not necessary for a company to be registered in the US, as 11 U.S.C. § 109 (1) states that an individual or a company qualifies to be a debtor to US insolvency proceedings when residing in the US or having "*a domicile, a place of business, or property in the US*". Property in the US as a qualifying feature for a potential debtor has been accepted already when a company was able to show that it had a bank account in the USA.[186] This definition, besides individuals, includes partnerships and corporations according to 11 U.S.C. § 101 (41). Hence, the bar to enter an insolvency proceeding is both for US as well as foreign companies relatively low. All it needs is some kind of property, even in the form of a bank account. In addition to that and in contrast to the insolvency law systems of Germany and England & Wales, the company seeking to start an insolvency proceeding as a debtor does not need to be insolvent.[187]

Only 11 U.S.C. § 109 (c) (3) requires insolvency for a municipality to be eligible for an insolvency procedure under Chapter 9 of the Bankruptcy Code. In order to commence an insolvency proceeding in the US over the assets of the suitable debtor, a bankruptcy petition has to be filed and the fees for the procedure have to be paid.[188] This filing can either be made by the debtor himself as a voluntary petition according to 11 U.S.C. § 301 everyone eligible as a debtor under a bankruptcy chapter may file for insolvency or by the creditors as an involuntary petition (11 U.S.C. § 303). The involuntary petition is only available for the insolvency procedures of Chapter 7 and 11 and is more cumbersome in order to protect a company from being troubled by unfounded petitions of its creditors.[189] 11 U.S.C. § 303 (b) (1) requires at least three creditors[190] with aggregate claims amounting to at least USD 15,325.[191]

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[185] See Aaron (2014), p. 75.

[186] See Couwenberg and Lubben (2015), p. 720; *In re* McTague, 198 B.R. 428, 432 (Bankr. W.D.N.Y. 1996), where the bankruptcy court famously stated, that "*a dollar, a dime or a peppercorn*" would suffice to establish US located property to be eligible to petition for an insolvency proceeding in the US; see also *In re* Yukos Oil Co., 321 B.R. 396, 407 (Bankr. S.D.Tex. 2005). The generosity of the bankruptcy courts was restricted in 2013 when the United States Court of Appeal for the Second Circuit in *In re* Barnet, 737 F.3d 238 (2d Cir. 2013) held that a foreign company applying for recognition under the US Bankruptcy Code Chapter 15 must have a residence, domicile, place of business or assets in the US according to 11 U.S.C. § 109 (a). The Second Circuit overturned the bankruptcy court, which had granted recognition to an Australian company that had not introduced any evidence of assets or operations in the US.

[187] See Aaron (2014), p. 76.

[188] See Adler et al. (2007), p. 66.

[189] See Adler et al. (2007), p. 66.

[190] If the company is small and has less than twelve creditors, the petition of a single creditor is sufficient (11 U.S.C. § 303 (b) (2)).

[191] See Aaron (2014), p. 123.

The filing of a petition transforms the debtor's assets into property of the insolvency estate (11 U.S.C. § 541).[192]

The straightforward petitioning and relatively easy way to start an insolvency proceeding might lure some companies to abuse the generous debtor-friendly procedures of US insolvency law. To meet the danger of abuse, the bankruptcy courts review each bankruptcy petition, both voluntary and involuntary, and if, to the discretion of the court, the insolvency case does not serve the best interests of creditors and the debtor (11 U.S.C. § 305), it will abstain from having the case conducted.[193] Additionally, the court will dismiss the petition on the grounds of 11 U.S.C. § 707 (a) for unreasonable delay by the debtor prejudicial to creditors, non-payment of fees and in case of a voluntary petition, when the debtor does not provide the information stipulated under 11 U.S.C. § 521 (a).[194]

The fairly easy way to voluntarily start an insolvency proceeding in the US without any special condition, such as the English balance sheet test or the German insolvency reasons of illiquidity or over-indebtedness, is an "*affirmative incentive*"[195] to file an insolvency petition at an early stage of the company's financial struggle to increase the chances of reorganisation. This debtor-friendly approach is limited by the management's liability for "*deepening insolvency*".[196] This liability puts a duty on the company's management to file for insolvency instead of prolonging the company's life and thereby 'deepening' the insolvency.

An important feature of the US insolvency proceeding is the automatic stay. The stay of any proceedings or enforcement of judgements against the debtor is (automatically) effective under 11 U.S.C. § 362 (a) with the filing of either voluntary or involuntary petition and throughout the restructuring process. The automatic stay, shielding the debtor, gives the financially struggling company time to work out a plan for reorganisation.[197] The automatic serves the debtor's creditors as well.[198] The stay halts all creditor claim-enforcements and prevents a 'creditors run', and is thus vital for the fairness among the creditors and as a result for the *pro rata* satisfaction

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[192] See for this and the following Baird (2014), p. 37.

[193] See for this and the following Aaron (2014), pp. 133, 134.

[194] Information required under 11 U.S.C. § 521 (a) is for example a list of creditors, a schedule of assets and liabilities and a statement of the debtor's financial affairs.

[195] Schillig (2010), p. 117.

[196] On the doctrine of 'deepening insolvency' see the cases *In re Investors Funding Corporation of New York Securities Litigation (Bloor v Dansker)*, 523 F.Supp. 533 (Bankr. S.D.N.Y., 1980) and *Schacht v Brown,* 711 F.2d 1343 (7th Cir. 1983). For an exhaustive display and discussion of the US 'deepening insolvency' doctrine compared to the German liabilities see Schillig (2010), pp. 116–157.

[197] The US House Report No 94-595, 1978 US Code Cong. & Admin. News 6296-6297 of the conference committee of the House of Representatives and the Senate detailed the automatic stay as "*one of the fundamental debtor protections provided by the bankruptcy laws. It gives the debtor a breathing spell from his creditors. It stops all collection efforts, all harassment and all foreclosure actions. It permits the debtor to attempt a repayment or reorganization plan, or simply to be relieved of financial pressure that drove him into bankruptcy*".

[198] See Schmidt (2010), p. 55.

of the creditors at the end of an insolvency proceeding.[199] 11 U.S.C. § 362 (b) works as a corrective of the automatic stay and excludes its shielding effect for criminal actions and procedures against the debtor. However, the stay may be unfair and burdensome for secured creditors. Thus, the court may grant a relief from the automatic stay on a creditor-filed motion, 11 U.S.C. § 362 (d).[200] In order to gain relief from an automatic stay the creditor has to either show "*cause*" (11 U.S.C. § 362 (d) (1), for example bad faith of the debtor) or that the debtor lacks equity in the property *and* such property is not necessary for an effective reorganisation (11 U.S.C. § 362 (d) (2)).[201]

11 U.S.C. § 363 provides a very detailed list of those creditor actions barred by the automatic stay and gives guidelines to lift the automatic stay. But the provision falls short in giving guidance on the situation that the debtor's creditors ignore the automatic stay and enforce their claims against the debtor's assets. 11 U.S.C. § 362 (h) only applies to 'individuals' and stipulates that the 'individual' filing for insolvency may recover all its damages suffered from the creditors' violation of the automatic stay. Hence, the corporate debtor does not have such right to claim damages incurred by automatic stay violations. Furthermore, the Bankruptcy Code does not give any guidance on whether the violating action should be categorised as void or voidable. The only decision of the Supreme Court of the United States on this matter held that an action against the automatic stay is void.[202] Thus the debtor does not need to invoke a motion to make the action void, as it would be the case if the action was only deemed voidable.

2.1.2.3.5 Chapter 11: Reorganisation of the Debtor

The pro-debtor reasoning has characterised US insolvency law from the beginning, as a discharge of debts existed already in nineteenth century in US insolvency legislation.[203] In its debtor-favouring tradition the US Bankruptcy Code opts for the reorganisation of the financially struggling company over its liquidation.[204] Making the rehabilitation of debtors possible at the cost of their creditors leads to credits being more costly on the market, as creditors raise interest rates in order to meet and minimise their financial risks.[205] This effect on all borrowers is accepted for the benefit of protection from the "*full consequences of economic misfortune*".

The strongest feature of this vivid US rescue culture is the Chapter 11-procedure where the debtor remains in possession of his company and its assets under 11 U.S.C. §§ 1101, 1107 and 1108. Without an administrator or a trustee, it is the debtor

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[199] See for this and the following Baird (2014), p. 195.

[200] See Stong (2006), p. 414.

[201] See for this and the following Gorman (2014/2015), p. 112.

[202] Kalb v. Feuerstein [1940] 308 U.S. 433.

[203] See Buchbinder (1991), p. 12.

[204] See Bailey and Groves (2007), p. 1350.

[205] See for this and the following Adler et al. (2007), pp. 21, 22.

who is responsible to manage the insolvency estate. The 'debtor in possession' concept is very attractive to financially struggling companies and is described as one of the "*most attractive features*"[206] of US insolvency law. That much power still vested in the debtor's management can however be risky. The US insolvency system meets such immanent risks by installing a creditors' and equity security holders' committee (11 U.S.C. §§ 1102 seqq.) to supervise the debtor in his continued management of the company. The committee's power to supervise the debtor includes the right to request the appointment of a trustee, who is than taking over the insolvency estate from the debtor under 11 U.S.C. § 1104 (a) in case of fraud, dishonesty, incompetence or a gross mismanagement of the debtor. Apart from this checking function, the committee participates in drafting of the plan of reorganisation to make sure that the creditors' interests are taken into account (11 U.S.C. § 1103 (c) (3)).

The plan of reorganisation lies at the heart of the Chapter 11 procedure.[207] 11 U.S.C. § 1121 allows the debtor the exclusive right to formulate a reorganisation plan within 120 days from the filing of the insolvency and to bring it to a vote by the creditors. The minimum content of a plan of reorganisation is set out in 11 U.S.C. § 1123. The plan has to formulate the classes of creditor claims, which are often covering at least four groups of claims: priority claims, secured claims, unsecured claims and ownership interests.[208] According to 11 U.S.C. § 1123, the plan has to specify how the different claims are treated and has to make sure that claims of the same class are treated equally. Beyond the question how the creditors of the debtor are classified and treated, the plan has to further give guidance on how to master the reorganisation of the company. Therefore, the plan shall state which measures of restructuring are to be utilised, for example sale of property (11 U.S.C. § 1123 (a) (5) (D)), merger with another company (11 U.S.C. § 1123 (a) (5) (C)) or curing or waiving of any default (11 U.S.C. § 1123 (a) (5) (G)). Subsequently to the drafting of the plan of reorganisation, the debtor has to disclose the plan together with a statement to the creditors. This statement is intended to outline the main aspects, like claims' classification and the actual means of restructuring, for the creditors.[209] On the basis of the disclosure statement, which is codified in 11 U.S.C. § 1125, the creditors had the chance to be sufficiently informed about the consequences of the plan and therefore can vote on the plan in order to give it their consent. Only with the consent of all creditors negatively affected by the plan, the bankruptcy court is ready to confirm the plan according to 11 U.S.C. § 1129 (a) (8). However, the missing consent of some creditors does not mean that the plan in its existing form has failed to be confirmed by the bankruptcy court. Notwithstanding the missing approval of some creditors, the debtor may request the court to still confirm the plan. The court only grants this 'cram down' of the opposing minority if the plan is fair and equitable, as 11 U.S.C. § 1129 (b) stipulates.

[206] Seitz (2009), p. 1357.

[207] See Podewils (2010), p. 212.

[208] See Aaron (2014), p. 696.

[209] See Schmidt (2010), p. 55.

With the plan's confirmation by the bankruptcy court, all parties involved, even the 'crammed down' creditors, are bound by the plans' regulations and its realisation can start. According to 11 U.S.C. § 1141 (d) (1) (A), all of the debtor's debts that arose before the date of the court's confirmation are discharged. After the breathing spell of the automatic stay, giving the debtor time to set the plan and arrange it with the creditors, this discharge gives the debtor a fresh start and is a vital element for a successful company restructuring. From the plan's confirmation further follows the end of the automatic stay (11 U.S.C. § 362 (c) (2) (C)), which is a clear sign that the reorganisation of the debtor's company has come to an end and that the company is therefore again ready to face the enforcement of creditors' claims.

2.1.2.3.6 Chapter 7: Liquidation

The Chapter 7 liquidation is the most frequently used form of all insolvency procedures available under US insolvency law. In 2014, 26,983 business insolvency cases were commenced, of which 18,184 cases were filed as Chapter 7 liquidation proceedings.[210] The Chapter 7 procedure offers direct way to liquidate the debtor's company.[211] As soon as the debtor himself (voluntary) or his creditors (involuntary) petition to commence liquidation under Chapter 7, the U.S. Trustee[212] appoints a private trustee in bankruptcy. The trustee's job is then to first appreciate and assemble all the debtor's assets to then continue to sell these assets or even the entire company including its business, according to 11 U.S.C. §§ 721-725. Under 11 U.S.C. § 726, the sales' revenues are subsequently distributed among the creditors. Again, in order to accelerate this procedure, the debtor at his filing for liquidation has to provide the information required by 11 U.S.C. § 521 (a).[213]

2.1.3 Summarising Comparison on Principles and Basic Features

It becomes apparent when looking at the three jurisdictions of Germany, England & Wales and the USA and their respective insolvency laws that there are common features even though Germany is the odd one out, as its legal system is deeply

[210] See Table F-2—U.S. Bankruptcy Courts Statistical Tables For The Federal Judiciary (Dec. 31, 2014) available at http://www.uscourts.gov/statistics/table/f-2/statistical-tables-federal-judiciary/2014/12/31 (last visited on 10 June 2018).

[211] See for this and the following Bailey and Groves (2007), p. 1392.

[212] The United States Attorney General appoints the United States Trustees (28 U.S.C. § 586) and under 28 U.S.C. § 586 (a) (1) they are responsible to establish, maintain, and supervise a panel of private trustees that are eligible and available to serve as trustees in cases under Chapter 7.

[213] Information required under 11 U.S.C. § 521 (a) is for example a list of creditors, a schedule of assets and liabilities and a statement of the debtor's financial affairs.

rooted in the legal traditions of Civil Law jurisdictions as opposed to the Common Law countries of England & Wales and the USA. All share the fundamental insolvency principle of *pari passu* or collectivity.[214] The collective satisfaction of the debtor's creditors is seen as the most effective mean to prevent a creditors' run on the debtor's assets and by that to ensure an orderly and more effective insolvency proceeding, be it liquidation or restructuring of the debtor. Furthermore, since Germany went on to reform its insolvency law in 1999, the idea to rescue a financially struggling company or at least giving it the chance to do so, instead of simply liquidating it, now unites the three jurisdictions here discussed.

Nevertheless, these similarities cannot obscure that due to different public policy considerations especially in insolvency laws the jurisdictions differ substantially, *e.g.* to the extent to which rescue measures are available or the degree to which a company has to be financially struggling to get access to the insolvency proceedings. German insolvency law requires at least imminent illiquidity whereas the US Bankruptcy Code does not stipulate any kind of insolvency or balance sheet test at all. Another important difference between the three jurisdictions in question is how they treat secured creditors, whether they form part of the collective creditor satisfaction or enjoy priority over the other creditors, and how they rank those secured creditors among each other. The aspect of secured creditors and their priority ranking will be examined extensively on the maritime sector's example of maritime liens in Chap. 3 of this book.

In the international competition of jurisdictions, Germany further lacks appeal to international debtors for a simple and pragmatic reason: the language. German insolvency proceedings are held in German and this condition cannot be waived. In the international surrounding of today's global commerce and trade, with the prominent example being the shipping industry, the debtor as well as the creditors usually use English as a common language, which is not available in German court and insolvency proceedings. Hence the German legislator may reform its insolvency law and adapt long established Anglo-American restructuring tools, but in the international competition of jurisdictions Germany would only manage to close the gap if restructuring procedures were also available in English.

2.2 Cross-Border Insolvency

2.2.1 Introduction

The insolvency of a company only operating in domestic spheres can already bear many legal problems and challenges for the parties involved in this proceeding. Additional complex legal questions as well as technical and administrative challenges come into play when the insolvent company acted beyond its domestic

[214] See for this and the following Bowen (2013), p. 121.

borders and had business relations, subsidiaries or assets in other jurisdictions.[215] This is the moment where international insolvency law becomes decisive. Wessel defines international insolvency law

> as a body of rules concerning certain insolvency proceedings or measures, which cannot be fully enforced, because the applicable law cannot be executed immediately and exclusively without consideration being given to the international aspect of a given case.[216]

The 1997 enacted UNCITRAL Model Law on Cross-Border Insolvency states for the event of cross-border insolvencies that "*[T]hose instances include cases where the insolvent debtor has assets in more than one State or where some of the creditors of the debtors are not from the State where the insolvency proceedings are taking place*".[217] Academics from the USA and Germany choose to describe the area of international insolvency more generally as "*the management of the general financial default of a multinational enterprise*".[218]

The jurisdictions of Germany, England & Wales as well as the USA have legal rules on cross-border insolvencies, mostly referred to as international insolvency rules. Nevertheless, there is no major international convention or treaty concerning cross-border insolvencies and their proceedings.[219] The famous cases of *Felixstowe Dock & Railway Co*[220] and *Maxwell Communication*[221] dramatically showed how important the international insolvency rules are, but that those rules are futile as long as there is no co-operation between the different courts involved. The Felixstowe case works well to illustrate the lack of co-operation to the detriment of the creditors. In contrast, in *Maxwell Communications* the complex cross-border proceeding—80% of the English company's assets were located in the USA—worked out for the benefit of the creditors, because the English administrators and the American examiners set up an "*overarching agreement*", later referred to as the "*Protocol*".[222] Even though this protocol did not settle legal questions, it helped in making communications between the insolvency officials in England and the USA feasible and efficient.

The following part serves to shortly illustrate the theoretical approaches taken in international insolvency law to deal with cross-border insolvency and which main legal problems can occur. This examination is necessary for the further discussion of insolvencies in the maritime sector, where the cases, naturally, more often involve cross-border aspects of insolvency law than in any other industry.

[215] See Fletcher (2005), p. 6.

[216] Wessels (2006), p. 1.

[217] UNCITRAL Model Law on Cross-Border Insolvency, Guide to Enactment (1197), Nr. 1.

[218] Westbrook (1999/2000), p. 2278; see Smid (2004), p. 4.

[219] See Perkins (2000), p. 787; Adler et al. (2007), p. 744.

[220] Felixstowe Dock & Railway Co v United States Lines Inc. [1989] 1 Q.B. 360.

[221] Maxwell Communications Corporation plc (No. 2) [1992] B.C.C. 757 (C.A.).

[222] See Hoffmann (1996), pp. 2514, 2515.

2.2.2 Legal Theories on Cross-Border Insolvency

The cases of *Felixstowe Dock & Railway Co* and *Maxwell Communication* showed that the success of a cross-border insolvency proceeding is, beyond the solution of legal problems, very much dependent on the practical approach the courts are taking and on the willingness of the parties involved to cooperate for the benefit of the creditors as well as the debtor. Nevertheless, this pragmatism cannot exist without a profound knowledge of the legal theories on cross-border insolvency, which basically circle around the question, which courts of which jurisdiction are competent in an insolvency proceeding that involves more than one jurisdiction.

Broadly speaking, there are two main but rival approaches in international insolvency law taken towards cases of cross-border insolvency. These rival approaches are based on the contrary principles of territoriality and universality.[223] These theories describe the scope and supremacy of the national insolvency law and determine which law applies, depending on where the debtor filed for insolvency. This pair of principles has been dominant in academic discussions of problems of international insolvency law. It should be born in mind that the terms of territoriality and universality do not have globally applicable definitions,[224] and therefore only the basics of those principles will be discussed.

2.2.2.1 Territorialism

The more traditional doctrine of territorialism follows the concept that each national insolvency law is limited to its state territory and that all the assets in *e.g.* Germany shall be seized and distributed in accordance with German law, even though the insolvency proceeding was opened in England.[225] At the same time territorialism means that the jurisdiction of the court where the insolvency proceeding was started, stops at its national border and therefore assets of the insolvent company which are located abroad are not included in the proceeding, as these fall into the jurisdiction of another state. Simply speaking, the courts adhere to the "*grab rule*"[226] and include all assets situated in their jurisdiction in their insolvency case without any regard to the parallel foreign proceedings. The reasoning behind this strict and 'domestic-jurisdiction-centred' principle is based on the idea of sovereignty of states.[227]

Territorialism is closely linked with the concept of plurality. Dealing with a transnational insolvency, due to the territorial approach, it is unavoidable that

[223] See Fletcher (2005), p. 11; Veder (2004), p. 85; Keay and Walton (2012), p. 404; Goode (2011), p. 620; S. Reinhart in Kirchhof et al. (2014), Vor §§ 335 ff, marg. no. 19, 20.

[224] See Nadelmann (1949/1950), p. 54.

[225] See Paulus (2005b), p. 334; Westbrook (2006), p. 362.

[226] See Westbrook (2004/2005), p. 625; Hathorn (2013), p. 241.

[227] See Paulus (2005b), p. 334; Hathorn (2013), p. 241.

multiple insolvency proceedings are opened, one for each jurisdiction, where the debtor has business links or assets.[228]

2.2.2.2 Universalism

A shift from territorialism to universalism has started in recent years, with the USA as a driving power to establish the doctrine of universalism.[229] In short, the principle of universalism is the direct opposite of the territorial approach and means, that there is "*a single law and … a single jurisdiction covering all assets*"[230] of the insolvent company. The applicable law will be determined by the insolvency court where the debtor's insolvency proceeding is opened (*lex concursus*), which is usually the debtor's home jurisdiction.[231] From the 'pure' universalist approach follows, that the opening insolvency court's laws will be applicable even to the assets situated in other states and jurisdictions.[232] Again opposite to territorialism, an insolvency proceeding with universal effect prevents plurality and establishes uniformity of proceedings, led by the court at the centre of main interest of the debtor. The advantages of an insolvency proceeding adhering to the principle of universalism are that the number of proceedings are minimized and that all creditors of the insolvent company worldwide are treated equally, as they all come under the same laws and regulations, namely those of the opening and main insolvency court.[233] This 'single proceeding - single law' argument becomes even stronger in terms of predictability. Especially where a company expands into foreign markets and becomes international, the creditors 'at home' can predict the law applicable in case of insolvency, because the law will not change when a universalist approach is taken. Westbrook reasons,

> one body of law must be applied to the maximum extent if relative default priorities are to be predicted accurately. The home-country law is the one law that can be most reliably predicted in advance.[234]

2.2.2.3 Theories in Practice

Traditionally, courts have been very willing to give their rulings universal effect, meaning that their decisions should be recognised and adhered to in any other foreign jurisdiction, because then their proceeding would include foreign assets of the

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[228] See Veder (2004), p. 86; Keay and Walton (2012), p. 404.

[229] See American Law Institute (2003), pp. 73, 74.

[230] Goode (2011), p. 782.

[231] For a detailed discussion on where to file for insolvency and the flexibility of the possible insolvency forum see below at Sect. 4.1.2.

[232] See Veder (2004), p. 86.

[233] Hathorn (2013), p. 242.

[234] Westbrook (1991), p. 469.

debtor as well and from this the creditors profit as the insolvency estate would cover more than just the domestic assets.[235] At the same time, as a result of a protective stance, courts have been very reluctant to grant this universal effect to foreign court decisions within their jurisdiction.

This contradiction paired with the problem of parallel insolvency proceedings, when territorialism is applied in another jurisdiction, leads to the question how the principles of territorialism and universalism actually work in practice.

The 'pure' principle of territoriality does not serve the basic principle of the best possible satisfaction of the debtor's creditors, as it does not draw the debtor's foreign assets into the insolvency estate. In cases like *Maxwell Corporation*, the strict application of the territorialist approach would have led to the phenomenon that the debtor's domestic creditors would not be satisfied out of the major part of the insolvency estate, because most of the assets were located in foreign jurisdictions. Furthermore, the plurality of proceedings following from territorialism, can have an obstructing or even blocking effect on the insolvency proceedings, as those proceedings in different jurisdictions might be parallel and follow contradicting goals of either restructuring or liquidating the insolvent company.[236] The case of *Bank of Credit and Commerce International* (BCCI)[237] is a prominent example of chaotic conditions resulting from many courts being involved in an international insolvency. In 1991 insolvency proceedings over the assets of BCCI were opened in several countries, accompanied by vast criminal investigations and litigation. The parallel proceedings were far from efficient and piled up the cost of the proceedings at the cost of the creditors, as the distributable insolvency estate shrank accordingly.[238]

But the principle of universalism is not flawless either. Applied in its pure form, a great deal of problems can arise. An insolvency proceeding under a pure universalist approach bears the danger to interfere with foreign legal relationships in other jurisdictions.[239] A consequent application of the universalist approach to an insolvency proceeding may lead to the situation that the legal relationship of two entities in country A is subject to the laws of country B when an insolvency proceeding is initiated over one of the entities' assets in country B. This effect cannot be justified with the argument of a more efficient and cheaper global insolvency proceeding, as the freedom of contract as well as the freedom of choice of law should prevail. A

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[235] See for this and the following Kindler and Nachmann (2014), § 1 Grundlagen, marg. no. 1.

[236] This problem is addressed by Westbrook (1999/2000), p. 2293, as he argues for a single court for the whole insolvency proceeding, "*A single court would maximize asset values, even in liquidation, by providing a unified approach to assembly and sale of assets as a whole. … A single court would improve dramatically the possibility of reorganization, with a single court to whom the manager of the reorganization could report and a single mechanism for adjusting the interests of stakeholders, the possibility of saving a sprawling multinational corporation would be greatly increased*".

[237] Re Bank of Credit and Commerce International SA [1993] B.C.C. 787; see Goode (2011), p. 827.

[238] See Wood (2007a), p. 401.

[239] See LoPucki (1998/1999), pp. 709 seqq.

further major problem can occur where it is uncertain where the universal and solely insolvency proceeding should be opened.[240]

The falling apart of locations of the insolvent company's headquarter and its assets, like in *Maxwell Corporation*, leaves the creditor in doubt about where the debtor's centre of main interest[241] lies. If there are a number of creditors with conflicting interests on where the proceeding should be opened, the danger of legal disputes about the centre of main interest can arise and delay the whole proceeding. The creditor's interest in that situation lies in establishing the insolvency proceeding in a jurisdiction that recognises the priority of the creditor' claims and security interests.

In cases of default of a company that is part of a corporate group, there is the peril that the 'universal' insolvency court spreads its jurisdiction out to affiliated foreign companies. The Canadian unreported case *Bramalea* exemplifies this problem.[242] The Canadian parent company defaulted and the Canadian insolvency court opened the proceeding. The proceeding did not just cover the Canadian company and its assets, but the Canadian court expanded its jurisdiction over the US subsidiaries of *Bramalea*.[243] The expansion of the Canadian insolvency proceeding over the US assets was a major upset for the solvent US subsidiary of *Bramalea* because Canadian insolvency law suddenly modified their credit agreements.[244] As a result, the US subsidiaries of *Bramalea* faced massive financial struggles as well.

These are just the most prominent difficulties of the pure territorialist and universalist approach to multinational insolvencies.

2.2.2.4 Modification of the Universalist and Territorialist Approaches

The legal uncertainty and practical problems emerging from the isolated or 'pure' application of either of the two main theories of international insolvency law have led both practitioners and academics to rethink the approaches. As a result, the two main and extreme principles have been modified and even merged in many countries.[245] Especially in the Anglo-American sphere two new concepts are discussed. The first is based on the territorialist approach and expands it with the element of court cooperation,[246] which was already displayed and well executed in the case of *Maxwell Corporation*. The 'cooperative territorialist' approach argues to be the more realistic approach towards the insolvency of multinational corporations, as it

[240] See for this and the following LoPucki (1998/1999), pp. 713, 714; Wood (2007a), p. 401.

[241] The term 'centre of main interest' (COMI) is used in accordance with the wording of the Art. 3 (1), (2) EU Insolvency Regulation (1346/2000). The Court of Justice of the European Union gave guidelines on the determination of the COMI in *Interedil Srl v. Fallimento Interedil Srl and Intese Gestione Crediti SpA* (CJEU, C-3906/09).

[242] See for this and the following sentence Marantz (1997), p. 7.

[243] See LoPucki (1998/1999), p. 718.

[244] See LoPucki (1998/1999), p. 719.

[245] See Wood (2007a), p. 400.

[246] See LoPucki (1999/2000), p. 2219.

does not strive for a global unification of insolvency laws, what would be the prerequisite for the success of the universalist approach.[247] Paulus described international cooperation as a central principle of modern international insolvency law[248]:

> Where parallel proceedings result from territorial approaches, foreign insolvency courts and insolvency administrators or insolvency receivers should at least cooperate to reduce the loss of effectiveness.

The term effectiveness has to be understood here as the aim to increase the insolvency estate from which the creditors will receive their insolvency dividend at the closing of the insolvency proceeding.

The alternative to the territorialistic cooperation is the 'modified universalist' approach, which is based on the principle of universalism. The modification of the universalist approach lies in the concept that a central and all controlling insolvency court in the debtor's home country, or more precisely at his centre of main interest, is not solely responsible to manage the global insolvency of the transnational company, but the main court will be assisted by courts in all those states where the insolvent company has further assets.[249] The American Law Institute characterised modified universalism in the following way: "*Modified universalism is universalism tempered by a sense of what is practical at the current stage of international legal development*".[250] The concept of modified universalism is much more flexible and less dogmatic than the 'pure' universalist approach. The courts can decide whether or not they cooperate with the court of the main proceeding as ancillary court. This choice brings the ancillary courts into a position where they can effectively protect the rights of the creditors and assets located in their jurisdiction,[251] since the alleged ancillary court's refusal to assist would block off the extension of the foreign proceeding from the home creditors and assets.

The most recent and internationally acknowledged codes on international insolvency law are the EU Insolvency Regulation and the UNCITRAL Model Law on Cross-Border Insolvency. Both are based on the modified universalist approach.[252] Especially the EU Insolvency Regulation is infused by the ideas of modified universalism, as it gives universal effect to the insolvency law of that country where the debtor has its centre of main interest, but at the same time allowing the initiation of ancillary insolvency proceedings.[253] England & Wales are part of the European Union and therefore the EU Insolvency Regulation takes direct effect. Furthermore, England & Wales as well as the USA have adopted the UNCITRAL Model Law, a clear sign that both countries are more in favour of the universalist approach on cross-border insolvencies. The two bodies of rules will be discussed in more depth

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[247] See LoPucki (1999/2000), p. 2224.

[248] See Paulus (2005b), p. 334, this passage has been translated into English by the author.

[249] See Goode (2011), p. 785.

[250] American Law Institute (2000), p. 11.

[251] Goode (2011), p. 624; see LoPucki (1998/1999), p. 728.

[252] See Goode (2011), p. 785.

[253] See Bowen (2013), p. 122; Fehrenbach (2014), pp. 16–21.

below. Nevertheless, especially the Model Law is seen just as a step towards the establishment of universalism in international insolvency and it has been criticised for missing out a chance to fully establish a universalist approach.[254]

2.2.3 Cross-Border Insolvency Laws

This section serves to give an overview of the laws and rules that national jurisdictions, international organisations and institutions have adopted to deal with the legal challenges of cross-border insolvency. An in depth discussion of each legal system cannot be provided as it would exceed this work's capacities. A detailed exposition of the proprietary rights of maritime liens and how these rights are affected by debtors' insolvencies in the specific countries of Germany, England & Wales and the USA will be given in the third chapter.

2.2.3.1 National Law

International insolvency law of individual states has to cover at least three main areas of law to give sufficient guidance and establish a functioning system for the administration of cross-border insolvencies. These three fields are "*choice of law rules, jurisdiction rules and enforcement rules*".[255] The display of the international insolvency rules of Germany, England & Wales and the USA bears the interesting aspect that Germany and England & Wales are subject to the EU Regulation on Insolvency Proceedings and that England & Wales together with the USA have adopted the UNCITRAL Model Law on Cross-Border Insolvency, which formed the basis of their domestic international insolvency law. England & Wales therefore works as an example of a bridging jurisdiction, rooted in the Anglo-American law tradition of Common Law but also nowadays vastly influenced by its European Union membership,[256] which is dominated by Civil Law jurisdictions.

2.2.3.1.1 Germany

The German international insolvency regulations have two sources of law. First the EU Insolvency Regulation, which as a EU regulation has direct effect in Germany and takes precedence over the second source, the German national rules for

[254] See Perkins (2000), p. 787.

[255] Keay and Walton (2012), p. 403.

[256] On 23 June 2016 a majority in the UK voted to leave the EU. Based on that vote the government of the UK will prepare the dissolution of the UK's EU membership. The actual modalities of this dissolution and the effect on the existing legal regulations in the UK are not predictable. Hence this book applies the legal *status quo*.

international insolvency cases, which are codified in secc. 335 seqq. InsO.[257] As soon as insolvency cases have links with a third state, the legal norms of secc. 335 seqq. InsO become relevant. A foreign link exists when the debtor has assets abroad or a foreign creditor exists.[258] The German international insolvency law has to answer three main questions: where does the jurisdiction for the international insolvency case lie, which effect takes a German insolvency proceeding in a foreign state and shall a foreign insolvency proceeding be recognised in Germany and to what extent?[259]

According to sec. 3 InsO, a German insolvency court has exclusive local jurisdiction if the foreign debtor's self-employed business activity is located in its district. The debtor may then file for an insolvency proceeding to be opened over his assets according to German insolvency law.

An insolvency proceeding in Germany covers all of the debtor's domestic as well as foreign assets.[260] This is a distinctive feature of the principle of universalism.[261] Of course, the scope of the German insolvency proceeding depends on its recognition by the foreign jurisdiction, thus whether the foreign jurisdiction is willing to give effect to the German insolvency proceeding with the effect that the debtor's foreign assets are not dealt with in a local proceeding but drawn into the German procedure and under the disposition power of the German insolvency administrator. In case this recognition is not given to the German insolvency proceeding, but a debtor's creditor still manages to seize assets of the debtor located in this foreign jurisdiction, the insolvency administrator in Germany can claim these assets from this creditor and draw them into the insolvency estate to enforce the basic insolvency principle of collective satisfaction of the debtor's creditors.[262]

Until 1985, German courts took a territorial stance in cross-border insolvency cases and did not recognise foreign insolvency proceedings. This changed with a landmark decision of the BGH, where it applied the universalist approach for the first time and granted recognition to a foreign insolvency proceeding.[263] In this decision the BGH set out the requirements for the recognition of foreign proceedings: The proceeding has to be filed orderly according to the applicable foreign insolvency law, the foreign insolvency court has to have jurisdiction and the recognition shall not infringe on the German *ordre public*.[264] This approach is now codified under sec. 343 InsO.[265]

[257] See S. Reinhart in Kirchhof et al. (2014), Vor §§ 335ff marg. no. 2, 3.

[258] See AG Köln (2012) NZI, p. 379.

[259] See Bork (2014), pp. 274, 275.

[260] See BGH (2003) ZIP, p. 2124.

[261] See Bork (2014), p. 277.

[262] See BGHZ 88, pp. 153 seqq.

[263] See BGHZ 95, pp. 263 seqq.

[264] See BGHZ 95, pp. 269 seq.; BGH (1997) NJW, pp. 524 seqq.

[265] See Miguens and Esser (2011), p. 278, pointing out that the German international insolvency law takes a more universalist approach than nations like Argentina, USA, Switzerland or even the UNCITRAL Model Law on Cross-Border Insolvency, which all insist on the opening of a parallel proceeding in their jurisdiction.

2.2.3.1.2 England & Wales

The international insolvency law of England & Wales is based on three sources, Section 426 of the IA 1986, the European Insolvency Regulation and the Cross-Border Insolvency Regulation of 2006 (CBIR).

Section 426 of the IA 1986 requires the courts of the whole UK (England, Wales, Scotland and Northern Ireland) to cooperate in insolvency proceedings and extents this requirement to the Channel Islands, the Isle of Man and many other Commonwealth countries[266] designated by the Secretary of State.[267] This provision reflects the traditional links of the former British Empire. The second source of international insolvency law for England & Wales is the EU Insolvency Regulation. It will be dealt with separately below.

The CBIR represents England & Wales' incorporation of the UNCITRAL Model Law on Cross-Border Insolvency. Thus, it is based on the concept of modified universalism. It came into effect in Great Britain[268] on 4 April 2006, roughly 10 years after the publication of the Model Law.[269] The CBIR has eight sections and four Schedules. Schedule 1 includes the Model Law with its 32 articles. Schedule 2 sets out the rules for the procedural requirements for an application for relief under the Model Law in England & Wales.[270] The Regulation does not have a reciprocity requirement, which means that a foreign insolvency official can apply for relief under the Model Law although his home country has not yet fully or at all adopted the UNCITRAL Model Law on Cross-Border Insolvency.[271] Art. 3 of Schedule 1 sets out the rules where the EU Regulation takes precedence over the CBIR and in turn the CBIR presides over the domestic international insolvency law of England & Wales.

The CBIR only deals with foreign proceedings and their officials seeking assistance from English Courts.[272] If a foreign insolvency official wishes to 'expand' his insolvency proceeding onto England & Wales, either to cover assets of the debtor located there, or to make the access into the proceeding for certain creditors easier, he has to apply under Art. 2(i) of the CBIR to a court for the recognition of his proceeding. Moreover, the CBIR gives foreign insolvency officials, like for example a German *Insolvenzverwalter* (insolvency administrator) or an American trustee the chance to choose English law by applying to an English court to commence an insolvency proceeding, according to Artt. 11 and 12 of the CBIR. For a court to

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[266] The designated countries are: Anguilla, Australia, the Bahamas, Bermuda, Botswana, Brunei, Canada, Cayman Islands, Falkland Islands, Gibraltar, Hong Kong, Ireland, Malaysia, Montserrat, New Zealand, St Helena, South Africa, Turks and Caicos Islands, Tuvalu and the Virgin Islands.

[267] See Bowen (2013), p. 122.

[268] Great Britain includes England, Wales and Scotland. For Northern Ireland a separate Cross-Border Insolvency Regulation (Northern Ireland) came into force on 12 April 2007.

[269] See for this and the following Fletcher (2007), pp. 138, 139.

[270] See for this and the following Keay and Walton (2012), p. 413.

[271] See for this and the following Bowen (2013), p. 123.

[272] See Keay and Walton (2012), p. 414.

recognise a foreign proceeding under the CBIR, the proceeding in question has to adhere to the internationally acknowledged principle of collectivity, meaning that the proceeding has to cover all of the debtor's creditors.[273] The court's recognition of the foreign proceeding leads to a stay of proceedings started in England & Wales against the foreign debtor under Art. 20.1 of the 2006 Regulation. This provision, common to all domestic insolvency laws, transfers the principle of stay of proceedings into international insolvency law, with the effect that the debtor can have a breathing spell to prepare for example his reorganisation without the peril of having to lead costly court trails abroad. To provide full and effective protection for the foreign debtor, Art. 19 of the CBIR opens up the possibility for the foreign insolvency official to request a court order to protect the debtor's assets or the interests of the creditors during the time of application and court order, by granting a provisional relief for this interim period.[274]

2.2.3.1.3 USA

The US legislator of the 1978 Bankruptcy Code did not foresee the fast development of internationally operating companies and its downside of possible default. Transnational insolvency did not become an issue before the late 1980s. Therefore, the former 11 U.S.C. § 304 provision was rather short and expected proceedings of foreign insolvency courts to be ancillary to the Chapter 7 and 11 cases.[275] This notion changed over the time and in 2005 the Chapter 15 for "*Ancillary and Other Cross-Border Cases*" was added to the existing US Bankruptcy Code. The new international insolvency law of the USA is almost a copy of the UNCITRAL Model Law on Cross-Border Insolvency and the US legislator made only a few adaptations and alterations to fit the Model Law into the existing US Bankruptcy Code.[276] The US legislator made a clear statement in favour of the modified universalist approach with the incorporation of the Model Law into the US Bankruptcy Code.

Since its entry into force on 17 October 2005, Chapter 15 serves for those cases where the foreign insolvency court or the respective insolvency official seek to have their foreign proceeding recognised by the US bankruptcy court. The reason to just apply for the recognition of the foreign procedure may be that the foreign jurisdiction would not allow assets in its jurisdiction to be administered by a non-domestic insolvency proceeding. Chapter 15, incorporated to promote coordination and cooperation in international insolvency proceedings, explicitly states in 11 U.S.C. § 1525(a) that the US courts have to cooperate with a foreign court or representative

[273] See Bowen (2013), p. 130; *in re* Stanford International Bank [2011] Ch. 33, the Court of Appeal decide on the requirement of collectivity and held, that the US receivership was not a "*foreign proceeding*" for the purpose of Art. 2(1) of the Model Law, but the Antiguan liquidation in contrast was.

[274] See Keay and Walton (2012), p. 416.

[275] See for this and the following Aaron (2014), p. 1057.

[276] See Paulus (2005a), p. 439.

"*to the maximum extent possible*". This shows how seriously the USA takes the ideas of universalism for multinational insolvency cases, as this approach only works effectively when courts work together and do not block or bypass each other.[277]

In contrast to the other Chapters of the US Bankruptcy Code, Chapter 15's first section presents an outline of its purposes.[278] These are under 11 U.S.C. § 1501(a): international cooperation between the courts, greater legal certainty for trade and investment; fair and efficient administration of cross-border insolvencies; the protection and maximisation of the value of the debtor's assets and the facilitation of the rescue of financially troubled businesses. As a result of its descent from the UNCITRAL Model Law and to make sure that Chapter 15 keeps its international aura, 11 U.S.C. § 1508 points out that the bankruptcy courts shall consider its international origin, and the need to promote an application of this Chapter that is consistent with the application of similar statutes adopted by foreign jurisdictions.[279] The interpretation of the Chapter 15 rules with recognition of foreign courts' interpretation of the Model Law rules or similar codes is important to guarantee that the globally intended legal framework does not suffer from divergence due to different interpretations. But already 5 years after the introduction of Chapter 15 clear differences can be observed in the interpretation of central terms like 'centre of main interest'.[280] These differences have led some to argue that the Model Law in its different interpretation in the respective jurisdictions has not helped to provide more legal certainty and reliability in determining the outcomes of judicial decisions.[281] This is a very harsh analysis, which leaves out the benefits of the Model Law and its role to provide common ground for a further harmonisation of international insolvency law in the future.

The procedure of Chapter 15 is open to all foreign insolvency proceedings. Under the defining provision of 11 U.S.C. § 101, the term 'proceeding' includes interim proceedings, which make an early action at the provisional phase possible. Furthermore, US bankruptcy courts have broadened the term 'proceeding' by including the English scheme of arrangement proceeding, which explicitly is not an insolvency proceeding but a restructuring tool under Part 26 of the Companies Act 2006 of England & Wales.[282] The widening of the term 'proceeding' should help to provide immediate and effective measures at hand for the foreign insolvency official

[277] As already pointed out, the UNCITRAL Model Law on Cross-Border Insolvency, on which the US Chapter 15 is based on, was a clear move towards the modified universalism most prominently advocated by Westbrook.

[278] See O'Flynn (2012), p. 400.

[279] See Paulus (2005a), p. 439.

[280] See for a full display of the US bankruptcy courts' interpretation of COMI in contrast to European Courts: Ragan (2010/2011), pp. 117–168.

[281] See Gopalan and Guihot (2015), p. 1266.

[282] A Case in which the US bankruptcy courts accepted a scheme of arrangement proceeding to be a proceeding according to 11. U.S.C. § 101 was *In re* Magyar Telecom B.V., Case No. 13-13508 (Bankr. S.D.N.Y. Dec. 11, 2013).

of the struggling company.[283] A proceeding is "*foreign*" according to 11 U.S.C. § 101 (23) if "*the assets and affairs of the debtor are subject to control or supervision by a foreign court*". If all required documents are provided, the bankruptcy court grants an order of recognition of the foreign proceeding according to 11 U.S.C. § 1517. Making this order, the court has to determine whether the foreign proceeding can be classified as a main or an ancillary proceeding. These two categories were unknown to the US insolvency jurisdiction until the introduction of Chapter 15 and obviously stem from the UNCITRAL Model Law, which was not only drafted by US but also by European experts, who introduced these terms against this background. The court classifies the foreign proceeding as "*main*" when according to 11 U.S.C. § 1502 (4) a foreign proceeding is pending in the country where the debtor has the centre of its main interests. On the question of where a company's centre of main interest is located, 11 U.S.C. § 1516(c) provides an assumption: "*in the absence of evidence to the contrary, the debtor's registered office is presumed to be the centre of the debtor's main interests*". This presumption mirrors Art. 3 (1) sentence 2 of the EU Insolvency Regulation, which is another evidence that the international insolvency systems of Europe and the USA are closing ranks.

The differentiation of foreign main and non-main proceedings in the recognition order of the US court is not only a question of labelling the proceeding, but has actual meaning for the effect of the recognition order on the foreign proceeding. If the court classifies the proceeding as a main proceeding, an automatic stay will follow from it according to 11 U.S.C. § 1520(a) (1), § 362 for the whole of the debtor's assets located in the USA. Furthermore, the representative of the foreign main proceeding under 11 U.S.C. § 1520(a) (3) may operate the debtor's business and may exercise the rights and powers of a trustee on the US located assets of the debtor. Such far reaching rights are only connected to the foreign main proceeding and are of huge importance for those proceedings where large parts of the debtor's global assets are located in the USA, as they fall directly under the administration of the foreign insolvency representative, who can use these assets either to continue the business or liquidate it for the benefit of the debtor's creditors.

Even though Chapter 15 largely opens the US insolvency procedure to foreign proceedings, the US courts still have some power to control and restrict the foreign insolvency official. 11 U.S.C. § 1522(a) stipulates that the court only grants an interim relief under 11 U.S.C. § 1519 or § 1521, if the interests of the creditors and other interested entities, including the debtor, are sufficiently protected. 11 U.S.C. § 1521(b) goes one step further and is a product of the modified universalism where the interests of domestic creditors are still under the protection of the US court, as the wording goes:

> Upon recognition of a foreign proceeding, whether main or non-main, the court may, at the request of the foreign representative, entrust the distribution of all or part of the debtor's assets located in the United States to the foreign representative or another person, including an examiner, authorized by the court, provided that the court is satisfied that the interests of creditors in the United States are sufficiently protected.

[283] See Paulus (2005a), p. 440.

The explicit protection of US creditors is a genuinely territorialistic approach, which diminishes the universalistic approach and hence modifies it.

Nevertheless, Paulus comes to the conclusion that the US Chapter 15 is a "*modern international insolvency law*" and praises its readiness to support foreign proceeding to a very large and effective extent.[284]

2.2.3.2 EU Law

Since 1960, the EU has taken several steps towards a unified insolvency system, which is the necessary consequence of a more and more integrated European single market.[285] The 15 member states of the European Union at that time passed the EU Regulation on Insolvency Proceedings in 2000 and the regulation came into force on 31 May 2002.[286] A regulation of the EU as opposed to international conventions has the advantage under Art. 249 of the EU Treaty to be binding for all member states of the European Union and is therefore directly applicable when it comes into force.[287] Today, the EU Insolvency Regulation applies in 27 member states of the European Union.[288]

Stipulating the scope of the EU Insolvency Regulation, Art. 1 (1) of the Regulation, in its newest version of 20 May 2015,[289] states:

> This Regulation shall apply to public collective insolvency proceedings, which are based on laws relating to insolvency and in which for the purpose of rescue, adjustment of debt, reorganisation or liquidation:
>
> a) a debtor is totally or partially divested of its assets and an insolvency practitioner is appointed;
> b) the assets and affairs of a debtor are subject to control and supervision by a court; or
> c) a temporary stay of individual enforcement proceedings is granted by a court or by operation of law, in order to allow for negotiations between the debtor and its creditors, provided that the proceedings in which the stay is granted provide for suitable measures to protect the general body of creditors, and, where no agreement is reached, are preliminary to one of the proceedings referred to in point a) or b).

The Art. 1 (1) of the redraft of the EU Insolvency Regulation is much more detailed in stipulating the scope of the regulation than the former Art. 1 (1), which simply stated, that the "*Regulation shall apply to collective insolvency proceedings*

[284] See Paulus (2005a), p. 441.

[285] For a detailed display of the history of European insolvency law and the route it took, see Moss et al. (2009), pp. 1–16; Fehrenbach (2014), pp. 12–15.

[286] EU Regulation 1346/2000, 29 May 2000 available at http://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:32000R1346 (last visited on 10 June 2018).

[287] See Fletcher (2005), pp. 354, 355.

[288] Applicable only in 27 of 28 member states, as Denmark opted out of giving effect to the Regulation.

[289] Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings will take effect on 26 June 2017 available at https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32015R0848 (last visited on 10 June 2018).

which entail the partial or total divestment of a debtor and the appointment of a liquidator".

Art. 1 (2) of the regulation stipulates that it shall not apply to insolvency proceedings concerning insurance undertakings, credit institutions and investment undertakings. All proceedings covered by the EU Insolvency Regulation are listed in its Annex A.[290] The relevant proceedings for Germany are *Konkursverfahren*, *gerichtliches Vergleichsverfahren*, *Gesamtvollstreckungsverfahren* and *Insolvenzverfahren*; and for England & Wales: winding-up by or subject to the supervision of the court, creditors' voluntary winding-up (with confirmation by the court), voluntary arrangements under insolvency legislation, bankruptcy or sequestration.

At the heart of the EU Insolvency Regulation lays the principle of "*centre of main interest*" (COMI). The centre of main interest is supposed to determine the debtor's home and thus where the debtor should file for insolvency. The insolvency proceeding that is started at the COMI of the debtor forms the main proceeding. If a company has its COMI outside of the EU or in Denmark, the whole EU Insolvency Regulation is not applicable for its insolvency.[291] The COMI of an insolvent company also works to determine the EU member state, which will be in charge to govern its main insolvency proceedings, according to Art. 3 of the EU Insolvency Regulation.[292] Art. 7 of the regulation sets forth that the rule of *lex fori concursus*, the respective jurisdiction's insolvency law, where the debtor's COMI lies, will apply.[293] Nevertheless, this characteristic feature of the cross-border insolvency law principle of universalism is subject to a number of exceptions codified in the Artt. 8 to 18 of the EU Insolvency Regulation.[294] A truly harmonised European insolvency law would need the harmonisation of the material insolvency laws as well. Even though there had been plans to do so, this project is still at the initial stage and unlikely to be realised in the near future.[295]

Another feature of the EU Insolvency Regulation, which justifies its classification as a modified universalist insolvency regulation, is the recognition of any Member States court's judgement opening insolvency proceedings by all other Member States, according to Art. 19 (1) of the EU Insolvency Regulation.[296] Art. 20 (1) further adds to that by stipulating that the opening shall produce the same effects in any other Member State as under the law of the state of the opening of proceed-

[290] See Moss et al. (2009), p. 42.

[291] See Keay and Walton (2012), p. 428.

[292] See Mucciarelli (2013), p. 176.

[293] See for this and the following Fehrenbach (2014), p. 19.

[294] Especially Art. 8 of the EU Insolvency Regulation plays an important role in maritime cross-border insolvency as this article covers the "*Third Parties' Rights in rem*" and the effect the opening of an EU Member States' insolvency proceeding has on these rights. At this point of the book a detailed discussion of Art. 8 EU Insolvency Regulation is not helpful for a general orientation, therefore this article will be displayed exhaustively in the relevant chapter on maritime insolvency, see below at Sect. 4.3.1.

[295] See Fehrenbach (2014), pp. 18, 19.

[296] See Bork (2014), p. 277.

ings. This is important as it gives effect to the national laws' particularities, for example the powers of a German insolvency administrator are recognised in all other Member States due to this regulation. But again, the strictly universalist approach of recognising the insolvency proceedings opening judgements of all other Member States is modified to the extent that the recognition may be refused if contrary to a Member State's public policy, according to Art. 33 of the EU Insolvency Regulation.[297]

Comparable to the EU Insolvency Regulation of the European Union other regions have adopted conventions or treaties to harmonise the procedures of cross-border insolvencies in their respective regions. The Montevideo treaties, ratified by Argentina, Bolivia, Colombia, Paraguay, Peru and Uruguay,[298] and the Nordic Bankruptcy Convention,[299] for the Scandinavian region, are in force since more than 80 years and were only achievable because the participating states already shared similar insolvency and commercial law systems.[300] These circumstances are rare and therefore regional insolvency treaties or conventions are still an exception.

2.2.3.3 Laws and Guidelines of International Institutions

Apart from nation states and the European Union, other institutions have not only identified the problems of cross-border insolvency and discussed it on the academic level, but have recognised the need for a globally operating system to deal with transnational insolvency, mainly occurring where multinational company groups are defaulting. As these institutions are not so much concerned about states' sovereignty, they have adopted approaches, which are very much in favour of the universalist approach on cross-border insolvency.

2.2.3.3.1 UNCITRAL Model Law on Cross-Border Insolvency

Even though the 1980s brought dramatic change for the global market and the default of multinational companies was a known phenomenon, it took until the 1992 UNCITRAL congress "*Uniform Commercial Law in the 21st Century*" that the work on a model law on cross-border insolvency was started.[301] The drafting of the Model Law was assisted by the International Association of Insolvency Practitioners (INSOL) and Committee J (Insolvency) of the Section on Business Law of the

[297] For a detailed display and discussion of public policy in European insolvency proceedings see: Laukemann (2012), pp. 207–215.

[298] The Montevideo Treaties were ratified in 1889 and 1940 dealing with commercial law in general and insolvency procedural regulations in particular. See Nadelmann (1944), p. 69.

[299] The Nordic Bankruptcy Convention was concluded in 1933 and amended in 1977 and 1982 and takes effect in Denmark, Finland, Iceland, Norway and Sweden. See Nadelmann (1944), p. 68.

[300] See Clift (2004), p. 313.

[301] See Clift (2004), p. 308.

International Bar Association and was adopted on 30 May 1997.[302] As of today, 43 states[303] have enacted the Model Law. The number has nearly doubled in 2015, because the West and Central African organisation OHADA (*Organisation pour l'Harmonisation en Afrique du Droit des Affaires*) voted to adapt the UNCITRAL Model Law.[304] This can be seen as a further step forward for this ambitious project of harmonisation.

The Model Law itself does not have any binding effects and every state is free to choose whether to adopt it or not, or even drop it again.[305] The Model Law aims at harmonising the approach of national legal systems on how to deal with international insolvencies.[306] An important aspect of harmonisation is the encouragement and establishment of "*cooperation between courts and office holders involved in the same insolvency in different jurisdictions*". The regulations of the Model Law are procedural only and there are no conflicts-of-law or substantive law rules.[307] The focus on cooperation among the courts and recognition of foreign procedures was set to address those issues in international insolvency law, which could be solved or improved without a long lasting process of harmonisation.[308] This method has been referred to as "*an exercise in realism and in 'the art of the possible'*".[309] The Model Law was drafted in the spirit of the modified universalist approach on cross-border insolvency.[310] The drafting commission opted for the modified universalist approach to reach the widest acceptance possible. Compared to the EU Insolvency Regulation the Model Law is weaker. Where the opening of an insolvency proceeding in any of the EU member states is automatically recognised by all other member states jurisdictions, the Model Law does not provide such an automatic recognition and

[302] See *Guide to Enactment of UNCITRAL Model Law on Cross-Border Insolvency* at para 4 available at https://www.uncitral.org/pdf/english/texts/insolven/1997-Model-Law-Insol-2013-Guide-Enactment-e.pdf (last visited on 10 June 2018).

[303] These states are: Australia (adopted in 2008), Benin (2015), British Virgin Islands (overseas territory of the UK) (2003), Burkina Faso (2015), Cameroon (2015), Canada (2009), Central African Republic (2015), Chad (2015), Chile (2013), Colombia (2006), Comoros (2015), Congo (2015), Côte d'Ivoire (2015), Democratic Republic of the Congo (2015), Dominican Republic (2015), Equatorial Guinea (2015), Gabon (2015) Great Britain (2006), Greece (2010), Guinea (2015), Guinea-Bissau (2015), Israel (2018), Japan (2000), Kenya (2015), Malawi (2015), Mali (2015), Mauritius (2009), Mexico (2000), Montenegro (2002), New Zealand (2006), Niger (2015), Northern Ireland (2007), Philippines (2010), Poland (2003), Republic of Korea (2006), Romania (2003), Senegal (2015), Serbia (2004), Seychelles (2013), Singapore (2017), Slovenia (2007), South Africa (2000), Togo (2015), Uganda (2011), USA (2005) and Vanuatu (2013). An updated status of the list of adapting countries is available at http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model_status.html (last visited on10 June 2018).

[304] Acte uniforme portant organisation des procédures collectives d'apurement du passif (OHADA), adopté le 10/09/2015 à Grand-Bassam (Côte d'Ivoire).

[305] See Goode (2011), p. 794.

[306] See for this and the following Goode (2011), p. 793.

[307] See Goode (2011), pp. 795, 796; Clift (2004), p. 317.

[308] See Clift (2004), p. 315.

[309] Fletcher (2005), p. 453.

[310] See Ragan (2010/2011), p. 123.

requires the application of the insolvency representative to the respective court to effect the recognition as a foreign main proceeding.[311]

A detailed presentation of the Model Law is not given, as it is identical in its vast parts to the US Chapter 15 and the Cross-Border Insolvency Regulation of England & Wales. Especially the important issues regarding the scope of application, the access of foreign representatives to courts of the enacting states, relief granted for the foreign proceeding and the recognition of foreign procedures have all been covered under the sections regarding the international insolvency laws of the USA and England & Wales, as these states have already adopted the Model Law.[312]

2.2.3.3.2 Global Principles for Cooperation in International Insolvency Cases

In 2006, the ALI (American Law Institute) and the III (International Insolvency Institute) appointed two of the most prominent professors of international insolvency law to work out a report on "*Global Principles for Cooperation in International Insolvency Cases*". Professor Fletcher and Professor Wessels published this report in June 2012, which forms an evolution of the ALI's Principles of Cooperation among the member-states of the North American Free Trade Agreement. The report was never intended to form the basis for an international treaty or convention, but to be established as a non-binding guideline for an improved cooperation between courts of different jurisdictions in international insolvency cases. The report aims at addressing both civil as well as common law jurisdictions.[313]

The report contains 37 global principles on coordination of international insolvency cases and 18 guidelines applicable to court-to-court communications in cross-border cases.[314] The principles and guidelines all have the goal to improve the interaction and communication between the courts, insolvency officials, debtors and creditors, who are all involved in an international cross-border insolvency case. An improvement of the interaction between these parties can save time and money, as the insolvency proceeding is more streamlined towards the central insolvency courts and the assets can be concentrated in those proceedings for the benefit of the creditors as well as the debtor. Separate and contradicting insolvency proceedings, where courts neglect the necessary communication with foreign courts and insolvency officials, might block each other and by that waste valuable time and assets to the detriment of both creditors and the debtor, the latter possibly losing the chance to reorganise his business.

Besides the principles and guidelines, the report does not provide the courts or insolvency officials with substantive rules. This lack of legal regulation gives the report a realistic chance to be used by courts in their day-to-day work on cross-

[311] See McCormack (2016), p. 138.

[312] For further reading on the UNCITRAL Model Law on Cross-Border Insolvency see the instructive article Clift (2004), pp. 307–345.

[313] See for the whole paragraph: Fletcher and Wessels (2013), pp. 2, 3.

[314] See Fletcher and Wessels (2013), p. 3.

border insolvency cases. But the report also missed the chance to address the urging challenges of cross-border insolvency, like recognition of foreign proceedings, determination of the centre of main interest and the definition of main and secondary insolvency proceeding.

2.3 Conclusion: Insolvency Laws and Cross-Border Insolvency

The first part of this chapter showed that the insolvency law systems of Germany, England & Wales and the USA share many basic features and that insolvency law in these jurisdictions is evolving from a simple liquidation procedure to a complex legal code for the restructuring of international multi-layered business groups. There are still differences between these three jurisdictions and especially Germany lacks competitive-ness when it comes to the decision where an international corporate group shall pursue a restructuring proceeding.

The second part showed the different legal approaches to cross-border insolvency. The rivalry between the territorialists and universalists still exists and the contradictions are not yet solved. The need for functioning international rules for the reality of global corporations filing for insolvency urged the legislators as well as the international organisations to find workable solutions. The EU Insolvency Regulation as well as the UNCITRAL Model Law on Cross-Border Insolvency are committed to the concept of modified universalism. Both codes are in force since more than 10 years and a workable system for international insolvency seems to be establishing on this ground. Especially the redrafting of the EU Insolvency Regulation in 2015 did not lead to a total make over but only included minor adjustments and changes, which is a sign for the workability of the Regulation. It is therefore fair to say that the international insolvency laws in place, in the national jurisdictions and the EU, are working and that the trouble of cross-border insolvencies lies more in the communication between the courts involved in the proceeding. With the main and secondary proceeding concept, a clear hierarchy of insolvency courts has been established and it improves the chances to manage an international multi-jurisdiction insolvency proceeding more effectively than without such clear adjudication of power and court competence.

As international insolvency law has found workable approaches for the challenges of a globalised world it is even more interesting to see how robust these approaches are when it comes to maritime cross-border insolvencies, where not only the international character of the industry provides a challenge for international insolvency law but also the peculiarities of maritime law can cause much confusion to the by now well established systems of international insolvency law. These peculiarities and their effects in an insolvency proceeding shall be examined in the following two chapters of this book.

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Chapter 3
The Maritime Industry and the Peculiarity of Maritime Liens

The maritime industry and especially the shipping industry are for many reasons a special case when it comes to insolvency. Not only is the international character of shipping an inherent feature but the mobility of the main assets of most financially struggling shipping companies, the ship itself, presents a further complicating factor for the reorganisation or liquidation under national insolvency laws. This chapter serves to display one of the most salient features of maritime law,[1] the law of maritime securities and in particular that of maritime liens.

In times of numerous insolvencies of shipping companies, a study and examination of rights *in rem* in cross-border insolvency proceedings promises to be revealing when it comes to central issues of international insolvency law and its challenges in the international, globalised context of an industry that long before other branches of industry and commerce set sail to foreign jurisdictions with different approaches in both insolvency as well as maritime law. Maritime liens are an ideal object of study in this context. These liens are special rights *in rem* in relation to ships and even though Germany, England & Wales and the USA are all familiar with them, the way they deal with these liens, especially in enforcing them, differ starkly. For an examination of this special security interest it is vital to have a general understanding of the maritime industry, especially the shipping industry and its legal peculiarities, which evolved out of a long history of seaborne trade. Hence the maritime industry and its special features, particularly the shipping industry, are discussed first in this chapter before maritime liens will be examined.

[1] This book only covers maritime law and the resulting law of maritime liens. The law of inland navigation will not be considered.

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3.1 Maritime Industry

From the earliest days of civilised human societies, the location of villages and trading places was considered to be ideal when it was connected to a waterway. The empire of the Pharaohs at the river Nile, the ancient city-state of Mesopotamia, located between the two rivers of Euphrates and Tigris, or the Phoenician and Greek city states at the costs of the Mediterranean Sea, they all shared the connection to waterways, which until today facilitate a reliable and cheap transport of people and goods. At those hubs of civilisation the first traces of a maritime industry can be found, old docks of shipbuilders and ship repairers and warehouses at the waterfront.[2] Today, the transport of goods by sea is more important than ever before and the network of transportation has grown into a world-spanning system. The following section serves to illustrate the shipping industry as an important sub segment of the maritime industry.

3.1.1 Shipping Industry

The term shipping industry in this context has to be understood as the branch of the maritime industry that deals with the ship-based transport of goods.

3.1.1.1 History

The history of shipping can be traced back as far as to the establishment of the first civilisations of mankind. The first ancient civilisation to have established a branch of ship-based commerce, worth to be called industry, were the Phoenicians. Their trade routes covered the entire Mediterranean Sea and they excelled in shipbuilding, navigation and trading, the basic elements of the shipping industry.[3]

During the times of the ancient Greeks and Romans the ship-based trade was local or regional and did not solely serve the purpose of trade but was linked with colonisation and domination of other people and regions. Over the following centuries, shipping did not change much and was limited to the regions of Europe, Southeast Asia and Arabia, as the technological level did not allow long voyages far from the coastlines. Therefore, sea-trading powers like Venice and the Hanseatic League did have links and profited from each other's trading centres but were limited to their regions.[4] This changed with the improvement of nautical skills using the celestial on top of the terrestrial navigation. Driven by colonial and commercial motives, the nations of Britain, Spain, Portugal, France and the Netherlands

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[2] See for an overview of the beginnings of maritime commerce: Reddie (1841), pp. 31–61.

[3] See for a detailed description of the Phoenicians' merits in shipping: Reddie (1841), pp. 34, 35.

[4] See Stopford (2009), p. 11.

conquered the world by sea from the end of the fifteenth century onwards. By no surprise, the founding of the British East India Company[5] and the Dutch East India Company (*Vereenigde Oost-Indische Compagnie*)[6] took place in 1600 and 1602. During that time, Sir Walter Raleigh famously formulated the mantra of the future British perspective on the importance of sea trade:

> He who commands the sea commands the trade routes of the world. He who commands the trade routes, commands the trade. He who commands the trade, commands the riches of the world, and hence the world itself.[7]

This logical reasoning of Raleigh proved to be true for Britain for at least the next 300 years, as Britain built a world spanning empire with colonies in all parts of the world and Britannia ruled the waves.

The next big change for the shipping industry came with the industrial revolution, which brought technological advancements like steam propulsion and iron hull for ships, as well as a growing demand for raw materials and exotic goods, which both had to be shipped to Europe from all over the world.[8] From then on, the shipping industry had turned from a local and regional into a global industry. Sletmo describes this as a dramatic change:

> Shipping is losing its national character as shipmanagement firms contribute towards the fragmenting of traditional shipowning firms into separately managed activities, making shipping more footloose as an industry, and facilitating relocation in least cost factor markets.[9]

3.1.1.2 Global Industry

The shipping industry is a global industry and the shipping companies operate trading lines across the globe. The three main goods transported by ships are containers, bulk and liquids, like oil and gas. The total volume of seaborne shipments totalled in 2014 to almost 9.84 billion tons.[10] This figure is even more impressive when compared to the shipping volumes of 1970 (2.6 billion tons), 1980 (3.7 billion tons), 1990 (4.0 billion tons) and 2000 (5.9 billion tons).[11] The only time in the last 20 years that the volume of shipments decreased from 1 year to another was in 2008/2009 when the volume dramatically shrank from 8.2 billion to 7.8 billion tons. This dent in growth coincides with the world financial and economic crisis and illustrates how closely the shipping industry is linked to the global economic

[5] See Wild (1999), p. 6.

[6] See Ruangsilp (2007), p. 5.

[7] Quoted in Harlaftis and Theotokas (2010), p. 3.

[8] See Harlaftis and Theotokas (2010), p. 4.

[9] Spruyt (1994), p. 7.

[10] See UNCTAD (2015), p. 5.

[11] See for this and the following UNCTAD (2015), p. 6.

development. This connection comes as no surprise: The shipping industry serves both the producing as well as the consuming side of the global economic market.

3.1.2 Lasting Crisis in Shipping

The international shipping markets are like any other industry subject to volatile sequences of market up- and downturns. Since the Second World War, the shipping industry has gone through several crises.[12] Nevertheless, the last crisis of the shipping industry was and still is unprecedented in its impact and length. The reasons are manifold. The crisis triggered by the global financial crisis was preceded by a unique boom cycle from 2002 to 2008. During that time, ship-owners were able to make earnings from their ship charter rates of USD 24,000 to USD 50,000 per day.[13] These high charter rates attracted many investors and banks were more than ready to provide the industry with fresh capital for investments in new built vessels. But the global financial crisis and the following recession forced the market prices down to a daily rate of just USD 5000. From this low charter-rate the market recovered only slowly.

The global markets may have stabilised by 2010, but at the same time the shipping market suffered from another setback. During the booming phase, the capital market discovered the shipping industry and the shipping companies were able to order new build ships in great numbers. These new ships were delivered steadily during the crisis and deepened its effects, as the obvious over-capacities of the shipping market put further pressure on the already low charter-rates. An additional factor for the downturn in the shipping industry, particularly in Germany, was the strong EUR compared to the USD after 2008, leading to a disadvantageous EUR-USD currency exchange rate. The German shipping companies had to operate their business in EUR and at the same time their charter-rates were usually negotiated in USD, which made their businesses less profitable than before 2008, due to the currency gap.

In order to stabilise the market, large shipping companies either buy smaller or equally sized shipping companies to push competitors out of the market or they merge with other leading shipping companies.[14] Such market activities are a clear

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[12] For a detailed economic discussion on shipping market cycles: Stopford (2009), pp. 93–134.

[13] See for this and the following Syriopoulos (2010), p. 814.

[14] The merger of the German shipping company Hapag-Lloyd and the Chilean shipping company CSAV in December 2014 is an example. After the merger they form the fourth biggest shipping company world-wide with about 200 ships. See Hapag-Lloyd's press release on 2 December 2014 available at https://www.hapag-lloyd.com/en/ir/financial-news/financial-news.iry-2014.irid-1435149.html (last visited on 10 June 2018), or the acquisition of Hamburg Südamerikanische Dampfschiffahrts- Gesellschaft (Hamburg Süd) by A. P. Moller-Maersk Group (Maersk) in 2017. The approval of the share purchase agreement was announced on 28 April 2017. See Maersk's press release on 28 April 2017 available at http://investor.maersk.com/releasedetail.cfm?releaseid=1023455 (last visited on 10 June 2018).

sign that the crisis is severe and that the companies search for solutions. With the low charter rates and the overcapacity of vessels, the financial pressure grew on shipping banks as well as the financing banks. To understand the complex shipping industry, the following section will focus on the peculiarities of the industry to lay the base for a discussion of the industry specific security interest of maritime liens.

3.1.3 Peculiarities of the Shipping Industry

The shipping industry, where ships serve to transport goods, is since its ancient beginnings a very capital intensive and risk exposed business. This led to some peculiarities, which can be subdivided into operation of the ship (*1*), risk management (*2*) and financing of the vessel (*3*). At least a general understanding of these particularities is necessary to assess the problematic issues when dealing with maritime security interests and the insolvency of maritime entities, like shipping companies or maritime service providers.

3.1.3.1 Operation of the Ship

For the operation of a ship, the ship-owners usually establish a single company for each of their ships, which then forms the "*one-ship company*".[15] The reason for the operation of ships of the same business group under separate 'one-ship companies' is twofold. One reason is the prerequisite of common ship-registers such as Liberia or Cyprus, that the company owning the ship has to be registered itself in that respective country. The second and seemingly more important reason for the establishment of 'one-ship companies' is the threat of arrest. Both the 1952[16] and 1999[17] Arrest Conventions stipulate that the claimant may arrest either the particular ship in respect of which the maritime claim arose, or any other ship that is owned by the person who was, at the time when the maritime claim arose, the owner of the particular ship.[18] This regulation was incorporated in England & Wales in sec. 21(4) of the Senior Courts Act 1981. These provisions make it possible for claimants to arrest so-called 'sister ships', owned by the same company. In order to prevent the arrest peril for the whole fleet, the ship-owner divides his fleet into various 'one-ship companies'.[19] In England & Wales, on the arrest of a sister ship, the 'one-ship company' was challenged in court but stood the test.[20] In Germany this system is well

[15] See for this and the following French (2006), p. 11.

[16] Art. 3 (1), (2) and (4) of the International Convention Relating to the Arrest of Sea-Going Ships, Brussels, 10 May 1952.

[17] Art. 3 (2) of the International Convention on Arrest of Ships, Geneva, 12 March 1999.

[18] See for a detailed display and discussion: Berlingieri (2011), p. 199.

[19] See French (2006), p. 12.

[20] The Evpo Agnic [1988] C.A., 3 All E.R. 810.

established and the 'one-ship company'-concept is upheld for the additional reason that the 'one-ship company', mostly in the form of Kommanditgesellschaft (KG), a German limited liability partnership, serves as a special purpose vehicle to facilitate an effective capital collection. Thus, private equity investors own the majority of German vessels.[21] The US shipping companies are using the one-ship company concept for the same reasons.[22] The concept of one-ship companies was acknowledged by the Singapore High Court in 1994, which was important, because Singapore was and is an established jurisdiction for the effective enforcement of maritime claims by way of arresting the ship; the High Court stated:

> It is well known that business engaged in shipping set up and utilise one-ship companies within their corporate structure for the purpose of limiting liability. The device has been around and recognised by the courts as a legitimate one the court's view has been that the court will not lift the corporate veil unless their circumstances are exceptional.[23]

When starting the management of a ship, the shipping company has to decide at first whether to operate the ship itself or to enter a bareboat charter with a specialised operator.[24] Either way, an important question is under which flag the ship shall operate.

Since the 1950s, the registration of ships has changed from a traditional "*genuine link*" requirement between the ship and the State to so-called "*flags of convenience*" of states with ship registries with more liberal requirements.[25] But not only the liberal registration requirements led ship-owners worldwide to operate their ships under flags others than those of their home state. In a globalised and economically optimised world, the main advantages of operating the ship under 'flags of convenience' lie in the fact that often no income taxes accrue, the security standards under which the ship has to be operated are lower and the manning of the ship is largely unregulated. The detour via a bareboat charter to change the flag of a ship serves the 'one-ship company' in maintaining its ownership of the ship and the primary register. At the same time, the bareboat chartering operator, often a subsidiary of the shipping company managing the 'one-ship company', can freely register the ship under a 'flag of convenience' and therefore benefit from low to no tax burdens and liberal regulations of manning and ship's security.[26] All these advantages have led to the phenomenon that states like Liberia, Panama and the Marshall Islands have the world's largest fleets of ships in their registers.[27] Nevertheless, the traditional

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[21] See Buss (2016), p. 167.

[22] See on one-ship companies: Stopford (2009), p. 273.

[23] The Skaw Prince [1994] 3 SLR 146.

[24] See French (2006), p. 10. The bareboat charter allows the one-ship company to register the ship in its domestic register and at the same time the bareboat charterer can choose his 'flag of convenience' for the registration of the chartered ship for the time of the charter. This allows the mortgages for the financing of the ship to remain on the primary and often more reliable and trusted register.

[25] See for this and the following Mandaraka-Sheppard (2013), p. 69.

[26] See Athanassopoulou (2005), p. 117.

[27] See UNCTAD (2015), p. 42. The 14,074 ships registered in Panama, Liberia and the Marshall

seafarer nations are still leading on numbers of ships owned by companies registered in these countries.

German merchant shipping fleet counts more ships than the fleets of the USA and UK together. The German rise came with the readiness of German banks to invest in the maritime industry, a trend that came to an abrupt end with the current global shipping crisis, but the German position appears rather healthy compared to the industry's situation in the USA. The rise of the German fleet concurred with the decline of the US shipping industry. In 1986, the major US shipping company United States Lines collapsed and was ultimately liquidated under US Bankruptcy Code's Chapter 7, after a reorganisation under Chapter 11 had failed.[28] The negative trend for the US shipping industry did not come to an end after 1986 and the recent crisis made it even more difficult to revive the industry. Additionally, with the US administration's change in foreign affairs—withdrawing troops from Iraq and Afghanistan—the US shipping industry will further decline. Interestingly, the history of the twentieth century has shown that the US shipping industry is very dependent on the US military and the termination of international conflicts and wars always affected the industry negatively.[29]

3.1.3.2 Risk Management

The risk management of the shipping industry has evolved over centuries and gained a rather complex structure. This section serves to give a little insight into the risk management of today's shipping industry.

The transport of goods by sea has always been exposed to high risks for the ship and its crew as well as the transported goods. The dangers of the sea and the difficult manoeuvring with ships in ports and waterways is hardly calculable and therefore already the Phoenicians, ancient Greeks and Romans understood the need to either share the risks of maritime transport or find some way to insure the goods and investments involved.[30]

The modern risk management in the shipping industry is twofold. Each seagoing ship is insured with a marine insurance against losses in connection to marine transport. The most important shipping insurance company today is Lloyd's.[31] Traditionally, the marine property insurance only covers ¾ of the insured liabilities, to ensure that the insured party has an incentive to prevent damaging events and losses.[32] These are the so-called 'running down clauses'. In order to cover the missing ¼ as well as protection and indemnity of third parties, war risks and defence

Islands account for 41.80% of world total dwt.

[28] See de la Pedraja (1992), p. 280.

[29] See McCullough (2007/2008), pp. 460–469.

[30] See Bennett (2006), p. 1.

[31] See Rose (2004), p. 1.

[32] See Heiss and Trümper (2015), § 38, marg. no. 336.

costs, ship-owners founded[33] mutual insurance associations, the so-called P&I clubs (protection and indemnity).[34] The members of such clubs are ship-owners and charterers.[35] The most important P&I clubs are again located in England and open to foreign ship-owners and charterers as well.[36] The major P&I clubs[37] form the International Group, based on the International Group Pooling Agreement and the International Group Agreement.[38] Together, the International Group accounts for 90% of the world tonnage.[39]

Another shipping specific tool of risk management is the concept of 'general average'. The general average principle roots in the unpredictable dangers that the ship is exposed to and to the multitude of owners of the goods carried by the ship. Bennett defines the general average as follows:

> The essential concept of general average is both ancient and simple, namely that loss sustained or expenditure incurred in time of peril and for the common good of all interests embarked upon the common maritime adventure should be shared between those interests in proportion according to the benefit derived from that loss or expenditure.[40]

Illustrated by a fictional case, the general average principle applies when the carried goods of one party are sacrificed to save the whole ship and the remaining goods of others. The other parties jointly compensate the losses of one party. These other parties are the owner of the ship or the charterer and the owners of the other goods transported by the ship.[41]

3.1.3.3 Financing of the Ship

As much as the shipping industry is international itself, in the same way it is correct to call the financing industry behind the ships truly international. Hence it is not unusual to find "*an American bank, acting through its London office, lending to a Greek-controlled owning company and securing itself on a Liberian registered ship*[42]".

The most common financing arrangements for the building or purchasing of a ship are ship mortgages or bareboat leases.[43] The financing bank is or the syndicate

[33] In 1854 ship-owners founded the first club as the "Shipowners Mutual Protection Society".

[34] See Bennett (2006), p. 11.

[35] Bennett (2006), p. 11.

[36] See Heiss and Trümper (2015), § 38, marg. no. 338.

[37] These are: The American Club, Skuld, Gard, Britannia, The Japan P&I Club, The London Club, The North of England P&I Club, The Shipowners' Club, The Standard Club Ltd, Steamship Mutual, The Swedish Club, The UK P&I Club, The West of England.

[38] See Bennett (2006), p. 486.

[39] See Heiss and Trümper (2015), § 38, marg. no. 339.

[40] Bennett (2006), p. 763.

[41] For a detailed display and discussion of general average: Rose (2005).

[42] French (2006), p. 2.

[43] See Nikaki (2016), p. 212.

of banks[44] are willing to provide the necessary amount of money for the purchase or building of the ship if they receive enough security in exchange. The only security the shipping company can offer is the vessel itself. Therefore the ship mortgage forms the most dominant security interest for the financing banks.[45] The registration of a ship is a vital prerequisite to operate the ship and as a result the shipping company or operator of the ship will make sure to register the ship as soon as possible. But not only the operation requires the registration of the ship, the only way to register a ship mortgage in favour of the financing bank is to register it in the vessel's ship register.[46]

The financing of vessel building or purchase is one part; the other is the maintenance of the ship during operation. Ships are mainly exposed to wind, seawater and waves, so their maintenance is always an issue. To paint the ship's hull or repair the ship's engine and propeller, the vessel needs to be docked in a shipyard. The maintenance works are costly and if the yards work on credit, they usually try to secure their claims by contracts or by a maritime lien. Usually they receive their security in form of a maritime lien for necessaries under US maritime law, which can be claimed globally under a choice of law clause. These liens are important maritime security interests and the following section will cover them in detail.

3.2 Maritime Liens

The following section will cover the maritime law particularity of maritime liens. A short display of the history and evolution of maritime liens will show how this special security reached its current character and legal nature. The following section shall present the similarities and differences the legal institute of maritime liens has in Germany, England & Wales and the USA. This book explicitly does not cover ship mortgages and focuses on maritime liens. There may be still references to ship mortgages in regard of publicity of maritime liens, their priority and enforcement.[47] The distinctive features of maritime liens and their attachment to the vessel without registration make this maritime security interest very controversial and legally problematic in international maritime cases. In contrast, ship mortgages are registered in

[44] When it comes to financing modern and large seagoing vessels, the capital volume may be so high that the financing risk for only one bank would be too burdensome. For example the vessel *Emma Maersk* has a capacity of 15,000 TEU and the construction cost in 2006 exceeded USD 145,000,000 (see Emma Maersk Container Vessel Specification available at http://www.emma-maersk.com/specification/ (last visited on 10 June 2018)). For such vessels, the banks form a financing syndicate to share the financial risks and benefits.

[45] See Stopford (2009), p. 286.

[46] See French (2006), p. 289.

[47] For an introduction to ship mortgages and a discussion and display of the legal particularities of this ship-specific security interest see: England: Bowtle and McGuinness (2001), Chapter 3, pp. 25–78; Germany: Grädler and Zintl (2013), pp. 95–99; USA: Schoenbaum (2011), pp. 713–721.

the registries of the respective jurisdictions and enjoy recognition all over the world, thus their legal status and international recognition is very straightforward.

In the following section, the catalogues of maritime claims for which a maritime lien are granted are going to be displayed separately for Germany, England & Wales and the USA. The single maritime claims will not be discussed in depth.[48] A special emphasis will be placed on the conflict of laws rules concerning maritime liens in each of the examined jurisdictions. Whether maritime liens can be harmonised or how the maritime industry deals with potential legal and practical differences of maritime liens in an international context are the central questions of this chapter.

3.2.1 Introduction to Maritime Liens

The purpose of liens is to give a claimant a proprietary interest and privilege in an asset to secure a judgment or a claim. This legal concept is established in both civil and common law.[49] What makes maritime liens exceptional compared to other securities on ships, like statutory liens or ship mortgages, is that maritime liens establish automatically with the event in which the ship has done some mischief or was provided with certain services or goods.[50] For the English understanding, Sir John Jervis in *The Bold Buccleugh* defined maritime liens as follows:

> Having its origin in the rule of hypothecation of the Civil Law, maritime lien is well defined by Lord Tenterden to mean a claim or privilege upon a thing to be carried into effect by legal process. A maritime lien is the foundation of the proceeding in rem, a process to make perfect a right inchoate from the moment the lien attaches. This claim or privilege travels with the thing, into whosoever possession it may come. It is inchoate from the moment the claim or privilege attaches and when carried into effect by legal process by a proceeding in rem, relates back to the period when it first attached. This simple rule … is deduced from the Civil Law.[51]

Furthermore, maritime liens survive, once established on a ship, even the selling of the ship and the following change of ownership.[52] These industry specific liens exist in all jurisdictions, nevertheless the scope of claims, which can be secured by maritime liens, is very different from one jurisdiction to the other and also the priority ranking of these liens is not uniformly codified.[53] For example, in Germany and the UK services to the ship, like repairs, supplies and bunkers, usually called 'necessaries', do not enjoy the privileged status of a maritime lien, which would rank before ship mortgages and general claims. The US legal system on the other hand grants the

[48] For a detailed display of the single claims privileged by maritime liens see Schmidt-Vollmer (2003).

[49] See Jackson (2005), p. 459.

[50] See Mandaraka- Sheppard (2009), pp. 22, 23.

[51] See The Bold Buccleugh [1851] 7 Moo. P.C. 267, on p. 284.

[52] See Derrington and Turner (2007), p. 54.

[53] See Herber (2016), p. 121.

status of maritime lien to those necessaries. This difference shows the potential for conflicts when it comes to the question whether a German or English court would accept the US given status as maritime lien for a service provided to a ship in the USA, which would never amount to a maritime lien under their respective law.[54]

Whether the lack of uniformity results in a conflict of laws or is dealt with pragmatically will be examined for each jurisdiction of Germany, England & Wales and the USA separately in the sections below.

3.2.2 Origins of Maritime Liens

The pragmatism behind the concept of maritime liens and the informal establishment of those liens may lead to the proposition that this maritime security interest is a common law concept and found its way into civil law due to the supremacy of Anglo-American shipping tradition. This is not true and Tetley emphasises:

> Most of the misunderstandings and erroneous theories relating to maritime liens have arisen because the maritime lien has been considered as a common law concept, even as a remedy, when in reality it is a right, a privilege, in the codified 'civilian tradition'.[55]

This civilian tradition can be traced back as far as to the Rhodian, Greek and Roman law.[56] In the late twelfth century the *Rôles d'Oléron* where codified at the wine trading port of the island of Oléron at the shore of Bordeaux.[57] These roles were a collection of principles and judgments, which stipulated among others maritime liens in favour of the ship's crew. Since then, the concept of maritime liens has spread across the world and has found its way into the maritime laws of all leading shipping nations.

3.2.3 Legal Nature of Maritime Liens

A maritime lien is a security interest and therefore falls into the group of security charges like other liens as well as mortgages. In contrast to other liens, especially in England & Wales and the USA, the maritime lien, due to its historic function, does not require the possession of the vessel for the creditor to be able to enforce his rights.[58] In Germany, liens other than maritime liens, without possession of the chattel are very limited and only accepted when based on statute.[59] The distinct nature

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[54] See Tetley (1994a), p. 539.

[55] Tetley and Wilkins (1998), p. 7.

[56] See McCabe (2012), p. 581.

[57] See Tetley (1994b), p. 110.

[58] See Thomas (1980), p. 3.

[59] See for example the security right of a lessor stipulated in §§ 562-562d BGB.

of maritime liens becomes even more apparent in a comparison of maritime liens with ship mortgages. Both rights serve as security interests with the object of security being the ship, on which the charge is created. The ship mortgage depends on an agreement to create the mortgage followed by its registration in a ship register to be effective,[60] while maritime liens are secret security interests that need not be registered, as the maritime lien attaches to the vessel by statute and is not dependent on an agreement between the ship owner and maritime creditor.[61]

3.2.4 Maritime Liens Under German Law

German maritime liens, like their English and American counterparts, cannot be registered in a ship register.[62] As a national particularity, the German law on maritime liens differentiates between culpability and liability of the debtor (*Schuld* and *Haftung*). Only the ship-owner or the ship's charterer can be the debtor of a maritime lien based on culpable deeds under German law. The liability at the same time shifts with the asset of the ship and accordingly a new owner of the ship can still be held liable for the tort of the former ship-owner or ship's charterer.[63]

3.2.4.1 Regulations in the German Commercial Code

German maritime liens on seagoing ships are codified under secc. 596–610 HGB (*Handelsgesetzbuch*—German Commercial Code). The concept of maritime liens and the legal nature are uncommon for German property and security interest law. These liens are classified as non-possessory liens on the ship and its accessories (sec. 598 HGB).[64] The general rules on liens of the BGB are not applicable to maritime liens.[65]

3.2.4.2 Claims Secured by Maritime Liens

Sec. 596 (1) HGB contains a list of claims secured by maritime liens under German law. These are:

[60] The concept of registration of ship mortgages is universal and well established in Germany (*Schiffsregistergesetz*), England & Wales (Merchant Shipping Act 1988, sec. 21) and the USA (46 U.S.C. Chapter 313).

[61] See Weil (1996), p. 205.

[62] See Krohn (2004), p. 209; Jackson (2005), p. 476.

[63] See for this paragraph: Rabe (2000) Vor § 754 marg. no. 4.

[64] See Herber (2016), p. 121; T. Eckardt in Schmidt (2014), Vor § 596 marg. no. 1.

[65] See Rabe(2000) Vor § 754 marg. no. 1.

- Wages due to the master and the other persons making up the ship's crew with respect to their employment on the vessel;
- Public charges such as vessel dues, port, canal and other waterway dues; and pilotage dues;
- Claims to compensation for damages in respect of loss of life or personal injury, as well as for the loss of or physical damage to property, occurring in direct connection with the operation of the ship. However, those claims in respect of the loss of or physical damage to property shall be ruled out that are based on a contract or that could be derived from a contract;
- Claims to a salvage reward, to special compensation, and to the costs of salvage, claims against the owner of the ship and against the creditor of the freight for contribution in general average; claims for wreck removal;
- Claims of the social security authorities against the ship owner, including unemployment insurance claims.

This list is conclusive.[66] From this conclusiveness follows that no other maritime lien can be created under German law, neither by statute of another legal code nor by contract.[67]

3.2.4.3 Enforcement and Extinction of Maritime Liens

German legal codification does not provide for a special codex of maritime law where the maritime rights as well as the maritime specific enforcement procedures are laid down. The arrest of ships, as the globally established procedure of maritime rights enforcement is embedded into the general rules and procedures of enforcement. Sec. 601 (1) HGB stipulates that the satisfaction of the maritime lienholder out of the ship is effected by the German civil procedure of compulsory enforcement (*Zwangsvollstreckung*). The applicable rules of compulsory enforcement into ships are found in secc. 162–171 ZVG (*Zwangsvollstreckungsgesetz*—German Enforcement Code).[68] German law differentiates between claims and enforceable claims. For a claim to become an enforceable claim, the claimant has to obtain a final and binding court ruling. With this enforceable claim the claimant can apply to court for an action to obtain the toleration of compulsory enforcement (*Klage auf Duldung der Zwangsvollstreckung*). This action has to be brought against the owner or the operator of the ship (sec. 601 (2) HGB). As soon as the court orders the enforcement of the claim, the owner or operator has to tolerate the compulsory enforcement of the maritime lien. The enforcement is targeted at the main asset of the shipping company, the ship. With the court's order to enforce the maritime lien

[66] See BGH 9.12.1985, (1986) TranspR, on p. 247 on § 102 BinSchG, the corresponding German rule for inland shipping.

[67] See T. Eckardt in Schmidt (2014), Vor § 596 marg. no. 1.

[68] See T. Eckardt in Schmidt (2014), Vor § 601 marg. no. 1.

the actual satisfaction of the lienholder is achieved by a judicial sale of the ship in a public auction, as sec. 165 (1) ZVG stipulates.

The auction, as well as its date will be announced in industry specific newsletters and papers (sec. 168 (1) ZVG). If other maritime lienholders have registered their liens within 6 month prior to the auction's announcement, these liens will be considered as registered with the auctioning court, according to sec. 168b ZVG, with the consequence that the liens will participate in the distribution of the ship's sale proceeds, as stipulated under secc. 104 seqq ZVG.

The enforcement procedure for claims secured by maritime liens is well regulated, but the fact that a maritime lienholder has to transform his claim into an enforceable claim, together with the long arrest procedures in Germany, has led to a very costly procedure.[69] Before the German legislator reacted to this unpopularity with a reform in 2013, the maritime claimant had to show to a probable cause that the claim exists (*Arrestanspruch*) and that without the arrest the enforcement of the claim would be frustrated or at least be significantly more difficult (*Arrestgrund*), according to pre 2013 sec. 917 ZPO (*Zivilprozessordnung*—German Code of Civil Procedure). The second requirement, the *Arrestgrund,* was narrowly interpreted by German courts and denied whenever the ship left a German harbour to stop next in ports of a EU member states or if the ship operated on liner service and could be expected back in Germany in a reasonable time.[70] Furthermore, in contrast to other European jurisdictions German law of enforcement, applicable to the German ship arrest, stipulates in sec. 945 ZPO an obligation of the enforcing creditor to compensate for damages suffered by the ship owner on the wrongful arrest. This obligation is regardless of culpability and therefore a very strict rule for wrongful arrest of ships.[71] As a result, Germany is "*avoided*"[72] for cases of maritime lien enforcements through ship arrest. Other nations have much higher numbers of ship arrest in their respective harbours and courts, due to faster and thus cheaper arrest and claim enforcement procedures. Thanks to their effectiveness the leading jurisdictions for ship arrest are Gibraltar, Hong Kong, Singapore, South Africa, the Netherlands and the UK.[73]

The German legislator reacted to the 'unpopular' standing of German ship arrest procedures and introduced legal reforms in 2012, which came into effect in 2013.[74] The reform added a subsection to sec. 917 ZPO, stipulating that no reason for an arrest needs to be given, if the arrest is only enforced against the ship. Hence, the claimant should only request the arrest of the ship as long as other property or values of the ship-owner are not included in the arrest procedure, because then the new sec. 917 (2) ZPO would not apply anymore. The new procedural setting mirrors the rules in the Netherlands and is supposed to improve the appeal of German arrest

[69] See for this and the following sentence Schmidt-Vollmer (2003), p. 87.

[70] See Schmidt-Vollmer (2003), p. 236.

[71] See I. Drescher in Krüger and Rauscher (2016) § 945 marg. no. 3.

[72] B. Schmidt-Vollmer (2003), p. 88.

[73] See Franks et al. (2017), on p. 8.

[74] Gesetz zur Reform des Seehandelsrechts, BT-Drs. 17/10309.

procedures for German as well as foreign maritime claimants.[75] Whether the reform was effective cannot be proven by data yet. It might be a step in the right direction, but German arrest procedures still lack effectiveness, because of their debtor-friendly rules. In contrast to many former Commonwealth Nations in the list of leading ship's arrest jurisdictions, another huge disadvantage for German proceedings is stipulated in sec. 184 GVG (*Gerichtsverfassungsgesetz*—German Courts Constitution Act), "*The language of the court shall be German*". German is not as common as English and the requirement forces foreign claimants to seek additional German legal assistance for proceedings in Germany, whereas usually their international legal counsels can deal with proceedings in Gibraltar, Hong Kong, Singapore, South Africa and the UK in English language. The German-prerequisite is an issue on which the German legislator has made proposals and a reforming legislation has been brought on its way in 2014, without having been introduced yet.[76]

The enforcement of maritime liens is inhibited when the lien lapses. The lapse of a maritime lien can occur either because the claim itself, secured by the maritime lien, lapses (sec. 599 HGB)[77] or because of the passage of 1 year since the claim has arisen (sec. 600 (1) HGB). According to sec. 600 (1), (2) HGB, the lien does not lapse when the maritime lienholder enforces his claim within 1 year. From this follows that the maritime lien may be a strong security interest but needs to be timely enforced.

3.2.4.4 Ranking and Priority of German Maritime Liens

The issue of ranking and priority of maritime liens among each other and in relation to other security interests vested on the ship only rises in importance when the available proceeds, mainly the value of the ship up on its sale, do not cover the value of all claims against the ship or the ship-owner combined. In that case, a reliable ranking of the claims has to be in place to give the lienholders and mortgagors the opportunity to calculate their security interests and the chances of satisfaction of their claims.

The ranking of maritime liens under German law is codified in sec. 603 HGB, which stipulates that maritime liens shall rank in the order in which the corresponding claims are listed in sec. 596 (1) HGB. This ranking is modified for salvage liens, which take priority over all other liens listed in sec. 596 (1) HGB. The privileging of salvage liens stems from the idea that without the salvage of the ship the other liens would be rendered worthless because the enforcement into a sunken ship would not be possible.[78]

[75] See BT-Drs. 17/10309, on p. 143.

[76] See BT-Drs. 18/1287, on pp. 1, 2.

[77] Sec. 599 HGB mirrors the basic principle of accessoriness, which makes the security interest lapse as soon as the secured claim lapses.

[78] See Rabe (2000) § 762, marg. no. 2.

Maritime liens of the same number of 1 to 3 and 5 under sec. 596 HGB shall rank *pari passu* as between themselves as sec. 604 (1) HGB stipulates. Sec. 604 (2) HGB further stipulate that personal-injury claims under number 3 of sec. 596 (1) HGB shall take priority over liens for property-damage claims. If there are two or more maritime liens for salvage under sec. 596 (1) number 4 HGB, they are ranked according to the "*inverse priority rule*"[79] of sec. 604 (3) HGB, with the consequence that the last liens for salvage rank over those earlier created. Again the reasoning of this untypical priority rule is found in the logic that without the salvage of the ship all other claims would become worthless.[80]

More important for maritime lienholders regarding the enforcement of maritime liens is the question whether they enjoy priority over other claims against the ship or the shipping company. This is answered in favour of maritime liens by sec. 602 HGB, which gives priority to maritime liens over all other liens on the ship.[81] This priority is absolute and as a result maritime liens enjoy priority over ship mortgages to the extent that the liens' complete satisfaction may lead to the mortgage on the ship becoming worthless.[82]

3.2.4.5 Recognition of Foreign Maritime Liens

German rules on recognition of foreign maritime liens are centred on Art. 45 (2) EGBGB (*Einführungsgesetz zum Bürgerlichen* Gesetzbuche—German Introductory Act to the Civil Code) with a surprisingly liberal *lex causae* approach. Nonetheless, the priority rules for foreign maritime liens follow the *lex fori* principle.

3.2.4.5.1 Art. 45 EGBGB

Since 1999[83] the conflict of laws rule of Art 45 (2) EGBGB governs the recognition of foreign maritime liens in Germany.[84] Art. 45 (2) EGBGB established clarity in the field of recognition of foreign maritime liens and how German courts should deal with them.[85] Art. 45 EGBGB reads as follows:

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[79] Thomas (1980), p. 244.

[80] See Krohn (2004), p. 223.

[81] See Krohn (2004), p. 224.

[82] See BT-Drucks. 6/2225 on p. 39; BGH 21.1.1991, (1991) TranspR, on p. 198.

[83] The German legislator introduced the Gesetz zum Internationalen Privatrecht für außervertragliche Schuldverhältnisse und für Sachen on 21 May 1999, BGBl. I 1026. This legislation, especially for maritime liens, is based on the doctrine of *lex causae* which was applied by the majority of courts in Germany already before 1999 and which was proposed by Drobnig (1991), pp. 13–36.

[84] See T. Eckardt in Schmidt (2014), Vor § 596 marg. no. 6.

[85] See for a display and evaluation of the different approaches and views on the recognition of foreign maritime liens by German courts before the introduction of Art. 45 (2) EGBGB: Mankowski (1990) TranspR, pp. 213–228.

(1) Interests in airborne, waterborne and rail borne vehicles are governed by the law of the country of origin. This is

1. as to aircrafts the country of their nationality,

2. as to watercrafts the country where they are registered, otherwise the home port or home location,

3. as to rail vehicles the country of licensing.

(2) The coming into existence of statutory security interests in these vehicles underlies the law applicable to the underlying claim. The ranking among several securities follows Art. 43 sub article 1.[86]

Art. 45 (2) s. 1 EGBGB clearly follows the conflict of laws doctrine of *lex causae*[87]—the law of the country where the contract was formed or the deed/tort occurred shall be applicable. The German legislator introduced the provision of Art. 45 (2) EGBGB in order to provide certainty for the creditors of seagoing vessels. Foreign creditors can now easily predict the availability of a maritime lien for their claim in Germany by taking into consideration the law of the country where for example a service was provided to the ship.[88] This conflict of laws rule has the effect that German courts will recognise foreign maritime liens, which are not included in the German conclusive catalogue of maritime liens under sec. 596 (1) HGB. Especially the US maritime liens for necessaries are subject to the provision of Art. 45 (2) s. 1 EGBGB, as these liens are not granted under German law, but have to be recognised by German courts, if they were orderly created according to US law.[89] Maritime liens resulting from a choice of law clause and unknown to the German system are dealt with under Art. 45 (2) s. 1 EGBGB as well.

Nevertheless, the fact that the German understanding of maritime liens results in the ship owner's liability and not in the liability of the ship itself—like in England & Wales or the USA—leads to the problem that choice of law clauses might produce problems for the creditor when enforcing a maritime lien based on a choice of law clause in Germany. This problem can be illustrated by the frequently occurring case that a bunker supplier stipulates in his contract terms according to which US law shall govern the contract; hence a maritime lien for necessaries establishes with the delivery of the bunker. Such a clause is unproblematic if the bunker supplier forms the contract with the ship owner himself. In contrast, when such a clause is stipulated between the operator of the ship and the bunker supplier, the ship owner is not bound by this clause. The ship owner only becomes bound by the choice of law clause if he agreed to this specific clause.[90] Without the ship owner's approval,

[86] The translation of the German Introductory Act to the Civil Code (EGBGB) is provided by the German Ministry of Justice available at https://www.gesetze-im-internet.de/englisch_bgbeg/ (last visited on 10 June 2018). All following English translation of the German EGBGB are derived from this source.

[87] See Krohn (2004), p. 211; Herber (2016), pp. 125 and 423.

[88] See BT-Drs. 14/343, p. 18; Schmidt-Vollmer (2003), p. 96.

[89] See Herber (2016), p. 424; Puttfarken (1998), p. 793; Schmidt-Vollmer (2003), p. 98.

[90] See T. Eckardt in Schmidt (2014), Vor § 596 marg. no. 6.

the clause does not bind him and the maritime lien cannot be enforced against him. This follows from the German legal principle that the freedom of contract is limited when parties enter an agreement to the detriment of a third party, here the ship owner.[91] Consequently, especially bunker suppliers who usually use choice of law clauses in their contract terms and conditions to secure their claims with a US maritime lien, have to be cautious about the question whether it is a German party they are contracting with and should it comes to an enforcement of the lien, against whom they could enforce their maritime lien.

The deviation from the conclusive catalogue of German maritime liens has led to severe criticism of Art. 45 (2) s. 1 EGBGB. In 1972, the German legislator reduced the number of German maritime liens in accordance with international conventions. With Art. 45 (2) EGBGB, the number of maritime liens accepted by German courts now increases again, at least in the case of foreign maritime liens, and only because a conflict of laws rule does not take the established maritime liens into account.[92] The criticism of Art. 45 (2) EGBGB is mainly based on the fact that German courts would accept US maritime liens for necessaries, a security that is not available to German bunker or service suppliers and therefore the German suppliers suffer from a competitive disadvantage.[93]

The critics have viable points in their argumentation against Art. 45 (2) EGBGB, to the extent that it contradicts the legislator's initial intention to reduce the catalogue of maritime liens in Germany to a minimum and that German ship creditors may suffer from competitive disadvantages. Nevertheless, the practical importance of the German *lex causae* doctrine on foreign maritime liens can be relativised, as on one hand the number and importance of arrest procedures in Germany is marginal compared to other arrest-specialised jurisdictions[94] and on the other hand German bunker and service suppliers are free to use choice of law clauses to make the security of a US maritime lien available for their claims. As long as the choice of law clause is not to the detriment of a third party, for example the ship owner, the German courts will accept it as viable under the doctrine of freedom of contract. Furthermore, the priority of foreign maritime liens, which do not fall into the German catalogue of sec. 596 HGB, is not as equivalently privileged as the usual priority rules for maritime liens, which will be shown in the following section. This is a further objection to the critics' argument of competitive disadvantage for German service- and bunker-suppliers in the maritime industry.

On the occasion of reforming the German maritime law in 2012, the German legislator did not solve the controversy surrounding Art. 45 (2) EGBGB. The legislator was aware of US maritime liens for necessaries, but denied the need for protec-

[91] Tiedemann (1995), p. 60; Heinz (2011), p. 75.

[92] See Herber (1999), p. 295; Puttfarken (1998), p. 795.

[93] See Puttfarken (1998), p. 795 and pp. 810, 811; Schmidt-Vollmer (2003), p. 98.

[94] In the period from 1995 to 2010, only 6 debt-related arrest procedures where dealt with by German Courts, whereas at the same time 287 debt-related arrest procedures were dealt with in the ports of Gibraltar, Hong Kong, Netherlands, South Africa and the UK (see Franks et al. (2017), p. 8).

tion of German maritime supply companies.[95] Thus it did not include a new maritime lien for necessaries into the German lien catalogue. The uncertainty remains, whether the recognition of US maritime liens for necessaries in Germany under the *lex causae* rule was intentional or not. With the reform of German maritime law in 2012 the German legislator definitely missed a chance to clarify this issue by either excluding maritime liens for necessaries from recognition or grant the lien-status for domestic bunker supply companies to remove this competitive disadvantage.

3.2.4.5.2 Priority Rules on Foreign Maritime Liens

The priority rules for foreign maritime liens are subject to the conflict of laws doctrine of *lex rei sitae*, according to Art. 43 (1) EGBGB. The *lex rei sitae* of ships in an enforcement procedure is usually the *lex fori*.[96] From the *lex fori* rule follows that the law of the forum where the arrest or other enforcement procedure takes place is applicable. Therefore German courts will apply the German priority rules on foreign maritime liens. At this point, the German legislator makes an uncodified differentiation between those foreign maritime liens that have a German equivalent in the catalogue of sec. 596 (1) HGB and foreign maritime liens that cannot be categorised accordingly.[97] The foreign maritime liens with German equivalents receive the same priority, ranking above ship mortgages. In contrast, foreign maritime liens without a German equivalent are not privileged and rank below the German maritime liens, German-equivalent liens and ship mortgages.[98] However, these foreign maritime liens, in most cases liens for necessaries, still rank above the claims of German service- and bunker-suppliers, who are ranked at the lowest spot of the priority ranking.[99] The legislator's decision to rank foreign maritime liens that cannot be categorised in accordance with the German maritime liens, mirrors the view of the OLG Oldenburg in its decision in 1974.[100]

This priority rule is inconsistent and therefore unfortunate. On one hand, the German legislator allows the enforcement of unknown foreign maritime liens, on the other hand these liens are not ranked like German liens and are subordinate to the priority of German maritime liens, foreign maritime liens with German equivalents and ship mortgages. This contradiction can be seen as an attempt to moderate the competitive disadvantage that German service- and bunker-suppliers have in comparison to their US counterparts, whose claims are secured by maritime liens under US law and enforceable in Germany according to Art. 45 (2) s. 1 EGBGB.

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[95] See BT-Drs. 17/10309, on p. 131: "*It is the suppliers' own risk to grant credit for delivery of goods*".

[96] See T. Eckardt in Schmidt (2014), Vor § 596 marg. no. 7.

[97] See BT-Drs. 14/343, p. 18.

[98] See Herber (2016), p. 125; Rabe (2000) Vor § 761 marg. no. 4; T. Eckardt in Schmidt (2014), Vor § 596 marg. no. 8.

[99] See Puttfarken (1998), pp. 810, 811; Schmidt-Vollmer (2003), p. 98.

[100] OLG Oldenburg 7.6.1974 (1975) VersR, on p. 271.

3.2.4.5.3 Extinction of Foreign Maritime Liens

Art. 45 (2) EGBGB only covers the coming into existence and recognition of foreign maritime liens, but it does not deal with their extinction.[101] German maritime liens lapse within 1 year from their creation due to sec. 600 (1) HGB. There is no explicit rule on the extinction of foreign maritime liens. Thus, either the foreign maritime liens are subject to German rule following the doctrine of *lex fori,*[102] or the *lex rei sitae* applies with the effect that in a German arrest procedure sec. 600 (1) HGB would apply to the question when the foreign maritime lien on a ship arrested in Germany lapses.[103] Herber interprets the question of lapse of foreign maritime liens with a strict application of the *lex causae*. This has the effect that foreign maritime liens do not lapse according to sec. 600 (1) HGB within 1 year and pose therefore a threat to buyers of German ships, who in the past could rely on the lapse of maritime liens at the latest 1 year after their purchase of the ship.[104]

There is neither a recent court decision on the lapse of foreign maritime liens under German conflict of laws rules nor has the German legislator commented on this issue. It appears to serve legal certainty to favour Herber's view that the foreign maritime liens lapse in accordance with the law under which they were created.[105] A deviation from the basic principle of legal certainty needs a codification and without it the *lex causae* should apply to both creation and extinction of the foreign maritime lien when dealt with by German courts.

3.2.5 Maritime Liens Under English Law

This section shall present the law of maritime liens in England & Wales. In contrast to German codification, the English maritime lien rules are largely based on case law[106] and their coming into existence, nature and enforcement are not as straight forward as in Germany.

3.2.5.1 Legal Nature of English Maritime Liens

Confusion in respect of maritime liens starts already at the fundamental question regarding the legal nature of maritime specific liens: Are they a procedural or substantive right. In the case of *The Bold Buccleugh* Sir John Jervis defined maritime

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[101] See Schmidt-Vollmer (2003), p. 104.

[102] In favour of an application of the *lex* fori doctrine in order to protect other creditors of the ship or shipping company: Schmidt-Vollmer (2003), p. 104.

[103] See T. Eckardt in Schmidt (2014), Vor § 596 marg. no. 9.

[104] See Herber (1999), p. 295.

[105] See T. Eckardt in Schmidt (2014), Vor § 596 marg. no. 9.

[106] See Schmidt-Vollmer (2003), p. 119.

liens and labelled them as "*inchoate rights*".[107] This view led Lord Diplock in *The Halcyon Isle*[108] to conclude that the inchoate right of a maritime lien does not create an "*immediate right of property*" and needs to be enforced by an "*action* in rem" to gain full legal status.[109] Such reasoning supports the opinion that maritime liens are procedural rights. But Lord Diplock himself showed in his reasoning that the procedural approach to maritime liens leads to logical and practical problems, which have to be rectified by creative explanation: "*once carried into effect [the maritime lien by an action* in rem*], the charge dates back to the time that the claim on which it is founded arose*". Such an artificial twist shows that it is more logical and consistent with the continental background of maritime liens to legally categorise them as substantive rights. The argument of 'inchoateness' of maritime liens does not catch, because other substantive rights need to be enforced by an action *in rem* as well. As a result, the maritime lien exists from the moment it is created as a substantive right in contrast to statutory liens, which need to be issued by a court on the claimants' request. Therefore, the latters' status may be described as inchoate, as the claim may exist but the security interest would still have to be established by a court order.

3.2.5.2 Statutory Liens

For a general understanding of English law on maritime security interests it is important to differentiate between maritime liens, which are available for a limited number of maritime claims, and statutory liens, which can be granted by courts. Firstly, the term 'statutory lien' is no ideal and to name it 'statutory right *in rem*' gives clearer guidance to what this right stands for. But in the admiralty context the term 'statutory lien' is used to make the similarity to maritime liens clearer.[110] Statutory liens were introduced to English law with the Admiralty Court Acts 1840 and 1861, both providing that the High Court of Admiralty "*shall have jurisdiction*" over a list of claims. These liens can only be granted where an action *in rem* is available for the claimant.[111] Today's Supreme Court Act 1981 sec. 20 (2) contains a list of claims to which a statutory right *in rem* is available.[112] The list goes beyond the short list of traditional maritime liens and covers nearly all relevant claims which can arise in commercial operation of a ship,[113] for example claims "*in respect of goods or materials supplied to a ship for her operation or maintenance*" (sec. 20 (2) (m)) and "*in respect of the construction, repair or equipment of a ship or in respect of dock charges or dues*" (sec. 20 (2) (n)); these are claims usually identified as

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[107] The Bold Buccleugh [1851] 7 Moo P. C. 284.

[108] The Halcyon Isle [1980] 2 Ll. L. Rep. 325.

[109] See Jackson (2005), p. 481.

[110] See Jackson (2005), p. 517.

[111] See Jackson (2005), p. 517.

[112] See Bowtle and McGuinness (2001), p. 123.

[113] See Schmidt-Vollmer (2003), p. 129.

claims for necessaries and which are not secured by a maritime lien under English law.

In contrast to maritime liens, the statutory lien needs to be issued in a claim form to the court to be created and then be enforceable by the claimant.[114] The detour via a court procedure makes the statutory lien less attractive for maritime claimants than the maritime lien. Nevertheless, there are situations where a claimant still might seek to receive a statutory lien by court order to either threat the ship-owner with an arrest of the ship or actually arresting it to enforce the claim. Another disadvantage of statutory liens compared to maritime liens is stipulated in sec. 21(4) of the Supreme Court Act 1981, as a statutory lien may have been granted by court but as opposed to a maritime lien, it cannot be enforced after the ownership of the vessel has changed.[115] The only way for a statutory lienholder to enforce his lien after the ownership change is to issue the *in rem* action before the change.[116]

The complicated path to receive the status of a statutory lien for a maritime claim together with the unenforceability against a new ship owner strikingly shows the advantages of maritime liens, attaching to the vessel by law and sticking to it even after a change of ownership.

3.2.5.3 Claims Secured by Maritime Liens

There is no codification of those claims to which "*a maritime lien may attach*",[117] but case law established the recognition of four classes of maritime liens[118]:

- Bottomry and respondentia,[119]
- Damage caused by the ship,[120]
- Salvage,[121]
- Crew's and master's wages[122] and master's disbursements.[123]

[114] See Jackson (2005), p. 525; Schmidt-Vollmer (2003), p. 128.

[115] See Bowtle and McGuinness (2001), p. 123.

[116] The Monica S [1967] 2 Ll. L. Rep. 113.

[117] Jackson (2005), p. 475.

[118] Schmidt-Vollmer (2003), p. 119.

[119] Maritime liens for bottomry or respondentia are in times of modern payment methods nearly obsolete.

[120] For an example for the claims group of damage done by the ship: Berliner Bank AG v Czarnikow Sugar Ltd (The Rama) [1996] 2 Lloyd's Rep. 281.

[121] Already recognised as secured by a maritime lien in: The Two Friends [1862] 167 E. R. 249.

[122] The master's disbursement is only secured by a maritime lien if the disbursement is authorised by the ship owner: The Castlegate [1893] A. C. 38.

[123] In the past, the wages of the ordinary crew and the master were dealt with separately and their merger came only in 1995, when the wages of crew and master were codified as the only maritime liens in sec. 41 of the Merchant Shipping Act 1995.

The above list of claims secured by maritime liens shows that similar to Germany, the number of court-recognised maritime liens is small and that claims arising from services rendered to the ship, like the supply of bunker or repair services to the ship, the so-called maritime liens for necessaries, do not qualify as maritime liens under English law.[124]

Nonetheless, English law offers a way for bunker suppliers and ship repairers to secure their due claims against the ship. The ship's creditors can apply to court to secure their claims. The court then issues a statutory right *in rem*, also known as 'statutory lien', which can be enforced against the ship, even if the ownership of the ship has changed.[125] The availability of statutory liens for nearly any claims against the ship is relativised by the fact that statutory liens rank below maritime liens and ship mortgages when it comes to arresting the ship and enforcing the claims. This will be displayed in detail below.

3.2.5.4 Enforcement and Extinction of Maritime Liens

The claims secured by a maritime lien in England & Wales can only be enforced by an action *in rem*.[126] Before 1840, the action *in rem* was only available to those claimants secured by a maritime lien.[127] The scope of the action *in rem* was widened and today, the filing for an action *in rem* and the granting of the court leads to the establishment of a statutory lien, or more precisely a statutory right *in rem*. The nature of the procedural figure of action *in rem* was subject to controversial debate and two main views crystallised. On one hand the nature of the action *in rem* is explained by the concept of the personification of the ship. This personification theory, which is adhered to in the USA and Canada, makes an action against the owner of the ship unnecessary and centres on the ship itself.[128]

On the other hand, the action *in* rem may be seen as a mere procedural tool. The procedural view is based on the origins of the action *in rem* in the eighteenth century as a procedural mean to either force the defendant to come to court or to seize the defendant's ship as the *rem*, in case a satisfaction of the claimant was not available.[129] Jeune J. established the procedural view in the case *The Dictator.*[130] Thereafter, courts supported this view and the procedural view was confirmed. Nonetheless, the procedural view is not fully compatible with the legal figure of maritime liens, as this theory fails to explain why maritime liens can be enforced

[124] The leading court decisions holding that maritime liens for necessaries do not exist under English law: Northcote v Owners of the Heinrich Bjorn (The Heinrich Bjorn) [1885] 10 P. D. 44; Bankers Trust International v Todd Shipyards Corp (The Halcyon Isle) [1980] 3 All E. R. 197.

[125] See T. Harrison *Legal Issues in Bunkering* (2011), on p. 181; Schmidt-Vollmer (2003), p. 114.

[126] See Jackson (2005), p. 467.

[127] See Schmidt-Vollmer (2003), p. 133.

[128] See Lind (2010), p. 46.

[129] See Jackson (2005), p. 258.

[130] The Dictator [1892] P. D. 304.

against a *bona fide* purchaser[131] of the ship by using an action *in rem*.[132] A moderate view is taken when arguing that the distinction between the personification theory and the procedural view is somehow artificial and leaves out the fact that in most cases the action *in rem* and the action *in personam* may be enforced at the same time.[133] The creditor should base his claim on both actions, because then the value or assets of either the vessel or the ship-owner do not restrict his claim.

Even though the procedural theory on the legal nature of action *in rem* fails to satisfyingly explain this tool of enforcement for maritime liens in England & Wales, the courts have accepted this view as a guiding principle.[134]

The maritime lien extinguishes in England & Wales by satisfaction of the underlying claim, by providing a bail or through an action *in rem* by a sale of the ship ordered by the court.[135] The enforcement of a maritime lien after these events is not possible. The enforcement is further barred by limitation and by the doctrine of laches. The limitation periods for the enforcement of a maritime lien are codified under sec. 190 of the Merchant Shipping Act 1995 and range from 1 year for tortious claims to up to 6 years for crew's and master's wages.

The doctrine of laches is rooted in equity and was developed by the admiralty court to prevent claimants to enforce their maritime liens without "*reasonable diligence in its enforcement*".[136] The requested 'reasonable diligence' is particularly important when the claimant tries to enforce the maritime lien against third parties, who bought the ship from the liable owner *bona fide*.[137]

3.2.5.5 Ranking and Priority of Maritime Liens in England & Wales

The ranking of maritime liens among each other depends on whether the competing liens are of the same or different class. English case law deals with every class of maritime lien separately. The maritime liens for damage rank among each other *pari passu* but take priority over maritime liens for earlier salvage, bottomry and wages for the reason that negligent handling and navigation of ships shall be prevented.[138] Based on the logic that without the salvage of the ship no other maritime lienholder could enforce his claims, the salvage liens rank before liens for earlier damages,

[131] See The Bold Buccleugh [1851] 7 Moo P. C. 267.

[132] Lord Steyn mentioned this deficit when reviewing the procedural theory on action *in rem*, but left it undecided, as the case did not deal with maritime liens—The Indian Grace [1997] 4 All E. R. 380.

[133] See Rose (2003), p. 58.

[134] See Jackson (2005), p. 260.

[135] See Davies and Dickey (2004), pp. 121/122; for a detailed display see Jackson (2005), pp. 501–508.

[136] See The Europa [1863] 2 Moo. N.S. 1.

[137] See Jackson (2005), p. 297.

[138] See Thomas (1980), pp. 244, 246.

bottomry and seamen's and master's wages.[139] If there is more than one salvage lien, the 'inverse priority rule' applies for the same reason: the latest salvage shall have priority, because without the latest salvage all other claims are likely to be worthless.[140] The liens for wages of seamen and master rank *pari passu* within their classes.[141] Liens for bottomry follow the inverse priority rule within their class.[142] As a result, the ranking of maritime liens in England & Wales can be listed as follows:

1. Damage liens (later salvage claims take priority);
2. Salvage liens;
3. Wages liens;
4. Bottomry.

In English law, there is no codification of the priority rules for maritime claims. Moreover, courts have discretion regarding the ranking of maritime security rights. Nevertheless, courts have established a priority ranking over time.[143]

Maritime liens enjoy priority over ship mortgages as well as statutory liens.[144] This priority is based on the classification of maritime liens as "*privileged claims*" and therefore it makes no difference whether the maritime lien was created before or after the registration of a ship mortgage.[145]

Statutory liens rank below maritime liens and ship mortgages.[146] In times of falling ship values such liens are very likely to remain unsatisfied as the proceeds generated by the sale of ships are already exhausted by the satisfaction of maritime liens and ship mortgages. These mortgages secure financing banks with the highest claims imposed upon the ship.

From the above follows the general ranking of maritime claims[147]:

1. Costs of the Admiralty Marshal and the arresting party;
2. Maritime liens;
3. Possessory liens;
4. Mortgages;
5. Statutory rights *in rem*;
6. *In personam* claims.

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[139] Brandon J expressed this view in The Lyrma (No. 2) [1978] 2 Ll. L. Rep., p. 33.

[140] See The Veritas [1901] P. D. 304.

[141] The Mons [1932] P. D. 109.

[142] La Constancia [1845] 166 E.R. 807.

[143] See Schmidt-Vollmer (2003), p. 146.

[144] See for this and the following sentence Thomas (1980), p. 254.

[145] This has been confirmed by a number of cases: The James W. Elwell [1921] P. D. 351, The Athena [1923] 7 Ll. L. R. 75.

[146] See Jackson (2005), p. 524.

[147] See Derrington and Turner (2007), p. 54.

3.2.5.6 Recognition of Foreign Maritime Liens

The English approach on recognition of foreign maritime liens is rather clear, as only those foreign maritime claims are recognised under English law to be secured by a maritime lien that are granted this privilege under English law as well.[148] There are no exceptions to it and as a result, English courts only accept a limited number of foreign maritime liens. The reason for dealing with foreign maritime liens under strict application of the principle of *lex fori*, and therefore excluding all foreign maritime liens which do not have an English equivalent, lies in the fundamental classification of maritime liens as *in rem* claims and thus as procedural legal rules rather than substantive law.[149] The rationale was based on the procedural view on maritime liens and the action *in* rem, which led the Privy Council in its famous decision in *The Halcyon Isle*.[150] This decision and the following application of the *lex fori* principle in matters of recognition and priority of foreign maritime liens has been harshly criticised,[151] especially on grounds that the legal questions of existence of a maritime lien and its priority are not at all procedural, but substantive and should therefore be dealt with under the principle of *lex causae*, to which *e.g.* the German legislator is committed to. But not only the German legislator has taken a different approach, even Australia, a Commonwealth country which adhered to the Privy Council's decision, takes the *lex causae* approach on the enforceability of foreign maritime liens since the recent case of *Sam Hawk*.[152] The Australian dissenting decision is remarkable and further shows how isolated the English approach of strictly applying *lex fori* on foreign maritime liens has become.[153]

Unsurprisingly and in accordance with many other jurisdictions, the English courts apply the *lex fori* approach on the priority and ranking of foreign maritime liens as well.[154]

3.2.6 Maritime Liens Under US Law

Maritime liens existed in the USA since the latter obtained independence from the British Empire, which had established its legal system in the American colonies. The legal concept of maritime liens may root in English law, but today's legal

[148] See Jackson (2005), p. 31; case law: The Halcyon Isle [1981] A. C. 221; The Acrux [1965] P. D. 391.

[149] See Schmidt-Vollmer (2003), p. 154.

[150] Bankers Trust International Ltd v Todd Shipyards Corp (The Halcyon Isle) [1981] A.C. 221.

[151] In Jackson (2005), p. 720, Jackson states: "*The decision in* The Halcyon Isle *seems a prime example of concealment of reality through abstruse legal labels*."; Jackson already expressed his criticism of the Privy Council's decision in Jackson (1981), pp. 338, 339.

[152] Reiter Petroleum Inc v The Ship Sam Hawk [2015] FCA 1005.

[153] Already in 2002 legal academics called for an Australian dissenting approach to The Halcyon Isle: Davies and Lewins (2002), p. 780.

[154] See Davies and Lewins (2002), p. 780.

regime on maritime liens in the USA is very different from its English counterpart. The differences are the reason why the prominent case of the *The Halcyon Isle*[155] decided by the Privy Council and the German cases of *Delaware Bay* and *Chesapeake Bay*[156] dealt with the problem of recognising US maritime liens in foreign jurisdictions. In both cases, the main source for conflict was the US specific[157] maritime lien for necessaries.

The following section will display the US maritime law often referred to as admiralty law in the US on maritime liens, with special attention to the priority and ranking of maritime liens and the liens for necessaries.

3.2.6.1 Regulations in Chapter 313 of Title 46 of the United States Code

US maritime liens were codified for the first time in 1910 under the Federal Maritime Lien Act and today they are laid down under Chapter 313 of Title 46 of the United States Code.[158] The codification is very detailed, but fails to define the term 'maritime lien' itself. For the American understanding of maritime liens the following definition serves as an illustration:

> … a right of property in a ship adhering to it wherever it may go, vesting a right in the person whose claim is thereby secured, to cause a sale of the ship in a proceeding directly against it in order to obtain satisfaction of the debt.[159]

As stated in the definition, the person secured by a maritime lien can aim his action directly against the ship. As in England & Wales, this action is called an *in rem* action. The 'personification' of the ship is the biggest difference between the English and American concepts of a maritime lien's nature and its enforcement.[160] Today, the USA is the only major jurisdiction that still adheres to the theory of personifying a vessel and hence making way for legal enforcements directly against the ship.[161] The per-sonification theory is seen as the justification why the sale of the vessel out of court does not remove the maritime lien with the consequence that the lienholder may enforce his maritime claim against the purchaser of the ship under US law.[162] Like the maritime liens in Germany and England & Wales, the US maritime liens are secret and do not need to be registered to be enforceable.[163] This status was deliberately not altered when the US legislator introduced the registration

[155] Bankers Trust International v Todd Shipyards Corp (The Halcyon Isle) [1980] 3 All E. R. 197.

[156] OLG Bremen (1995) TranspR, on p. 302.

[157] See Puttfarken (1998), p. 793.

[158] The rules on maritime liens are set out in 46 U.S.C. §§ 31301–31343.

[159] The Rupert City 213 F. 263 (W. D. Wash. 1914).

[160] In the USA the personification theory has gained major acceptance, whereas English law adheres to the procedural theory; see Hartley (1981), p. 19; Hayden and Leland (2005), p. 1239.

[161] See Davies (2000/2001), p. 339.

[162] See van de Biezenbos (2015), p. 611.

[163] See for this and the following sentence Peck (2013), p. 984.

requirements for all kinds of land security interests under the Uniform Commercial Code in the 1950s.

3.2.6.2 Claims Secured by Maritime Liens

US maritime law differentiates two classes of maritime liens: preferred maritime liens and maritime liens for necessaries. The classification is based on the maritime priority scheme, which will be dealt with below. Preferred maritime liens are granted for a small list of maritime claims, much alike to the German list of maritime liens. These preferred maritime liens are defined under 46 U.S.C. § 31301 (5) and granted:

– for damage arising out of a maritime tort;
– for wages of a stevedore when employed directly by a person listed in sec. 46 U.S.C. § 31341[164];
– for wages of the crew of the vessel;
– for general average; or
– for salvage, including contract salvage.

Beside those claims listed above, US admiralty courts have the power to "*recognize new forms of maritime liens as circumstances warrant*".[165] For example, in the case of Exxon Corp. v. Central Gulf Lines Inc.,[166] the Supreme Court held that advances made by a ship's agent could give rise to a maritime lien.

The liens for wages, salvage and torts under US maritime law have counterparts in Germany and England & Wales and their range is nearly identical. However, the conflict-causing lien for necessaries is unique and neither the German or English system nor international conventions on maritime liens grant the privileged status of a maritime lien to claims arising from necessaries provided to the vessel. Therefore, it is important to understand the range of the term necessaries and the reasoning why US courts cherish this particular maritime lien.

3.2.6.3 Maritime Liens for Necessaries

The contractual lien for necessaries is defined by statute under 46 U.S.C. § 31301 (4) including "*repairs, supplies, towage, and the use of a dry dock or marine* railway". The codification of maritime liens for necessaries goes back to the Federal Maritime Lien Act (1910).[167] The very general wording of the definition gives courts the power to broadly interpret the term 'necessaries', hence the number of maritime

[164] Under 46 U.S.C. § 31341 (a) these persons are: the owner, the master, the vessel manager or an officer or agent appointed by the owner, charterer, an owner *pro hac vice* (for this occasion; often a lawyer) or an agreed buyer in possession of the vessel.

[165] For this and the following sentence Tetley and Wilkins (1998), p. 1403.

[166] Exxon Corp. v. Central Gulf Lines, Inc. [1991] 500 U.S. 603.

[167] See for this and the following Hayden and Leland (2005), p. 1239.

claims secured by a maritime lien is countless.[168] Most prominently, the maritime services of pilotage and bunkers are granted the status of lien-secured claims and especially the service of bunker supply has been the source of conflict.[169] The bunker a vessel is provided with can easily cost millions of USD and therefore the bunker-suppliers are highly interested in securing their claims by maritime liens attached to the vessel. An "*American maritime lien is a powerful tool*"[170] and can be enforced by an action *in rem*, which gives the power to arrest the ship in US ports. As most jurisdictions do not provide for a maritime lien for necessaries—including bunker supply—bunker supply companies around the world use choice of law clauses in their contracts' 'terms and conditions'. In the case of Trans-Tec Asia v. M/V Harmony Container[171] the vessel owner was Malaysian, the time-charterer from Taiwan. The time-charterer ordered bunker fuel from a company based in Singapore and the bunker was provided in Korea. The terms and conditions of the bunker supplier stipulated:

> Seller shall be entitled to assert its lien or attachment in any country where it finds the vessel. Each transaction shall be governed by law of the United States and the State of Florida, without reference to any conflict of laws rules. The laws of the United States shall apply with respect to the existence of a maritime lien, regardless of the country in which the Seller takes legal action.

Then, based on a US maritime lien, the vessel was arrested in the USA and the court held that the bunker supply contract was formed under Malaysian law, which allows such choice of law clauses. As a result, the choice of law clause was valid and thus a US maritime lien for necessaries was validly attached to the vessel enabling the claimant to arrest the ship and enforce the claim against the ship by an action *in rem*.

This case perfectly illustrates the common practice of bunker suppliers to globally deliver bunker under a choice of law clause, opting for US maritime law, because it is almost the only jurisdiction in the world to grant the privilege of a maritime lien to claims for bunker supply. The liberal approach of US maritime law was based on the intention to protect the claims of US maritime service suppliers. The national approach has developed into an international claim-securing tool for the globally operating industry of maritime bunker and service suppliers. The traditional reluctance of US legislators to join international conventions and treaties further strengthens the status of US maritime liens for necessaries as it is unlikely that the USA will join a convention on maritime liens, which does not include liens for necessaries.

The far reaching scope of the term 'necessaries' was confined by courts and later the legislator by setting the requirement under 46 U.S.C. § 31342(a) that the necessaries are provided "*to a vessel*". The delivery of goods or services to the shipowner or a place where more than one ship has access to the necessaries does not

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[168] *E.g.* pilotage, wharfage and dockage, stevedoring, purchase of engines, bunkers, fish finding radar, positioning systems, fumigation (Hayden and Leland (2005), pp. 1239/1240).

[169] See Harrison (2011), p. 183.

[170] Donovan (2001/2002), p. 192.

[171] Trans-Tec Asia v. M/V Harmony Container [2008] 518 F.3d 1120.

fulfil the narrow requirement of providing necessaries directly to a singled-out vessel.[172] The requirement of 'provided to a vessel' causes legal problems when it comes to container leasing, which is considered as a necessary to vessels.[173] The delivered containers are seldomly assigned to just one specific container vessel, leading courts to deny the above requirement's fulfilment. As a result, the attachment of a maritime lien fails in those specific cases.[174]

3.2.6.4 Enforcement and Extinction of Maritime Liens

In strict adherence to the personification theory on the legal nature of maritime liens the lienholder has to enforce his lien-secured claim by an action *in rem* against the ship itself.[175] The *in rem*—procedure is exclusively dealt with in the US Federal District Courts—acting as admiralty courts—where the ship is located, according to 28 U.S.C. § 1333(1).[176]

The enforcement procedure in admiralty matters is codified in Supplemental Rule[177] C and E of the US Federal Rules of Civil Procedure. To start the enforcement of a claim secured by a maritime lien, the lienholder has to file a complaint with the Federal Court and his claim has to justify *prima facie* the arrest of the vessel (Suppl. Rule C(2) and E(2)). Based on the complaint, the court will issue a warrant of arrest and a US Marshal will arrest the vessel by handing out the warrant to the ship's master. A post-arrest hearing follows this procedure. Here the debtor can provide a bailout to prevent the vessel from being further held under arrest and ultimately being sold to satisfy the lienholders' debt outstanding.

Like any other unregistered security interest and its German and English counterparts, the US maritime lien extinguishes by payment of the debt.[178] Furthermore, it is also possible to clear a vessel from attached maritime liens by selling it in a "*federal vessel foreclosure*" under the administration of a US district court.[179] The extinction of the lien is codified under 46 U.S.C. § 31326(a) and even if the claimants intervened or did not receive notice of the sale, the ship will be purchased free from any security interests.[180] The secret nature of the maritime lien works in this situation to the detriment of the lienholder, as the courts cannot inform unknown lienholders of the vessel's sale.

[172] See Hayden and Leland (2005), pp. 1239/1240 and the illustrating case of Piedmont & Georges Creek Coal Co. v. Seaboard Fisheries Co. [1920] 254 U.S. 6–7.

[173] See for this and the following sentence Schmidt-Vollmer (2003), p. 169.

[174] Silver Star Enterprises Inc. v. M/V Saramacca [1996] 82 F.3d 666.

[175] See McDonald (2000), p. 28.

[176] See Schmidt-Vollmer (2003), p. 169.

[177] Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions.

[178] See Hayden and Leland (2005), p. 1251.

[179] See Hayden and Leland (2005), p. 1252.

[180] See Weil (1996), p. 210.

US maritime law does not have a statute of limitations, thus maritime liens are unlimited.[181] In the absence of a limitation of maritime liens, the 'doctrine of laches' was established by court ruling: "*laches or delay in the judicial enforcement of maritime liens will, under proper circumstances, constitute a valid defence*".[182] The defendant may use the doctrine of laches as a defence against the lienholder. Whether the lienholders actions are laches or delay "*depends on the peculiar equitable circumstances of that* case". If a vessel to which a US maritime lien is attached rarely comes to US ports, even after years, the court will not accept the defence of laches or delay[183] in order to protect the interests of US maritime creditors.

3.2.6.5 Ranking and Priority of US Maritime Liens

In case the sales value of a ship is less than the ship's creditors are entitled to claim, the situation of insufficient funds has to be solved by a priority scheme.[184] The scheme ranks public, maritime and non-maritime claims in the following order[185]:

1. Expenses of justice during *custodia legis*—46 U.S.C. § 31326 (b)(1)
2. Preferred maritime liens—46 U.S.C. § 31301 (5)(A)–(F)
   a. Wages of crew and master
   b. Salvage and general average
   c. Maritime torts
3. Maritime contract liens, including liens for necessaries, arising before a preferred ship mortgage (US flag vessel) was filed
4. Preferred ship mortgages (US flag vessel)
5. Maritime contract liens arising after the filing of a preferred ship mortgage
6. Foreign preferred ship mortgages
7. Maritime contract liens, except US necessaries liens
8. Government tax claims
9. Non-maritime claim

The ranking of maritime liens for necessaries behind preferred maritime liens and preferred ship mortgages is subject to an exception. If the repair or services rendered to the ship as necessaries are made to maintain the value of the ship, the maritime lien for necessaries will rise in rank ahead of preferred ship mortgages, even if it attached to the ship after the registration of the mortgage.[186]

The ranking of maritime liens is established by statute today. The establishment of the ranking order of different maritime liens dates back to court decisions over

[181] Puttfarken (1998), p. 794.

[182] See for this and the following quote The Key City [1872] 81 U.S. 660.

[183] Puttfarken (1998), p. 794.

[184] See Force et al. (2008), p. 327.

[185] See for a detailed list: Force et al. (2008), p. 328.

[186] N.Y. Dock Co. v. S.S. Poznan [1927] AMC 727.

120 years ago. The priority of wage claims over other maritime liens was established in 1906.[187] The Supreme Court enunciated the principle of ranking tort claims prior to contract liens in 1898.[188] The court held that the vessel itself was the 'wrongdoer' and that all services rendered to the vessel before the tortious instance have to be seen as contributing to the vessel and therefore enabling it to do the wrong.[189]

Similarly to the German and English approaches, US maritime law ranks maritime liens of the same class according to the 'inverse order' rule, which simply said means that the lien-secured claims are satisfied on a "*last in time, first in right*" order.[190] In The William Leishear,[191] the court summarised the existing theories on the inverse order rule of maritime liens of the same class. One theory emphasises the logic that any service provided to the vessel or salvage of it helps to keep the vessel trading and therefore producing income to satisfy the claims against the ship. Without the last in time service or salvage, all other previously established creditors of the ship would face a higher risk of not receiving any payments. The other theory takes the proprietary interest into account and reasons that the proprietary interest that is secured by a maritime lien is subject to the sea transport specific dangers and therefore it may not take priority over events which later cause other creditors to establish proprietary interests in the vessel.

3.2.6.6 Recognition of Foreign Maritime Liens

When a foreign party tries to bring an action *in rem* against a vessel in the USA, the court will first determine whether a choice of law clause exists, which stipulates that the creation and enforcement of a maritime lien shall be subject to US maritime law. US courts[192] accept such clauses, even if the parties are both foreign and the contract was concluded in a foreign jurisdiction. This liberal approach led to the standard that bunker-supplying companies have choice of law clauses opting for US maritime law in their terms and conditions. On the other hand, the readiness of US courts to accept choice of law clauses works the opposite way as well and courts accept that no maritime lien attaches to the vessel under the chosen law, even though under US law a lien would have been created.[193] The only case in which US courts do not uphold the parties choice of law clauses—as a protective measure[194]—are clauses which deny the attachment of a maritime lien for necessaries, albeit the fuel supplier is American and the fuel was delivered to the vessel in a US port.[195] In no reported

[187] The C.J. Saxe [1906] 145 F. 749 (S.D.N.Y.).

[188] The John G. Stevens [1898] 170 U.S. 113.

[189] See van de Biezenbos (2015), p. 614.

[190] Hayden and Leland (2005), p. 1249.

[191] The William Leishear [1927] 21 F.2d 863 (D. Md.)

[192] See Trans-Tec Asia v. M/V Harmony Container [2008] 518 F.3d 1120.

[193] See *In re* Millenium Seacarriers, Inc. [2003] AMC 1185; Donovan (2001/2002), p. 196.

[194] See Force et al. (2008), p. 342.

[195] See Gulf Trading & Transportation Co. v. Vessel Hoegh Shield [1982] 658 F.2d 363.

case a US court ever refused to grant a maritime lien to US necessaries suppliers by relying on foreign maritime law.[196]

If there is no choice of law clause, the US court has to determine whether a conflict of law exists. As US maritime law is more liberal in granting the lien-status for maritime claims than other jurisdictions, conflicts are very likely. Following the determination of a conflict of laws, the US court has to undertake a choice of law analysis to decide which law is applicable to the present case.[197] The analysis is exercised on an *ad hoc* basis and does not simply apply one of the classic conflict of laws approaches like *lex causae* or *lex loci*, but examines a number of "*connecting factors*"[198] to determine the right law applicable.[199] Or in other words, "*While the law of the place of supply is probably the most important determinant in the choice of law analysis, it is by no means conclusive*".[200] The Lauritzen v. Larsen analysis scheme was the foundation for many following cases. The analysis of the choice of law never only looks at the place of contract-formation or supply of services, but considers all points of contact. In Lauritzen v. Larsen, the court had to decide whether a US maritime lien for torts arose and the decision to apply US law was based on the following points of contact: (1) the place of the wrongful act, (2) the law of the flag, (3) the allegiance or domicile of the injured party, (4) the allegiance of the defendant ship-owner, (5) the place of the contract, (6) the inaccessibility of the foreign forum, and (7) the law of the forum. In a more recent case, the 'points of contact' analysis was summarised:

> In the absence of statutory directives and subject to constitutional restrictions, the relevant factors [for the analysis] include (a) the needs of the international system, (b) relevant policies of the forum, (c) relevant policies of other interested states, (d) the protection of justified expectations, (e) the basic policies underlying the particular field of law, (f) certainty, predictability and uniformity of result, and (g) ease in determination and application of the law to be applied.[201]

These factors seem to be rather vague and this vagueness is not cured by the factor *(f) certainty, predictability and uniformity of result*. It is very difficult for foreign parties to predict the court's decision on choice of law issues. As courts decide on a case-by-case basis, the choice of law analysis is constantly changing. It seems that the only guiding principle in the 'points of contact' analysis is the protection of US necessaries-suppliers and generally the preservation of the unique status of maritime liens for necessaries.[202] But if there are too few points of contact with US

[196] See Schoenbaum (2011), p. 735.

[197] See Dresdner Bank v. M/V Voyager [2006] 463 F.3d 1210.

[198] Lauritzen v. Larsen [1953] 345 U.S. 571.

[199] See Schoenbaum (2011), p. 735.

[200] Donovan (1992), p. 132.

[201] Gulf Trading & Transportation Co. v. Vessel Hoegh Shield [1982] 658 F.2d 363.

[202] This US public policy stance of protecting US maritime interests is well illustrated in the case of Arochem Corp. v. Wilomi, Inc. [1992] 962 F.2d 496: "*Although the contract was formed in England, it is illogical to argue England has as great an interest as the United States in protecting an American purchaser form an unlawful arrest of cargo on an American vessel in an American port*".

jurisdiction, then the court will accept the foreign law to apply. For instance, there was no US bunker supplier involved, when a US court decided in an arrest procedure that Canadian law applied, where the delivery of necessaries by a Canadian company was made in a Canadian port to a non-American vessel.[203] The protective approach of US courts becomes even more apparent when looking at their neighbours in Canada and their dealing with foreign, mainly US, maritime liens for necessaries. In the case The Nordems,[204] the Canadian court exercised a similar analysis as that of Lauritzen v. Larsen on a fuel supply and the question whether US maritime law was applicable, to conclude that there were not enough points of contact and no public policy to protect fuel suppliers existed to outweigh this finding.[205]

The question as to what rank a foreign maritime lien would take in the US priority scheme of maritime claims falls under the conflict of laws principle of *lex fori*,[206] where the foreign maritime lien would take the rank of the corresponding US lien.[207] As the catalogue of US maritime liens is the most extensive in the world, the German problem of ranking a foreign maritime lien, which does not have a domestic equivalent, cannot occur in the USA.

3.2.7 Status of Maritime Liens in Insolvency Proceedings

With the comparison of the insolvency laws of Germany, England & Wales and the USA and the examination of their respective laws and rules on maritime liens, it becomes apparent that the status of maritime liens in insolvency proceedings is very similar in all of these three jurisdictions.[208]

First of all, maritime liens in Germany, England & Wales and the USA rank above any other maritime security interest vested on the ship in the classical maritime arrest procedures. Only the US-specific maritime lien for necessaries ranks behind preferred ship mortgages, if the lien arose after the registration of the mortgage. Secondly, the preferred status of maritime liens continues in case of insolvency of the shipping company. In Germany, maritime lienholders have a right of separate satisfaction under sec. 49 InsO, which gives them a comparable status to secured creditors in the USA and England & Wales. In England & Wales, maritime

[203] Ocean Ship Supply, Ltd. v. M/V Leah [1984] 729 F.2d 971.

[204] World Fuel Services Corporation v. The Ship 'Nordems' [2010] FC 332.

[205] For a detailed case analysis see: Letalik (2012), pp. 529–538.

[206] See for this and the following sentence Force et al. (2008), p. 343.

[207] See Potash Co. of Canada, Limited v. M/V Raleigh [1973] AMC 2658; Rainbow Line, Inc. v. M/V Tequila [1973] AMC 1431.

[208] For a detailed discussion of the ranking and priority of maritime lienholders in arrest and insolvency procedures see the relevant sections above. This part only serves to give a direct comparison of maritime liens' status in the three covered jurisdictions of Germany, England & Wales and the USA.

lienholders enjoy super-priority with the effect that the maritime lien can be enforced regardless of the filing of an insolvency proceeding, all it needs is an application of the lien-secured creditor to the administering court.[209] The concept of super-priority of the maritime lien over ship mortgages and other security interests in England & Wales dates back to 1907.[210] In line with that view, the incorporation of the UNCITRAL Model Law on Cross-Border Insolvency in England & Wales has led to a modification of Art. 20 (1) of the Model Law. A claimant enforcing a maritime lien by an action *in rem* and achieving the seizure and judicial sale of the ship before the shipping company's insolvency procedure is opened by court, is not affected by the insolvency triggered stay of proceedings stipulated in Art. 20 (1). The maritime claimant can continue the enforcement of the security right.[211] Hence the English approach is taken to an international level by the modification of the Model Law. The US insolvency system ranks maritime liens above all other security interests, but different to England & Wales the US legislator did not include Art. 20 (1) Model Law in the newly formed Chapter 15 of the US Bankruptcy Code, mainly because the concept of the automatic stay has such a great importance in the US insolvency system.[212] This has the effect that maritime claimants cannot enforce their security interest if the US court recognised the foreign insolvency proceeding as a main proceeding. This debtor-friendly stance allows a true 'breathing spell' for the insolvent shipping company. Nevertheless, in case of liquidation or any other form of proceeds-distribution, the maritime lienholders will be treated preferentially in the USA and will out-rank other maritime claimants.

The status of maritime liens in an insolvency proceeding is very concurrent among the jurisdictions of Germany, England & Wales and the USA. This leads to the conclusion that in an isolated examination of maritime liens an international unification is possible and the degree of unification effort manageable. But as the following section shows, similarities in the ranking and priority of maritime liens are just one aspect of international unification.

[209] See *In re* Aro Co Ltd [1980], Ch. 196.

[210] See Bowtle and McGuinness (2001), pp. 134, 135. The effect of a maritime lien's priority over ship mortgages has been described by Fletcher Moulton LJ in *The Manor* [1907] P.D. 339, "*It may well be that to allow a ship to become subject to a maritime lien may not be an infringement of the rights of the mortgagee, even though that maritime lien ranks above claims under the mortgage. For example, it cannot be said to be a breach of the rights of the mortgagee, if a ship in distress accepts salvage assistance, though a maritime lien thereby arises. But there is an obvious difference between allowing a ship to become burthened with a maritime lien, and allowing her to remain burthened with such a lien, without the power of discharge it, for, to that extent, you have, as in this case, substantially diminished, that is to say, impaired the value of the mortgage security*".

[211] See Davies (2016), p. 200.

[212] See Davies (2016), p. 201.

3.2.8 International Unification

The lists of claims secured by maritime liens in Germany, England & Wales and the USA show differences in number and kinds of claims covered. The international diversity of maritime liens' range of operation, ranking and priority has been recognised since the early twentieth century. Especially the CMI has been a driving force to achieve international unification in the field of maritime liens and mortgages.[213] The CMI's efforts resulted in two international conventions, the 'International Convention for the Unification of certain rules of law Relating to Maritime Liens and Mortgages 1926' and the 'International Convention for the Unification of Certain Rules Relating to Maritime Liens and Mortgages 1967'. Despite the commercial importance of maritime liens and mortgages for the international shipping industry and the high level of uncertainty resulting from the diversities between the relevant national laws, the two international conventions have not been ratified by the major shipping nations of Greece, UK, USA, Netherlands and Germany.[214] The reluctance to ratify on the side of those states had various reasons. The ship-supplier friendly states of the USA and the Netherlands were not in favour of a limitation of the number of maritime liens, especially not of those for necessaries. The Common Law-States did not ratify because the conventions were based too much on the Civil Law concept of liens,[215] which leads to striking differences in the enforcement of the liens from Common Law perspective. Moreover, the conventions did not include claims of social insurance carriers, which prevented Germany from ratifying either of the conventions.[216] As a result, the 1926 Convention entered into force in 1931[217] and the succeeding Convention of 1967 never even reached that stage. Nevertheless, Germany approved of the 1967 Convention list of maritime liens and based the reform of its national maritime law in 1972 on this Convention.[218]

Following the lack of international acceptance of the 1926 and 1967 Conventions, the CMI together with the IMO took another attempt to set up a widely accepted international convention on maritime liens and mortgages.[219] This resulted in the 'International Convention on Maritime Liens and Mortgages 1993'. Even though the international reactions and acceptance were again not positive, the 1993 Convention came into force in 2004, yet again ratified only by minor maritime

[213] See Thomas (1980), pp. 331, 332.

[214] See Rabe (2000) Vor § 754 marg. no. 18, 19; Thomas (1980), p. 332.

[215] See Berlingieri (1995), p. 57.

[216] See Schmidt-Vollmer (2003), p. 29.

[217] The ratifying states were: Belgium, Brazil, Denmark (denunciation in 1965), Estonia, France, Hungary, Italy, Madagascar, Norway (denunciation in 1965), Poland, Romania, Spain, Sweden (denunciation in 1965).

[218] See Herber (2016), p. 121; Puttfarken (1998), p. 795.

[219] See for this and the following sentence Force et al. (2008), p. 266.

nations.[220] The USA and England & Wales did not sign the Convention and Germany signed but did not ratify it.

When looking at the history of international unification it is fair to say that the dream of a global *lex maritima* has not been fulfilled in the particular field of maritime liens.[221]

3.3 Conclusion: Maritime Liens as Sources of Conflict of Laws?

Almost all articles on maritime liens in an international context are concerned about the conflict of laws and the resulting uncertainty these liens may cause. The main source of confusion is the US maritime lien for necessaries. Even though no other main shipping nation grants liens for necessaries and all of the three international conventions do not include such liens, the USA holds on to these liens. The main reason for the US American truculence is protecting the US maritime industry of ship repair and bunker supply. The practical relevance of liens for necessaries may be strong, as most of the globally operating bunker suppliers include choice of law clauses—opting for US law—into their terms and conditions, but at the current trend of falling vessel values the question is how much these liens improve the situation of the US maritime industry. In the USA, the maritime liens for necessaries both domestic and foreign are recognised. In Germany, courts under the *lex causae* rule accept only foreign maritime liens for necessaries. England & Wales does not recognise such liens at all. So the chance to arrest ships based on a maritime lien for necessaries exists in two of three of the examined jurisdictions. The chance to arrest alone may be an effective instrument to put pressure on the debtor to satisfy the maritime claimant, but when it comes to the enforcement of a maritime lien for necessaries, this particular lien's ranking and priority raises doubt about how much the claimant may receive from the arrest and the subsequent sale of the vessel.

The value of a security interest in general depends on the effectiveness of its enforcement. The claimant cannot enforce his lien-protected claim for delivering or providing necessaries for the ship in England & Wales, while in Germany the foreign lien for necessaries ranks behind the ship mortgages. With falling vessel values the rank behind the ship mortgages is doomed to not receive sale proceeds at all. One might think that the USA, where the ship service industry is notoriously protected by the maritime lien for necessaries, would grant a better ranking and priority for necessaries claims. This is not the case. The lien for necessaries ranks after all other maritime liens and only before preferred ship mortgages if the lien arose before the filing of the mortgage. The ranking before the mortgage is a very unlikely case. The financing banks will register

[220] The ratifying states today are: Albania, Benin, Congo, Ecuador, Estonia, Lithuania, Monaco, Nigeria, Peru, Russian Federation, Serbia, Spain, St. Kitts and Nevis, St. Vincent and the Grenadines, Syrian Arab Republic, Tunisia, Ukraine, Vanuatu; the list is available at https://treaties.un.org/Pages/showDetails.aspx?objid=080000028004a70a (last visited on 10 June 2018).

[221] See Schmidt-Vollmer (2003), p. 26.

their mortgages, often summing up to the entire value of the vessel, as soon as the ship is registered and put in commission. The ranking of maritime liens for necessaries in other jurisdictions as well as their home jurisdiction—the USA—renders this particular lien an arrest tool to force solvent, but payment-refusing shipping companies to clear their debts, not more. The ranking of a claimant secured by a maritime lien for necessaries may be weak, however the power to enforce this claim in an action *in rem* proceeding gives the claimant a strong position in negotiations with the shipping company. An action *in rem* proceeding gives the claimant the chance to arrest the ship. This arrest is a worst-case scenario for any shipping company, as it intervenes with the main business of a ship, moving goods from one place to another. Any time a ship stops it costs money and does not earn any. Therefore, already the threat to arrest the ship often persuades the shipping company to settle its debts with the maritime service provider. If the owing shipping company is in financial difficulties and the arrest leads to an insolvency of the company, the low priority of maritime liens for necessaries materialises and the underlying claim is likely to be left unsatisfied behind the better ranked maritime liens and ship mortgages.

The other maritime liens (for crew's wages, salvage and tort) do not pose such a problem. They exist in Germany, England & Wales and the USA and even if they are foreign liens they are recognised by all three jurisdictions and are given the same rank as their domestic counterparts.

Hence, the main problem with maritime liens in an international context occurs when the lien is securing a claim for necessaries under US law. In case of an insolvency of a shipping company this lien-issue adds to a series of other complicated cross-border as well as cross-jurisdiction problems. These issues are dealt with in the following chapter. The following chapter will also look at possible harmonisation instruments and other insolvency workout tools to meet the special challenges in the realm of the maritime industry in financial distress.

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Chapter 4
Maritime Cross-Border Insolvency and Harmonisation

The two previous chapters show that the insolvency laws as well as the maritime laws of Germany, England & Wales and the USA do not fall widely apart, but even minor differences can cause confusion and uncertainty for both practitioners and academics. Especially the treatment of the insolvent debtor, the restructuring tools available, and the legal theories behind the maritime security right of maritime lien are the main sources of legal conflict. Many harmonisation efforts have been enacted to reconcile these differences. In the context of international insolvency, the EU Insolvency Regulation and the UNCITRAL Model Law on Cross-Border Insolvency are the most effective and pragmatic harmonisation instruments. Such clear guidelines and regulations are still missing for stipulations on maritime liens and the conflict of laws that these liens are causing. It became evident in the previous chapter that the single state's catalogues of maritime claims, which are secured by the security interest of maritime liens, are very different and the acceptance and recognition of foreign maritime liens in domestic proceedings varies strongly, with England & Wales taking the most restrictive and the USA the most ship-creditor friendly approach.

The existing problems and conflicts in international insolvency and maritime law are even more complicated when these two distinct legal systems convene in a maritime insolvency. The following chapter will examine the interaction of insolvency law with maritime law in maritime insolvency. For each jurisdiction subject to this book, different problems in maritime insolvency arise. The following examination of maritime insolvency will discuss whether the current 'un-harmonised' situation in international maritime insolvency confronts the maritime industry with inexpugnable problems or leads the industry to solutions within the legal framework available. This display will lay the ground for considerations of potential approaches to either harmonise international cases of maritime insolvency or at least smoothen the existing problems and conflicts for the benefit of maritime debtors as well as creditors. Especially the practitioners' approach to the existing legal challenges in international maritime insolvency will be discussed, as such approach gives valuable

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information on how a whole industry finds ways to manage default and insolvency in an inevitably international surrounding.

4.1 Maritime Insolvency

It is impossible to assess the whole sector of the maritime industry within the book at hand, as it comprises *inter alia* shipping companies, charterers, vessel crews, stevedores, ports and port staff, bunker suppliers, ship yards and other ship service and maintenance companies. To observe the particular issues of a cross-border insolvency in the maritime industry, the insolvency of a shipping company is the most illustrative. The ship as mobile asset leads almost automatically to cross-border or transnational cases and in the light of the still on-going crisis in the shipping industry; the phenomenon of international insolvencies of shipping companies is still very topical.

4.1.1 'Ship Insolvency'

The term 'ship insolvency' is misleading, but to make things easier it is used in the following section. Ship insolvency is an abbreviating term, because the ship itself cannot become insolvent, but only the company, investment-fund or charterer behind it. Nevertheless, the term has its validity. The financial situation of the company hinges on the performance of the ship and the charter-rates that can be realised with the ship. And the vessel is often the main asset in an insolvency proceeding of shipping companies or charterers. The 'mono-asset' situation is a unique feature of ship insolvencies—compared to the insolvency procedures in other branches of industry—and leads to further problems when arrest and insolvency proceedings clash. In that situation, the only asset is subject to two competing proceedings. To make things more complicated, it often happens that these opposing proceedings are dealt with in different jurisdictions. Another factor in ship insolvencies is the value of the ships. The value of the debtor's main assets can easily be estimated in Millions of USD and the liquidation or reorganisation involves high stakes of capital. Understandably, the parties involved in such insolvency proceedings act very carefully either to prevent assets from losing their value or by trying to enforce as many claims against the debtor as possible. The values of both assets and claims in the maritime industry explain why the securing or enforcement does not stop at the borders of foreign jurisdictions. Both creditors and the debtor, or insolvency administrator respectively, are more ready to pursue their rights globally when it comes to such high values, which again leads to cases involving cross-border issues.

4.1.1.1 Number of Ship Insolvencies in Germany, England & Wales and USA

The severity of the global shipping crisis is underlined by 450 insolvencies of ship investment funds in Germany from the beginning of the shipping crisis in 2008 until November 2014.[1] These investment funds were all providing and administering the capital for the purchase and operation of a single vessel by setting up a so-called 'one-ship' company. Hence, the total of 450 ships is subject to insolvency proceedings. For England & Wales and the USA there is no reliable data available, but it can be assumed that the number may not be as high as for the German maritime industry. Compared to the German-owned fleet—3532 vessels—the fleets of the UK (1227) and the USA (1972) combined do not reach this number.[2]

Nonetheless, the US maritime industry's role in global bunker supplies and ship services and London as a centre for managing and insuring global shipping are indicators for the relevance of these two jurisdictions. The insolvent shipping companies may neither be based in England & Wales nor the USA, but their operation and business links often give legal grounds to start insolvency proceedings in these jurisdictions. Indeed, the bankruptcy court for the Southern District of New York had to deal with a number of maritime Chapter 15 procedures.[3] The debtors usually establish an attachment to New York due to the electronic fund transfers[4] (EFT) passing through the New York based banks. The easy access for nearly every maritime business to establish an attachment and thus procedural grounds in the USA explains why so many foreign companies do not only seek the recognition of their foreign insolvency proceedings under Chapter 15, but also use the liberal US insolvency system to restructure their entities under a Chapter 11 procedure combined with the USA wide automatic stay upon filing for insolvency or an orderly liquidation subject to Chapter 7. One of the most prominent examples of a US insolvency proceeding with a maritime debtor is Eastwind Maritime Inc.[5] In 2009, Eastwind filed for insolvency at the New York Southern District Court and was able to profit from the protective measures of the Chapter 7 procedure. The court's granting of the automatic stay ensured an orderly liquidation of this major shipping company. Due to the automatic stay, the assets of the company, mainly ships, were protected from arrest procedures. At that time Eastwind operated 105 vessels, of which it owned 68. The shipping company, responsible for the transport of almost all bananas from

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[1] See FOCUS Online *Schiffsfonds saufen ab – Anleger verlieren zehn Milliarden Euro* (25 November 2014) available at http://www.focus.de/finanzen/boerse/fonds/450-geschlossene-fonds-sind-pleite-schiffsfonds-saufen-ab-anleger-verlieren-zehn-milliarden-euro_id_4300137.html (last visited on 10 June 2018).

[2] See UNCTAD (2015), p. 36.

[3] See for this and the following sentence Seitz (2009), p. 1348.

[4] Global bank transfers in USD are usually through New York banks and in 2002 the money transfer through New York was held as a sufficient attachment for the filing of an insolvency proceeding in New York—Winter Storm Shipping, Ltd v. TPI [2002] 310 F.3d, on p. 273.

[5] Re Eastwind Maritime Inc. [2009] Bankr. S.D.N.Y., case no. 09-14047.

South America to North America and Europe, did not file for insolvency as a single company, but all its subsidiaries, each owning a ship. These filings were bundled, which helped to effectively administer the proceedings. The Chapter 7 proceeding is aimed at the best possible realisation of the company's assets in liquidation.

4.1.1.2 Number of Ship Arrests

Again, for the global number of ship arrests there is little data available, as courts do not breakdown their total arrest numbers to specific industries. An evaluation of data collected by Lloyd's List Intelligence has shown that in the years between 1995 and 2010 2195 ship arrests occurred.[6] The number of ships operating worldwide during that time, multiplied with the time of operation totals in 370,000 vessel-years and relativises the rate of ship-arrest to 0.6%. This might be a marginal number, but the arrest procedure still is an important tool of maritime claim enforcement and the interaction between insolvency and arrest procedures is worth examining, as many legal issues, summarised as problems of maritime cross-border insolvency, can be traced back to this conflict. The arrest procedure may occur in another jurisdiction than the insolvency filing and therefore a conflict of procedures is created.

4.1.2 Where to File for Insolvency?

As soon as the financial struggles of a shipping company or charterer start, the question where the filing for insolvency should take place arises. The EU Insolvency Regulation and the UNCITRAL Model Law only recognise an insolvency proceeding as a main proceeding if the corporate entity filed for insolvency at its 'centre of main interest'. What forms the centre of main interest of a shipping company or charterer? These questions are crucial and form the base of any further discussion of ship insolvencies. Furthermore, in the light of the recent shipping crisis, it can be observed that the number of shipping companies opting for an insolvency procedure in the USA steadily grows, even though the USA are not the home jurisdiction to most of these companies. This trend has to be analysed, as the debtor friendly US insolvency law establishes more and more a leading position in the "market" of insolvency jurisdictions, which raises the question whether a harmonisation of insolvency codes of different jurisdictions would still make sense or is already obsolete.

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[6] See for this and the following Franks et al. (2017), p. 7.

4.1.2.1 Definition of COMI

The centre of main interest ("**COMI**"), a term used both in the EU Insolvency Regulation (Art. 3) and the UNCITRAL Model Law on Cross-Border Insolvency (Art. 2 b), is the determining factor when deciding where the main insolvency proceeding of a company should take place. Art. 3 (1) s. 2 of the EU Insolvency Regulation defines the COMI as follows:

> The centre of main interest shall be the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties.

The Court of Justice of the European Union ("**CJEU**") clarified that objectivity lies at the heart of the determination of the debtor's COMI.[7] This objectivity is for the benefit of predictability and legal certainty, which should be the guiding factors.[8] With this criterion, the creditors are enabled to predict where a potential insolvency proceeding might take place and thereby foresee which jurisdiction's laws will apply to the insolvency or restructuring procedure and will govern their security interests. That the COMI determination shall be guided by objective factors is made clear by the stipulation that the COMI should be "*ascertainable by third parties*". The CJEU confirmed its *Eurofood* decision in the *Interedile*[9] case in 2011.

Further guidance on the determination of the debtor's COMI is given by Art. 3 (1) s. 3 EU Insolvency Regulation: "*the COMI of a company or legal person shall be at the place of its registered office, if there is no proof of the contrary*". This burden of proof further strengthens the position of creditors as it links the COMI to objective facts rather than leaving the determination to the blurred term of 'main interest'. In line with the EU Insolvency Regulation the UNCITRAL Model Law on Cross-Border Insolvency sets the same "*rebuttable presumption*"[10] for the determination of the debtor's COMI at its registered office in its Art. 16 (3).

As similar as the wording of the EU Insolvency Regulation and the UNCITRAL Model Law may be, the debtor's COMI is interpreted differently on both sides of the Atlantic Ocean.[11] The reason for that lies in the different wording of the US incorporation of the UNCITRAL Model Law in Chapter 15 of the US Bankruptcy Code. The US codification of 11 U.S.C. § 1516 (c) states: "*In the absence of evidence to the contrary, the debtor's registered office, […] is presumed to be the centre of main interest*." The US legislator changed the words of the Model Law from 'proof' to 'evidence'.[12] The use of the word 'evidence' does not only reflect the traditional legal wording in the US, but it turns the burden of proof totally around. Whereas the EU Insolvency Regulation and the Model Law use a rebuttable presumption, under Chapter 15 of the US Bankruptcy Code the burden of proof lies on

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[7] Case 341/04 Eurofood IFSC Ltd. [2006] E.C.R. I-3813.

[8] See Smid (2009), p. 70.

[9] Case 396/09 Interedile SRL v Fallimento Interedile SRL [2011] E.C.R. I-09915.

[10] El Borai (2006), p. 114.

[11] See Ragan (2010/2011), p. 150.

[12] See for this and the following Ragan (2010/2011), pp. 153, 154.

the party alleging the COMI in the USA.[13] All it needs is evidence of a company having assets or business operations abroad to shift the burden of proof to the foreign representative, who applies for the recognition of the foreign insolvency proceeding as a main proceeding by the US bankruptcy court under the Chapter 15 procedure. This difference may become a substantial issue if creditors are unhappy with the opening of an insolvency proceeding in the EU and still try to enforce their claims in the USA. Chapter 15 of the US Bankruptcy Code was designed for this situation. But the foreign representative who applies for the recognition of his proceeding as 'main proceeding' under Chapter 15, might face challenges of creditors in form of evidence, which cannot be as easily rebutted as under the EU Insolvency Regulation or the Model Law. Any evidence to the contrary, presented to the US bankruptcy court by the creditors against the COMI in the foreign jurisdiction, forces the representative to extensively proof that the debtor's registered office corresponds with its centre of main interest. Yet again, the effects from slight changes of the wording in an originally international provision show how difficult an effective international administration of an insolvency procedure may be and how cautious all parties involved have to be when pursuing their interests.

4.1.2.2 The COMI of a Ship

Based on the definitions of the EU Insolvency Regulation as well as the UNCITRAL Model Law on Cross-Border Insolvency the COMI of a shipping company or a 'one-ship' company can be assessed fairly easy. This is true *prima facie*. The shipping company's registered office is in country A and therefore the rebuttable presumption of the office's register applies and the main proceeding will be opened at the insolvency courts of country A. But especially in ship insolvencies the chances to rebut this presumption are fairly high and often desirable for the debtor or the creditors. For example, many shipping companies are registered in Germany, Greece and Cyprus, but the insolvency regimes of these countries lack much of the flexibility and restructuring tools the insolvency systems of the USA and England & Wales offer. Irrespective of the place of registry of the shipping company, the opening of an insolvency proceeding in England or the USA may still be considered and accepted as a main proceeding if there are enough facts backing the rebuttal of the Art. 3 EU Insolvency Regulation or Art. 16 of the Model Law. As illustrated before, the rebuttable presumption does not exist in the US Chapter 15 proceeding—11 U.S.C. § 1516 (c) places the burden of proof on the foreign representative claiming the main proceeding—therefore the determination of the COMI of a shipping

[13] In re Tri-Continental Exchange Ltd., 349 B.R. 635 (Bankr. E.D.Cal. 2006) the court expressly stated: "*Thus, if the foreign proceeding is not in the country of the registered office, then the foreign representative has the burden of proof on the question of centre of main interests. Correlatively, if the foreign proceeding is in the country of the registered office, and if there is evidence that the centre of main interests might be elsewhere, then the foreign representative must prove that the centre of main interest is in the same country as the registered office*".

company is not as straightforward as it might be in an EU proceeding. The debtor seeking to receive the recognition of a US bankruptcy court that its foreign proceeding is a 'main proceeding' at its COMI, often does so to profit from the granting of the automatic stay, which would hinder the debtor's creditors from enforcing their maritime claims in the USA and even globally. But for creditors with an interest in preventing the recognition of US bankruptcy courts it is not hard to give evidence that the COMI of the shipping company does not lay at its registered office.[14] In case of such evidence the burden of proof rests on the foreign representative who then has to spend time and money to convince the US bankruptcy court of the correlation of the shipping company's registered office and its COMI.

4.1.2.3 Flexibility of COMI

The EU Insolvency Regulation and the UNCITRAL Model Law are as clear as possible in giving guidelines and definitions for the 'centre of main interest' and the resulting 'main proceeding'. But the clear wording for predictability and legal certainty cannot prevent that the COMI of a shipping company can be handled flexibly, if not manipulated or abused, for the benefit of either the debtor itself or single groups of creditors. Some creditors, for example those secured by certain maritime liens that are only accepted in the USA, might try to push the insolvency to their favourable US insolvency jurisdiction. On the other hand creditors ranking behind such maritime liens for necessaries would naturally oppose the relocation of the COMI to the USA. Furthermore, the debtor might strive for a pre-insolvency restructuring of its company, which would not be feasible under the German insolvency law system, and thus shift the COMI to the more debtor friendly jurisdictions of the USA and England & Wales, where the restructuring tools for financially struggling companies are available without the requirement of the company being financially insolvent, as neither Chapter 11 nor the scheme of arrangement require the immanent insolvency of the company.

The change of COMI can be achieved if the debtor has more than one registered office, or if the creditors manage to argue and prove against the rebuttable presumption of the office location. Such a shift away from the presumed COMI of the registered office would not only give privilege to a certain class of creditors, but would also work to the detriment of less secured and less wealthy creditors, as they have to adapt to a new forum and often have to acquire further legal counselling.[15]

The 'flexibility' of the COMI for ship companies can be illustrated by the recent case of *Northsea Base Investment Ltd*,[16] decided by the English High Court of Justice. The facts of the case are very typical for insolvencies of ship and shipping

[14] As flexible as a shipping company can handle its COMI, as easy it is for maritime creditors to provide evidence for a COMI different from the company's registered office. The flexibility of the COMI of shipping companies will be discussed in the following section.

[15] See El Borai (2006), p. 116.

[16] Re Northsea Base Investment Ltd & others [2015] EWHC 121 (Ch).

companies and therefore worth to be considered. The administrators of eight companies applied to the English court for the declaration that the COMI of the companies lies in England and not in Cyprus, where all the companies were registered. Six of the companies each owned a ship, serving as special purpose vehicles; the other two companies were holdings. The applying administrators managed to rebut the COMI presumption of the offices' register by emphasising on the facts that the management of the ships was placed with an English ship agent and that the loan agreement with the financing bank syndicate were formed under English law and contained an exclusive English jurisdiction clause.[17] The court held that the proof of COMI in England was sufficient to rebut the office register presumption. This case may serve as template for other ship insolvencies, where the registry of the ship owning company and the management of the ship fall apart and can be located in different jurisdictions. In these cases, it can be easy for the debtor to choose between the jurisdictions and decide for the most debtor-friendly insolvency rules.

Another way to shift the COMI of a ship company is the relocation of the office. Several German companies have used this technique over years to have access to the restructuring tools of English insolvency law.[18] But with the amendment of the EU Insolvency Regulation 2015 the shifting of the office register is made more difficult. Art. 3 (1) s. 4 of the Regulation stipulates in reference to the rebuttable COMI presumption of the registered office:

> That presumption shall only apply if the registered office has not been moved to another Member State within the 3-month period prior to the request for the opening of insolvency proceedings.

Hence, a hasty shift of the office of a financially struggling ship company before the insolvency filing does not work anymore. The future debtor has to consider any such movement longer in advance. The 3-month period was introduced to protect creditors from being affected adversely by the change of COMI to another jurisdiction.

The COMI of a ship company is immaterial for a scheme of arrangement under English law. The EU Insolvency Regulation only covers "*insolvency proceedings listed in Annex A*" (Art. 2 (4)), which for England & Wales does not contain the proceeding 'scheme of arrangement', as it is an outside of court restructuring tool.[19] As a result the obstacle of a foreign COMI does not matter for an English scheme of arrangement proceeding and it is open to shipping companies from every foreign jurisdiction.[20]

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[17] For a comment on the Northsea Base Investment case see: Williams (2015).

[18] See Seelinger and Dähnert (2012), p. 243.

[19] See above at Sect. 2.1.2.2.5.3.

[20] See Bork (2012), p. 281.

*4.1.3 A "***Safe Harbour***"[21] for Distressed Shipping Companies*

Following the flexible approaches of English and US courts on the COMI of originally foreign companies these jurisdictions have developed into 'safe harbours' for various internationally operating companies. Among these, especially shipping companies are seeking their refuge in flight to the Anglo-American jurisdictions for an orderly and most importantly debtor-friendly restructuring procedure. This has not only positive aspects. Especially from a German perspective, the high degree of debtor-friendliness clashes with the public policies of creditors' best possible satisfaction and the protection of minor creditors. The longstanding 'safe harbour' of a Chapter 11 procedure in the USA will be displayed at first (*1.*), followed by the relatively new and out of court restructuring tool of 'scheme of arrangement' in England & Wales (*2.*).

4.1.3.1 US Chapter 11 for Financially Distressed Shipping Companies

The US insolvency law system has the longest restructuring tradition in the maritime sector. The USA have a strong maritime industry with a focus on maritime services like ship repair and bunker supply. The combination of a traditional maritime jurisdiction together with liberal insolvency and restructuring proceedings makes the USA for many shipping companies an ideal place to pursue a restructuring procedure. The following part, still in connection with the flexibility of COMI and the central question where to file for insolvency as a shipping company, will observe the phenomenon of the USA as a popular place of restructuring for maritime entities from all over the world.

Outside the reach of the EU Insolvency Regulation, the COMI of a shipping company can be shifted fairly easy, for example to the USA. How easily this shift to the USA can take place has already been addressed above. In the following, it will be examined what the motivation is for shipping companies to actually choose insolvency proceedings in the USA and how many shipping companies make the shift of their COMI to gain access to the US insolvency law to reach the so-called 'safe harbour'.

The special attraction of the US insolvency law system for shipping companies in financial distress is multi-layered. Firstly, in contrast to many other insolvency law systems worldwide, the US bankruptcy courts are willing to facilitate group restructurings based on a motion of the corporate group to jointly administer the single corporations.[22] In Germany, the necessity to facilitate group restructurings (*Konzern-insolvenz*) has been claimed from the beginnings of the insolvency law

[21] DeNatale and Mechling (2013).

[22] See Couwenberg and Lubben (2015), p. 722.

reform process of 2012, but until today this legislative project remains unfinished.[23] But not only Germany lacks progressiveness in facilitating the allocation of a corporate group's insolvency or restructuring proceeding at a single and central court. Little efforts have been made at national and international levels to allow debtors to file motions for joint administration like in the US insolvency system.[24] Especially shipping companies, often holding or managing numerous one-ship companies, profit hugely from a joint administration of their insolvency proceedings in just one court. In the recent case of Genco Shipping & Trading Limited,[25] the US bankruptcy court of the Southern District of New York impressively demonstrated its ability to handle the reorganisation of one of the world's largest shipping companies in the bulk sector, which operated 53 ships and totalled senior debt in the amount of USD 1.3 billion.

Secondly, the US Chapter 11 procedure does not install an insolvency administrator or any other third party, which in the proceedings of the shipping industry has two advantages. The debtor remains in control of his business and assets and hence the management of the shipping business is uninterrupted.[26] Also the banks as main creditors often prefer to leave the debtor in control of the trading fleet, as the management of ships in global trade needs special expertise and market knowledge, which cannot be expected from an insolvency administrator.

Thirdly, the automatic stay offered by US insolvency law is globally respected and the "*aggressive extraterritoriality of the Bankruptcy Code*"[27] helps containing the risk of exposing the shipping companies' assets, the ships, to arrest procedures, which endanger the success of an effective restructuring procedure.[28]

Additionally, the USA, especially New York City and the Federal State of Delaware, are international centres of financial operations, administrations and incorporation of special purpose vehicles. Nearly every bank in the world has either a branch or subsidiary in New York or operates through New York's banks in USD. Thus, institutional lenders and creditors of shipping companies accept restructuring procedures ordered by US Bankruptcy Courts to comply with US laws, courts and institutions.[29] A violation of the automatic stay or other US Bankruptcy Court orders exposes the creditors of shipping companies to a high risk of being held liable for noncompliance with US court orders. This is what makes the US insolvency law system so powerful and globally accepted and helps the automatic stay to be upheld, and in the end, makes the enforcement of US restructuring plans resulting from Chapter 11 procedures so effective.

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[23] A first draft bill on corporate group insolvency and restructuring has been introduced in the German parliament (*Bundestag*) in January 2014 (BT-Drs. 18/407). Since that first draft no further progress has been made in that particular field of insolvency law.

[24] See Paulus (2006/2007), p. 820.

[25] In re: Genco Shipping & Trading Limited [2014] 513 B.R. 233.

[26] See DeNatale and Mechling (2013).

[27] See Couwenberg and Lubben (2015), p. 722.

[28] See Couwenberg and Lubben (2015), p. 742.

[29] See for this and the following sentence Couwenberg and Lubben (2015), p. 741.

Finally, the flexibility and the solution-orientation of US bankruptcy courts have further added to the attractiveness of US insolvency law to foreign financially distressed shipping companies. In the famous insolvency proceeding of Hellenic Lines in 1983/1984, the US bankruptcy court was not able to prevent four creditors from arresting ships of Hellenic Lines in New York, even though the insolvency proceeding had already begun with Hellenic's filing for Chapter 11 reorganisation and the automatic stay being in place.[30] These arrests disrupted Hellenic Lines' business and as a result, the Greek shipping company had to go from a Chapter 11 reorganisation procedure into Chapter 7's liquidation. The arrests had prevented all restructuring efforts. As a result and due to the high degree of court's discretion and therefore flexibility, US bankruptcy courts today give shipping companies that are filing for Chapter 11 proceedings the chance to satisfy "*critical vendors*",[31] in advance and preferentially, who otherwise would threaten the success of the restructuring procedure, by arresting ships of the company.[32] US bankruptcy courts allow the satisfaction of critical or foreign creditors, often vendors secured by maritime liens, outside of the insolvency proceeding on a motion known as 'critical vendor motion'. This 'strategic' satisfaction of possibly interfering creditors has the further effect that all issues arising from the interplay of insolvency and maritime law are usually avoided and do not lead to timely and extended legal controversy.[33] By satisfying the ship's vendors, the shipping company ensures an orderly operation of the ship and can often maintain its business relationship with the vendor for the future.[34]

All these attributes of the US insolvency system add up and make the US jurisdiction preferable for shipping companies, when these companies have to make the choice of where to restructure. As easy as the access to the US insolvency jurisdiction may be, the shift to a foreign jurisdiction is costly and needs to be prepared with enough foresight to ensure the financial situation of the company has not deteriorated to an extent where a restructuring procedure does not make sense anymore. A further reason for foreign maritime debtors to open procedures in the USA lies in the readiness of US bankruptcy courts to recognise foreign insolvency proceedings as 'foreign main proceedings' under Chapter 15 of the US Bankruptcy Code, which then gives the foreign insolvency administrator the chance to file a motion for a relief from lien-enforcements in the USA during the insolvency proceeding.[35] Hence, Chapter 15 and the following restraints on enforcements against the debtor's assets expand the effect of the US 'safe harbour' stance beyond the borders of the

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[30] Morgan Guaranty Trust Company of New York v. Hellenic Lines Ltd. [1984] 38 B.R. 987.

[31] DeNatale and Mechling (2013).

[32] See for this and the following sentence DeNatale and Mechling (2013).

[33] Cases in which US bankruptcy courts authorised the satisfaction of critical vendors: General Maritime [2012] Case No. 11-15285 (Bankr. S.D.N.Y.); Omega Navigation Enterprises [2012] Case No. 11-35927 (Bankr. S.D.Tex.); Marco Polo Seatrade B.V. [2011] Case No. 11-13634 (Bankr. S.D.N.Y.) and B+H Ocean Carriers [2012] Case No. 12-12356 (Bankr. S.D.N.Y.).

[34] See DeNatale and Mechling (2013).

[35] Seitz (2009), pp. 1349–1351. An illustrative case for a foreign maritime debtor using Chapter 15 procedures to protect its assets against enforcements in the USA is *In re* Britannia Bulk PLC [2008] Case No. 08-14543 (Bankr. S.D.N.Y.).

USA. The motivation of shipping companies to strive for a proceeding under US insolvency law became clearer and today it is interesting to see how many shipping companies actually take the step to shift their COMI to the USA.

In their article "*Corporate Bankruptcy Tourists*"[36] Couwenberg and Lubben present and analyse a data set of major foreign debtors filing for 7 and Chapter 11 procedures in the USA from 2005 to 2012.[37] During that time, 316 cases of that kind occurred. Of these 316 cases, 231 were filed at the bankruptcy court of the Southern District of New York (Bankr. S.D.N.Y.), which illustrates the importance of New York City, in particular Manhattan—where the Southern District of New York is located—as a global financial centre.[38] Interesting and another proof of the leading role of US insolvency law in corporate group restructurings is the fact that the 316 cases of foreign debtors could be allocated to 49 corporate groups. Furthermore, the data set gave evidence to the trend that shipping companies, which are often organised as corporate groups[39] with a managing company and a number of one-ship companies, seek to facilitate their restructuring efforts under the regime of the US Bankruptcy Code. The evidence is gained from the original jurisdiction of incorporation of the filing debtors. The data set showed that 60% of the foreign debtors were originally incorporated in either Liberia or the Marshall Islands.[40] These two countries are famous in the shipping industry for providing so-called 'flags of convenience' with their open ship registers and little regulation on employment and security laws enforceable on ships sailing under their flags. This clearly shows that the maritime industry makes up the majority of cases where a foreign debtor files for an insolvency proceeding in the USA. The shipping industry may have an advantage to flexibly change their COMIs, with mobile assets and management structures, which can be moved from one jurisdiction to another, but more importantly, the shipping industry recognises the advantages of the US Bankruptcy Code and the resulting insolvency system for the special needs of their economic sector.

But for four cases, all other foreign debtors formed part of international corporate groups or through their business they owned mobile assets. These mobile assets are usually ships, as only one case included a debtor running a satellite business.[41] This again gives guidance to the central question, why financially struggling companies choose to restructure abroad in the USA and not under their domestic proceedings. The US Bankruptcy Code and its insolvency law system offer flexibility, group restructurings and the protection of mobile assets. These features make the US insolvency system so strong and competitive. The German insolvency system has failed to provide comparable and internationally accepted proceedings and protection tools for financially struggling companies. Only England & Wales seem

[36] See Couwenberg and Lubben (2015), pp. 719–749.

[37] See Couwenberg and Lubben (2015), p. 726.

[38] See Couwenberg and Lubben (2015), pp. 727, 728.

[39] The data set showed that foreign debtors with a shipping background file motions for joint administration as they include in average 32.7 companies.

[40] See Couwenberg and Lubben (2015), p. 732.

[41] See Couwenberg and Lubben (2015), pp. 739, 740.

to have developed an adequate answer to the US supremacy in international insolvency cases, as the following section is going to show.

4.1.3.2 English Scheme of Arrangement for Financially Distressed Shipping Companies

Like their US counterparts, courts in England & Wales have lowered the bar for foreign companies to have access to the English insolvency and restructuring procedures. Together with London's position as one of the leading centres for finance in Europe, the liberal interpretation of a company's COMI has made England & Wales a strong competitor in the global competition of jurisdictions for leading corporate group restructurings. The scheme of arrangement[42] has been the main proceeding that foreign companies in financial distress were aiming to undergo in England & Wales and the scheme of arrangement has been described as the "*most likely alternative to a Chapter 11 case*".[43] In previous sections of this book, many examples of foreign companies from various industries using the scheme of arrangement have been given. The still growing list of foreign companies that are restructuring their loans and other credit agreements in England & Wales illustrates the increasing significance of the scheme that is codified in the 2006 Companies Act.

Nevertheless, the fact that the scheme of arrangement is relatively new, especially in comparison to the long established Chapter 11 procedure in the USA, the number of case law is not extensive yet. What might be the biggest attraction of the scheme of arrangement, the lack of protection measures for junior and minority creditors, has at the same time caused criticism on this out-of-court-restructuring proceeding.[44] Furthermore, the scheme of arrangement is not considered to be an insolvency proceeding and thus the opening of a scheme of arrangement procedure does not have the effect of barring other insolvency procedures or legal enforcements against the company. In contrast, other regular insolvency proceedings under the EU Insolvency Regulation receive an effectiveness protection.[45] But especially shipping companies need the 'breathing spell', which is usually provided by an automatic stay or comparable moratorium in insolvency procedures.

Another reason why the scheme of arrangement is not used by shipping companies as extensively as by enterprises from other industries are the position and rights of the maritime specific creditor group of maritime lienholders. Their claims are usually minor in value to those of the ship-financing banks, but due to the powerful enforcement tool of ship arrest, maritime lienholders are the first creditors who should be satisfied to ensure that they do not disrupt the restructuring or insolvency proceeding with an arrest of the ship. As the scheme of arrangement is specifically designed for the 'cram down' of minor and junior creditors and does not provide

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[42] For a detailed display of the English scheme of arrangement see above at Sect. 2.1.2.2.5.3.

[43] Couwenberg and Lubben (2015), p. 743.

[44] See Couwenberg and Lubben (2015), p. 743.

[45] See Couwenberg and Lubben (2015), p. 744.

any form of moratorium, the eventual financial restructuring of a shipping company under a scheme would possibly have to face disruption by ship arrests, if the minor creditors like maritime lienholders see the danger of being 'crammed down' in a vote on the future loan and debt structure of the shipping company. Besides, the English courts would most certainly not approve the scheme of arrangement if they find maritime lienholders, who are usually protected and not even losing their rights in a sale of the ship, are being treated unfairly, which in legal terms means the deterioration of their legal position and security interest. A 'cram down' is nothing else than a vote on the deterioration of the minor creditors' rights.

The English scheme of arrangement is obviously designed to provide companies in financial distress with an opportunity to restructure their loan and debt structure. The specialties of maritime law, in particular maritime liens, have not been taken into account at the introduction of this modern restructuring procedure.

4.1.4 Interim Result

Since the beginning of the recent shipping crisis, the challenges of maritime insolvency and its usually international, cross-border character have left the affected shipping companies with the question, where to file for insolvency. The findings above show that major maritime debtors file for insolvency in the USA in order to circumnavigate the legal obstacles of maritime liens, recognition of foreign insolvency proceedings and the threat of arrest procedures against the companies' ships.

If the shipping company or its main creditors decide to pursue an insolvency or restructuring procedure under a foreign jurisdiction either by shifting the centre of main interest or by locating assets in the USA, the effects are twofold. On one hand, the minor creditors may be burdened by the shift to a foreign jurisdiction, on the other hand, the forum shopping of debtors as well as main creditors for the most suitable insolvency or restructuring jurisdiction leads to a specialisation on the side of courts and legal professionals in the respective jurisdiction. From this specialisation, the insolvency procedures benefit in general due to higher efficiency and experience. With more and more ship insolvencies shifted to the USA and England & Wales, the shipping industry itself develops improved experience when it comes to dealing with financially struggling entities and finding the adequate answers.

The leading position of the US insolvency system derives its strength from its pioneering role since the late 1970s and its liberal and debtor-friendly stance. The legislators of Germany and England & Wales were always second or third to reform their insolvency laws in order to meet the needs of the global default market. England & Wales may have found an adequate answer to the US restructuring tools with the scheme of arrangement, but it suits financial restructurings more than it does the reorganisation of shipping companies with their specific needs due to their mobile assets. Germany at least has not yet found an adequate answer to its strong competitors. Especially larger and globally operating companies, maritime and non-maritime, shift their COMI to the USA or England & Wales in order to get

access to more established and internationally recognised restructuring procedures. Those German shipping companies that file for insolvency in Germany usually suffer from severe over-indebtedness that precludes any restructuring procedure and have almost only German banks as main creditors and thus the German insolvency proceedings, mainly liquidations, suit this typical situation. The phenomenon of choosing foreign jurisdictions and proceedings over the ones available at home can be observed in the field of commercial dispute litigation as well. Parties to commercial disputes seem to have avoided German commercial courts more and more over the years and there is a clear shift to courts of international arbitration.[46] Hence, Anglo-American legal procedures will continue their leading role in the future.

But as high as the acceptance and appreciation of the US insolvency proceedings and its advantages may be, the trend to shift the COMI to the USA has a downside from the perspective of transnationalisation of law. The concentration on the US insolvency system puts a major threat to the efforts made to achieve a transnational insolvency system, where the insolvency courts cooperate with their foreign counterparts in international insolvency proceedings.[47] In other words, if nearly all major and international cases of defaulting companies and corporate groups choose the USA, why is there a need to globally harmonise the insolvency codes and rules? The US supremacy may make these harmonisation efforts obsolete. But even the US bankruptcy courts have to rely on cooperation in international cases and this cooperation and understanding for other jurisdictions has evolved out of the achievements the international insolvency law has made. Furthermore, the USA may be the first choice for financially struggling large corporations, but this does not mean that the US insolvency system is flawless. Especially at the interplay of insolvency and maritime law huge tensions have arisen and are still topical, as the following section will show.

4.2 Issues in Maritime Insolvency

The issues in maritime insolvency, here the insolvency of a shipping company, vary from jurisdiction to jurisdiction. The issues that result from the interplay of insolvency law and maritime law will be displayed separately for Germany, England & Wales and the USA. The identification of the main issues arising at the intersection of insolvency and maritime law is important to enable a profound analysis of the harmonisation-potential in this particular field of law. The conflict between the

[46] See Calliess and Hoffmann (2009), p. 120.

[47] See Couwenberg and Lubben (2015), p. 721: "*By analysing this new dataset, we conclude that the United States Bankruptcy Code is used by foreign debtors in a way that is diametrically opposed to most of the extant thinking on transnational insolvency. In particular, foreign debtors use the American bankruptcy system to impose a global discharge on assets, without the cooperation of any jurisdiction beyond the United States, where the case is pending. This is in complete contrast with the efforts of UNCITRAL to facilitate cross-border cooperation among jurisdictions*".

insolvency law regime and the ancient concepts of maritime law are already problematic within each jurisdiction itself. The dimension of internationality in maritime cross-border insolvencies adds further complication and legal uncertainty. It is therefore not only a conflict of laws in the classical sense, where the private law of one country and the law of another have to be considered to decide which applies, but also a conflict of laws—insolvency and maritime—within one jurisdiction. Each of the following three jurisdictions has different legal problems in maritime insolvency, because the legal systems as well as their respective adjudication of power to handle maritime insolvency cases differ. Nevertheless, the examination of the legal issues is important to develop an understanding what legal challenges result from the intersection of insolvency and maritime law. With this understanding, the further examination of potential international harmonisation in this special field of law is more effective and problem-orientated.

4.2.1 Maritime Insolvency in Germany

Germany has seen an unprecedented number of shipping insolvencies, with such proceedings concentrated at the traditional strongholds of the German maritime industry, the Hanseatic cities of Hamburg and Bremen. The German court system does not differentiate between admiralty and 'normal' courts, but the courts of insolvency (*Insolvenzgerichte*) form a special branch within the German court structure.

4.2.1.1 Forum Shopping in North Germany

A third insolvency court with high numbers of shipping companies filing for insolvency is Niebüll. This small court is located at the rural and most northern county of Germany, where traditionally no shipping companies have their registered offices. Still, from January 2013 to March 2014, at the midst of the shipping crisis in Germany, 38 shipping companies filed for insolvency at the insolvency court of Niebüll.[48] All of these 38 companies had changed their registered office to Niebüll county, precisely to the island of Sylt, shortly before the filing for insolvency took place. This change of registered office is a clear sign of 'forum shopping'. The reasons for the change of forum by the shipping companies are not easily accessible. One reason may be that the insolvency court of Niebüll appoints insolvency administrators who are more in favour of the struggling shipping companies than the insolvency court of Hamburg.[49] Furthermore, the insolvency court of Niebüll has only one insolvency judge and therefore parties of an insolvency proceeding can predict the handling of the case and the direction the proceeding will take more eas-

[48] See for this and the following sentence Brambusch (2014).

[49] See Brambusch (2014).

ily. Of course there are no publications on this shipping-specific forum shopping. This makes it difficult to explain this phenomenon, but together with the fact of just one judge in Niebüll, the other explanation for the rising number of shifted offices before an insolvency filing may be the approach of the insolvency court in Hamburg on a very specific legal issue in shipping insolvencies. This can only be understood when looking at the other two main insolvency courts for maritime insolvencies, Bremen and Hamburg.

4.2.1.2 The Preliminary Phase in a Ship Insolvency Proceeding

The insolvency courts of Bremen and Hamburg are just a bit more than 100 km away from each other, but the legal approach to the insolvency of shipping companies and to the main asset—the ship—could not differ more. In the reply by the German section of the CMI to the CMI Questionnaire on Maritime Cross-Border Insolvency,[50] one of the main issues of maritime insolvency in Germany was expressly the uncertainty of the vessel during the preliminary phase of the insolvency proceeding of the shipping company. The preliminary phase under German insolvency law is the period between the filing for insolvency and the official opening and publication of the insolvency proceeding by the insolvency court. This phase is generally loaded with legal conflicts, because on one hand insolvency law wants to grant its safety and asset protecting measures as early as possible, on the other hand the insolvency court does not want to grant a too privileged status to a debtor who could in the end not qualify as an insolvency debtor or where the assets and financial situation indicate that an insolvency proceeding would be in vain and would only cost the creditors money and time.

During the preliminary phase of a shipping company's insolvency proceeding, the insolvency court has to decide whether to grant a stay of all proceedings against the filing shipping company or not. The decision is often vital for the whole proceeding, as without a stay of proceedings creditors of the company or the ship can pursue arrest procedures against the ship in Germany and abroad. Of course, such an arrest procedure poses the biggest threat to the shipping company, because with an arrested ship it cannot continue its business and often the only asset of the company is bound in such a proceeding.

The German Insolvency Code (InsO) allows insolvency courts during the preliminary phase under sec. 21 (2) No. 3 InsO to "*order a prohibition or provisional restriction on measures of execution against the debtor unless immovable are involved*". This 'restriction on measures' is an equivalent to the US Bankruptcy Code's automatic stay. What separates the insolvency courts of Bremen and Hamburg is the wording in this provision 'unless immovable'. Under German law, seagoing vessels are usually treated as immovable, because like land property they

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[50] The reply is available at http://www.comitemaritime.org/Uploads/Work%20In%20Progress/Cross-Border%20Insolvency/2015-04-02%20-%20Answer%20CMI%20Questionnaire%20Cross-Border%20Insolvency%20German%20MLA.pdf (last visited on 10 June 2018).

are registered and subject to mortgages just like other immovable objects. Ships' ability to move is not taken into account under German property and credit security law. The German insolvency code has adapted this legal concept as well and categorises vessels as immovable objects in sec. 165 InsO and secc. 162–171 ZVG (German Enforcement Code).[51]

The insolvency court in Bremen moved away from this strict application of the law in case the filing company is a shipping company and its major asset is a seagoing vessel, which is located in foreign waters and under the threat to be arrested by its creditors.[52] The courts main argument against treating a seagoing vessel like an 'immovable' under sec. 21 (2) No. 3 InsO is based on the unavailability of sec. 30d (4) ZVG. The ship may fall into the same category as land property, but where the (preliminary) insolvency administrator can apply to the court responsible for execution (*Vollstreckungsgericht*) in case a creditor enforces a claim against the debtor's property during the preliminary phase for a halt of enforcement under sec. 30d ZVG, this is not the case if the ship is arrested abroad and therefore beyond the scope of sec. 30d (4) ZVG. This leads the Bremen insolvency court to the conclusion that sec. 21 (2) No. 3 InsO has to be interpreted beyond its wording and with account to the special circumstances of a maritime ship insolvency. The protection of the debtor's assets cannot be achieved if sec. 21 (2) No. 3 InsO is strictly applied, so the reasoning of the insolvency court in Bremen.[53] The decision of the insolvency court in Bremen has been harshly criticised,[54] as the Bremen insolvency court moved away from legal grounds and for a legal analogy—as proposed by the Bremen court—no legal gaps and uncertainties are apparent. Additionally, the Bremen decision is criticised on the grounds that it emphasises too much the missing protection of the debtor's assets abroad during the preliminary phase, whereas for example Art. 52 of the EU Insolvency Regulation offers enough protection and Germany has international insolvency rules in place to deal with that problem.[55]

In contrast to the view that the Bremen insolvency court has taken on the 'movability' of ships, the insolvency court Hamburg strictly adheres to the wording of sec. 21 (2) No. 3 InsO and does not grant a stay of proceedings for seagoing vessels during the preliminary phase of the insolvency proceeding, because German law categorises ships as 'immovable'.[56] The Hamburg insolvency court explicitly contradicts the opinion of the Bremen court and opposes an interpretation of sec. 21 (2) No. 3 InsO beyond its wording.

Do these two differing views on the treatment of seagoing vessels during the preliminary phase of Germany insolvency proceedings have the effect of leading shipping companies in Hamburg to change their office to other courts in Germany? This question, as outlined before, cannot be answered completely without proof by

[51] See Tetzlaff in Kirchhof et al. (2013), § 165 marg. no. 25.

[52] LG Bremen, Beschl. v. 14.8.2011, (2012), p. 904.

[53] See Frege et al. (2015), p. 320, marg. no. 689a.

[54] See Vallender in Uhlenbruck (2015), § 21, marg. no. 26.

[55] See the commentary to LG Bremen, Beschl. v. 14.8.2011 by B. Joos (2012), p. 388.

[56] AG Hamburg (2016) WM, on p. 135, 136.

statements or articles by parties involved. But from the shipping companies' point of view, it is clear that the Hamburg approach of strictly treating seagoing vessels as 'immovable', has disadvantages which might endanger the chances of a restructuring or effective liquidation. The insolvency court of Hamburg may have placed its decision on firm legal grounds, but the Bremen insolvency court has taken the more practical and industry-specific approach.[57] A foreign arrest procedure almost inevitably stops all chances of the preliminary insolvency administrator or the debtor himself, if it is a debtor-in-possession proceeding, to sell the ship quickly. The arrest of a ship may take months or years until resolved and during that time, the ship cannot operate and earn money for the shipping company and the condition of an arrested ship in the harbour deteriorates very quickly. All these factors accumulate to the short phrase, that the ship has to operate to make money or it only costs money. From a maritime law point of view, the decision of the insolvency court in Hamburg, allowing creditors to arrest the ship during the preliminary phase, may be favourable as it leaves maritime law unaffected from an interference of insolvency law. From the view of insolvency law and financially struggling shipping companies, however, the Hamburg decision is fatal. Without the granting of an automatic stay—a breathing spell—in German maritime insolvency procedures the position of the German insolvency jurisdiction is further weakened in the international competition of jurisdictions and the internationally operating shipping companies are almost pushed to go 'forum shopping' in order to find a maritime specific insolvency code and system that allows an effective liquidation or restructuring of the entity. Furthermore, the preliminary phase of a shipping company's insolvency proceeding is very crucial as the selling of the ship has to be achieved as quickly as possible as any loss of time, for example due to an arrest procedure, means a loss of the ship's value.

What makes the preliminary phase even more complicated is the fact that the preliminary phase is not internationally recognised as an 'insolvency proceeding' and therefore under the EU Insolvency Regulation or the UNCITRAL Model Law on Cross-Border Insolvency—if Germany ever incorporates it—the debtor has no chance to apply for the recognition as a foreign main proceeding and by that profiting from the granting of an automatic stay in foreign jurisdictions. As a result, if the view of the Hamburg insolvency court becomes dominant in Germany, the competitiveness of the German insolvency system will be further weakened and forum shopping to foreign jurisdictions will see new highs.

The problems of forum shopping and the different legal interpretations of the term 'immovable asset' have to be solved within the German jurisdiction. An international unification or efforts for an international harmonisation in the field of maritime cross-border insolvency would have no effect on these issues. Therefore it is true to say that the existing problems in German maritime insolvency are exclusively domestic, even though the granting of a stay may of course affect foreign arrest proceedings.

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[57] German maritime law practitioners regarded the Bremen court decision as correct in Wolf and Hartenstein (2012).

4.2.2 Maritime Insolvency in England & Wales

Over the past centuries, maritime law and insolvency law may have evolved without much regard to the respective other,[58] but when researching on the conflicts of these two sets of law in England & Wales, not many articles or books addressing the issue can be found. This is very much in contrast to the USA, where a whole field of legal research has evolved around maritime insolvency and the connected cross-border issues.

The main issue in England & Wales at the interplay of insolvency law and maritime law is the effect an insolvency proceeding, especially liquidation, has on a maritime proceeding in form of an action *in* rem in the admiralty court.

The status of maritime liens in an insolvency proceeding is relatively straightforward under English law. If the claimant started the *in rem* proceeding before the debtor filed for insolvency, the filing for insolvency halts the *in rem* proceeding. From that moment on, the creditor needs to apply to court to receive the grant to continue his action *in rem*.[59] The lienholders do not form part of the insolvency proceeding and can therefore demand leave from the court to enforce their claims against the ship, which is very likely to be granted.[60] Stephenson, Brandon and Brightman LJJ, who decided that the holder of a maritime lien ranked as a secured creditor for the purpose of insolvency legislation, established this view in the case *In re* Aro Co Ltd [1980]. They held that the holder of a maritime lien would be automatically granted leave to enforce its charge, despite the existence of a winding-up order. They held that service of the writ was not necessary to create or perfect the status of a secured creditor that the plaintiff had obtained merely by commencing the proceedings *in rem*.[61]

Even in cases where the debtor filed for insolvency and received court's recognition before the enforcement of maritime claims by an action *in* rem, those creditors that are secured by maritime liens or ship mortgages can establish their status as secured creditors. Again, upon simple application by the maritime claimants, the court will allow them to enforce their security interest despite the opening of an insolvency proceeding or the winding-up order.[62] English courts take a clear stance in favour of the supremacy of maritime creditors and arrest proceedings. This stance has been adopted throughout the Commonwealth and led courts in Singapore[63] and

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[58] See Thomas (1980), p. 65: "*The law of [insolvency] seems to have developed with little regard to the Admiralty proceedings* in rem."

[59] See Derrington and Turner (2007), p. 202.

[60] See Tetley and Wilkins (1998), p. 1134.

[61] See *In re* Aro Co Ltd [1980], Ch. 196.

[62] See Derrington and Turner (2007), pp. 202, 203.

[63] Beluga Chartering GmbH (in liquidation in Germany) v Beluga Projects (Singapore) Pte Ltd (in liquidation) [2014] 2 SLR 815, but more recently, the Singapore High Court recognised the South Korean rehabilitation proceedings of Hanjin Shipping Co Ltd in *Re* Taisoo Suk (as foreign representative of Hanjin Shipping Co Ltd) [2016] SGHC 195. For a detailed review of the Hanjin Shipping insolvency, the most recent insolvency of an internationally operating shipping company, see at Sect. 4.4.4.

Australia[64] to allow arrest procedures in their harbours despite the fact that insolvency procedures had already been initiated in other jurisdictions.

In recent years the out of court restructuring procedure of 'scheme of arrangement' has become a restructuring tool for a growing number of financially struggling maritime entities. The scheme of arrangement in its form under the law of England & Wales is globally unique and enjoys wide acceptance among the judicial body in England and restructuring practitioners worldwide. The issues and problems that can occur before, during and after a scheme of arrangement proceeding are not specific to the maritime industry and therefore do not form part of this book.[65]

4.2.3 Maritime Insolvency in the USA

The US legal system is leading since the 1970s in taking a liberal and modern approach on companies in financial distress. The Bankruptcy Code has been the model for many other jurisdictions which intended to reform their insolvency codes and restructuring procedures available for companies in distress. Especially the US Bankruptcy Code's debtor-friendly stance has led to the situation that the USA is today a "*safe harbour*" for financially struggling shipping companies worldwide.[66] An analysis of the foreign companies filing for insolvency in the USA has shown that the US Bankruptcy Code is especially suitable for shipping companies, which often have the characteristic of being a corporate group and operating ships, which are mobile and very arrest exposed assets.[67] Nevertheless, the Bankruptcy Code and the Maritime Law system of the USA are not in perfect harmony and already in 1985, the *Tulane Admiralty Law Institute Symposium in Admiralty Interface: Bankruptcy v. Maritime Rights*[68] addressed the problematic interplay of insolvency and maritime law in the US legal system. But in retrospection on that symposium, the sobering summary reads as follows: "*Many of the questions from 1985 remain unanswered* today".[69] Some go as far as to use drastic analogies to describe the interplay of maritime law rules and the US Bankruptcy Code as an "*international*

[64] Yu v STX Pan Ocean Co Ltd (South Korea) [2013] 223 FCR 189; Hur v Samsun Logix Corporation [2015] 238 FCR 483; and (The ship) Sea Hawk v Reiter Petroleum Inc [2016] 335 ALR 578.

[65] For a general display of the scheme of arrangement see above at Sect. 2.1.2.2.5.3 and for the growing importance of the English jurisdiction available to international restructuring projects see above at the end of Sect. 2.1.2.2.5.3.

[66] DeNatale and Mechling (2013).

[67] See for the whole analysis Couwenberg and Lubben (2015), pp. 719 seqq.

[68] See as a collection of various articles: *The Tulane Admiralty Law Institute Symposium on Admiralty Interface: Bankruptcy v. Maritime Rights* (1985) 59 Tul. L. Rev., on pp. 1157–1486.

[69] Seitz (2009), p. 1341.

feud between admiralty and bankruptcy".[70] The following section will concentrate on the main legal issues arising at the intersection of maritime and insolvency law in the USA. One of the main problems is the competence conflict of the admiralty court and the bankruptcy court over dealing with the ships of insolvent shipping companies—and especially selling the ships—(*1.*), and as a result the conflict of admiralty proceedings and the automatic stay (*2.*). In an effort to solve these problems a debate has evolved over the status of special maritime security interests, like maritime liens, and their status in US insolvency proceedings (*3.*).

4.2.3.1 Admiralty Court vs. Bankruptcy Court

The first main issue in maritime insolvency cases in the USA is the conflict of powers between the admiralty court and the bankruptcy court. This conflict roots in the maritime law concept that only the admiralty court can sell the ship free of liens, in other words, only this specialised court can clean the ship from any former obligation, which otherwise would be enforceable against the new ship-owner. This 'clearing competence' can only be exercised in an action *in rem* proceeding.[71] The bankruptcy court in the insolvency proceedings of Hellenic Lines confirmed this view.[72] Whether the same competence can be adjudicated to bankruptcy courts has not been decided by any precedential case[73] and the Bankruptcy Code does not provide any solution to this question.[74]

The lack of clear guidance on this matter opens the discussion for placing 'admiralty competences' in the bankruptcy court and thus allowing bankruptcy courts to sell ships in an insolvency proceeding free of charges. The proposal "*that a bankruptcy court should be able to sell a vessel free of maritime liens without having to refer such a sale to an admiralty court*"[75] may sound absurd to the maritime law community, but it is worth considering. Giving the bankruptcy court jurisdiction on the selling of ships may appear to be a breach of long standing international maritime traditions, but it would give effect to the bankruptcy court's role to facilitate the best possible satisfaction of the debtor's creditors. The main argument in favour of a bankruptcy court's competence to sell ships free of maritime liens is fairness.[76] It is true that the goal to treat all creditors in an insolvency proceeding fairly and to find the best solution for all parties involved can only be achieved by placing the administration of the entire insolvency estate in the hands of just one court. The bank-

[70] Falzone (2014), p. 1175.

[71] See Weil (1996), p. 200.

[72] See Hellenic Lines [1984] AMC, on pp. 1092–1093.

[73] In McCullough (2007/2008), p. 491 the author describes this lack of precedent: "*Without a clear rule by Congress or the Supreme Court concerning this admiralty jurisdiction issue, one can only guess how a court will rule in any given case*".

[74] See Weil (1996), p. 201.

[75] Ende (1988), p. 573.

[76] See Ende (1988), p. 585.

ruptcy court, in contrast to the admiralty court, takes all creditors' claims, maritime or non-maritime, into account and supervises the whole of the debtor's estate.[77]

The approach to place the competence to sell the ship free of maritime liens with bankruptcy courts may be desirable for insolvency practitioners, as it would solve the jurisdiction issue between bankruptcy and admiralty courts. But this approach can be rebutted on very practical grounds. The action *in rem* proceeding in admiralty jurisdiction is well established and usually very efficient and fast. Time is of utmost importance in an arrest procedure as a vessel in custody very quickly deteriorates in substance and that affects the sale price negatively.[78] For very practical reasons it is thus not desirable to vest the selling competence in the bankruptcy court's jurisdiction, as this court is not driven by the claim enforcement of a single creditor, but has to consider the claims and interests of all parties involved, creditors as well as the debtor. Such procedure takes too much time in order to be able to sell a ship efficiently. Furthermore, the question remains whether a ship sold by a bankruptcy court and not by an admiralty court would be recognised as cleared from all maritime liens internationally by foreign courts. It is well established in the maritime world that the admiralty court can clear the charges on a ship by its selling procedure, while this has not been established yet for the bankruptcy court. Hence, the purchasing party in a bankruptcy court administered sale of a vessel would be exposed to a degree of uncertainty. The concept of a strong and hard to eliminate maritime security interest, the maritime lien, would be endangered.

Besides these arguments based on practicality, the selling of a vessel by a bankruptcy court can be categorised as unconstitutional. The US Constitution vests the power to control maritime issues in federal courts, like the admiralty courts, in contrast to the bankruptcy courts as district courts.[79] In the case of *In re* Millennium the United States Court of Appeals for the 2nd Circuit held:

> When a debtor's estate consists primarily of maritime assets … a measure of uncertainty exists regarding propriety of the bankruptcy court's jurisdiction to sell those assets wholly free of maritime liens.[80]

This uncertainty results greatly from the lack of clear guidance on this question by the US legislator or the US Supreme Court.[81] In an effort to give the parties involved in maritime insolvencies some degree of certainty, the courts have used the doctrine of *custodia legis*. This doctrine stipulates that as soon as an asset falls in the jurisdiction of one court, this court shall retain jurisdiction over it, regardless of whether the asset would be allocated in another court more appropriately.[82] Practically speaking, the bankruptcy court retains jurisdiction over the vessel if the insolvency was filed before the arrest of the vessel, and vice versa. The admiralty court would administer

[77] See Ende (1988), p. 591.

[78] See Ende (1988), p. 577.

[79] See Peck (2013), p. 971.

[80] *In re* Millennium [2005] AMC, on p. 1999.

[81] See McCullough (2007/2008), p. 486.

[82] See McCullough (2007/2008), p. 471.

the arrest procedure of a vessel, even though the owner of the ship filed for insolvency in a bankruptcy court. But as convenient as the *custodia legis* doctrine may appear, the constitutional issue about the bankruptcy court's competence to sell a vessel free of charges remains unsolved.[83]

A realistic approach to this US jurisdiction conflict seems to be a flexible handling of maritime insolvency cases. The allocation of jurisdiction to the bankruptcy court for the debtor's entire assets, including ships, makes sense in a Chapter 11 restructuring proceeding, where the debtor's estate needs to be held together and shielded from maritime claims in order to give the restructuring procedure a realistic chance to succeed.[84] But as soon as the bankruptcy court loses faith in the restructuring efforts of the debtor or when a shipping company immediately files for liquidation under Chapter 7, the court should act and transfer the ship-assets into the hands of the admiralty court, where the sale of ships is most appropriately located at. This leads to the next problematic interplay of insolvency law and maritime law, the conflict of admiralty proceedings and the automatic stay.

4.2.3.2 The Conflict of Admiralty Arrest and the Automatic Stay

The automatic stay and the maritime arrest procedure, initiated by an action *in rem*, have been displayed extensively in this book. Now it shall be examined why the conflict between these two exists and how US jurisprudence and legal research deal with it.

The heart of the conflict between insolvency and maritime law lies at the differing policies behind both legal systems that intersect in maritime insolvencies.[85] US insolvency law's policy breaths the liberal approach of providing the financially struggling debtor with the opportunity of a 'breathing spell' and a 'fresh start'. At the same time insolvency law is designed to reach a fair solution for all creditors involved, by dividing the proceeds of the debtor's assets evenly among the creditors in accordance to their priority ranking. The characteristic insolvency principles of debtor-friendliness and fairness among the creditors cannot be found in the policy underlying maritime law. The maritime arrest procedure works as an ideal example. One single creditor, often with a minor claim secured by a maritime lien, can arrest the vessel, with no regard to the debtor's business situation or the other creditors' interests. Thus, an individual creditor can satisfy his claim at the expense of other creditors and with possibly severe consequences for the shipping company as a debtor itself. Indeed, the shipping company cannot operate the vessel to create profits if the vessel is subject to an arrest procedure, which places the ship in custody of the claim enforcing authorities in the respective harbour's jurisdiction.

The differences between the policies of these two legal systems could not be more obvious and contradictory. The situation where the clash of policies becomes

[83] See *In re* Millennium [2005] AMC, on p. 2000.

[84] See for this and the following sentence Weil (1996), p. 219.

[85] See Peck (2013), p. 958.

most apparent, is the concurrence of a maritime arrest procedure and the automatic stay, "*automatically triggered*"[86] by the debtor's filing for insolvency under the US Bankruptcy Code. Almost inevitably, every financially struggling shipping company that files for insolvency in a US bankruptcy court will cause this clash. Because as soon as the insolvency filing took place, the automatic stay will be granted to protect the debtor's assets, but at the same time the shipping company's creditors will become aware of the financial dead-end their debtor has reached and will try to enforce their claims as quickly as possible. Especially the holders of maritime liens can then resort to the effective and globally accepted maritime arrest procedure.

At the clashing point of automatic stay and the maritime arrest procedure, the challenging question remains: Which jurisdiction shall prevail and thereby rule out the other?

As detailed in the previous section, the problematic relation between the bankruptcy court and the admiralty court is not resolved by law or by clear court ruling. However, there is a trend to give the bankruptcy court and by that the automatic stay a stronger position, when the doctrine of *custodia legis*[87] allocates the matter to the jurisdiction of the bankruptcy court and the bankruptcy court treats the maritime assets of the debtor with regard to the established maritime laws and priorities.[88] This way, the highest possible acceptance of both maritime as well as insolvency law practitioners can be achieved. In the case of *In re* Muma Services Inc., the bankruptcy court managed to balance the policies and priority rules of insolvency law and maritime law.[89] Only such cautious handling of maritime insolvency creates trust and certainty.

However, as strong as the effects of an insolvency proceeding and the parallel automatic stay may be, the maritime creditors still have the chance to file a motion for relief from the automatic stay under 11 U.S.C. § 362 in order to enable maritime arrest procedures.[90] Nevertheless, especially in insolvencies in the maritime field using the Chapter 11 reorganisation procedure, it is very hard for the creditors to overcome the automatic stay. Based on 11 U.S.C. § 362 (d) (2), the creditor has to show that the debtor does not have equity in the property, here the vessel, and that the property is not necessary for an effective reorganisation of the shipping company. In its motion for relief from the automatic stay, the creditor might be able to establish the debtor's lack of equity, but the operation of the vessel forms the centre of the debtor's business and thus it is almost always necessary for an effective reorganisation of the debtor's business.[91] Bearing this particular situation of maritime creditors in a Chapter 11 procedure in mind, bankruptcy courts are cautious not to totally deprive maritime creditors of their strong position under admiralty law. Hence it is important that US bankruptcy courts are well aware of the priority rules

[86] Peck (2013), p. 966.

[87] See *In re* Millennium [2005] AMC, on p. 1999.

[88] See *In re* Muma Services Inc. [2005] 322 B.R., on p. 541.

[89] See Seitz (2009), p. 1386.

[90] See Peck (2013), p. 966.

[91] See Gorman (2014/2015), p. 115.

of maritime law and are ready to apply them, as illustrated in the case of *In re* Muma Services Inc.

4.2.3.3 Changing the Status of Maritime Security Interests in Insolvency Proceedings

The current relationship between insolvency and maritime procedures in the USA has reached a fairly balanced state and it is fair to say that the *modus vivendi* between these two legal systems works, besides the still existing uncertainties and tensions. But especially these remaining tensions led in the past to the emergence of controversial ideas to solve these tensions.

The central idea is to change the status of maritime security interests in insolvency proceedings. Ende proposes that the preferential treatment of maritime liens should be eliminated and the doctrine of *custodia legis* should never work to the detriment of the bankruptcy court.[92] This proposal is based on the assumption that the insolvency rules provide a fairer proceeding for all of the debtor's creditors.[93] The idea to give insolvency law and its proceedings priority over those of maritime law has the advantage that it solves the issue of courts' competence and where the assets of a maritime debtor are most appropriately allocated. The result would be a higher degree of certainty when it comes to financial defaults of shipping companies.

In contrast to the abolishment of maritime liens' priority and of the doctrine of *custodia legis*, the recognition of the "*primacy of admiralty law over maritime assets*"[94] has been claimed. This primacy should go as far as preventing insolvency proceedings from disturbing admiralty actions *in rem* and giving admiralty courts exclusive jurisdiction over maritime assets.[95] The advantages of this maritime law favouring approach are more certainty in maritime insolvencies and the holders of maritime liens would not have to file a motion for relief from the automatic stay with the bankruptcy court, but could enforce their security interest right away by an action *in rem*.

Both extreme approaches would bring a higher degree of certainty into the field of maritime insolvency, by either modifying the status of maritime liens or by allocating maritime assets exclusively to the admiralty court's jurisdiction. But this certainty would come at the expense of the respective other legal system. The approach that favours insolvency rules would have a negative effect on the market of ship finance. The harder it gets for maritime creditors to enforce and collect their claims, the higher the interest rates on financial credit would be.[96] Especially all creditors usually secured by a maritime lien would be less ready to provide services and

[92] See Ende (1988), pp. 585, 586.

[93] See Ende (1988), p. 585.

[94] Alwang (1996), pp. 2613, 2642.

[95] See for this and the following sentence Alwang (1996), p. 2642.

[96] See Alwang (1996), p. 2640.

actions on credit to shipping companies, if their priority in case of the company's default was hampered or even abolished. Furthermore, the constitutional issue whether a bankruptcy court can sell the vessel free from maritime liens, would remain unsettled. Hence, the insolvency approach at the costs of maritime law principles and rules would harm the entire maritime industry with unpredictable effects.

At the same time, the primacy of maritime law over insolvency law in a maritime insolvency is not desirable as well. The suppression of insolvency law would have the effect of depriving shipping companies of the chance to pursue a restructuring procedure under Chapter 11 of the US Bankruptcy Code. The laws of admiralty do not have the guiding principle of insolvency law to give the debtor a breathing spell as well as a second chance. The only possible way in an action *in rem* would be the liquidation of the shipping company, as the goal of this action is the selling of the vessel to satisfy the maritime creditor claims. The fairness towards the non-maritime creditors would be an issue too. Alwang may argue that "*the effect on other bankruptcy participants is neutral*",[97] because the only effect of a primacy of admiralty law would be that the vessels are not taken out of the insolvency proceeding by a motion for relief from automatic stay, as they would not form part of the insolvency proceeding at all.[98] However, in her reasoning, she leaves out the fact that a motion for a relief from an automatic stay in a Chapter 11 proceeding is hard to achieve, as the vessels are the main assets of shipping companies and often the only source of income, which makes them vital for successful restructuring.[99] Thus, the degree of fairness among the creditors (maritime or not) as well as the restructuring tools would go missing if insolvency law was set under the primacy of maritime law.

All the issues in maritime insolvency in the USA show that this field of law is far from being perfectly harmonised and legally settled. But as topical as some issues may appear, it is undisputed that the USA is still the most attractive jurisdiction for the handling of insolvencies of maritime group corporations. A functioning *modus vivendi* has evolved on maritime insolvencies and especially the liberal approach of US bankruptcy courts combined with the high degree of flexibility in US insolvency law has smoothened some of the most controversial legal issues in maritime cross-border insolvency. In recent publications, the importance of a balanced approach between insolvency law and maritime law has been proposed.[100] There is no other way than acknowledging the existence of maritime liens and the reasoning behind this special maritime security interest. At the same time, the protectiveness of US insolvency law has helped the US economy to become one of the strongest in the world and thus its proceedings and debtor protection tools need to be upheld. To find the best mediating approach on maritime insolvency is still one of the most pressing challenges.

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[97] Alwang (1996), p. 2644.

[98] See Alwang (1996), p. 2644.

[99] For the requirements of a motion for relief from an automatic stay in a Chapter 11 proceeding of a shipping company stipulated in 11 U.S.C. § 362 (d) (2) see above on p. 151.

[100] See for this and the following Falzone (2014), pp. 1204–1206.

4.2.4 Conclusion on Maritime Cross-Border Insolvency

Maritime insolvencies with an international dimension have been numerous over the last decade and there are not many signs of hope for a brighter future of the shipping industry. The above section showed that despite the existing legal uncertainties, the companies in the maritime industry have found a way to restructure their debts and if necessary liquidate their assets.

More than any other industry, the shipping branch has the advantage of a flexible handling of its companies' centre of main interest. The flexible shifting of the COMI gives shipping companies the chance to choose a jurisdiction's insolvency code that fits their needs the most. Especially larger corporate shipping groups tend to favour a restructuring or liquidation in the USA rather than in Germany, because the US Bankruptcy Code allows group procedures and its reach is not only theoretically, but also practically global, as the USA are still the main player in international commerce and finance. This financial and economic clout helps to enforce and uphold US courts' rulings.

Rather revealing was the analysis of the main legal issues arising at the intersection of maritime and insolvency law for each of the three jurisdictions of Germany, England & Wales and the USA. First of all, each of the three jurisdictions is aware of the legal problems that can occur in maritime insolvencies. But where England & Wales' handling of such special insolvencies is very settled and pragmatic, the legal debates in the USA on this topic are controversial and touch even constitutional spheres. In Germany, the main problems in maritime insolvencies crystallise at the legal status of the ship and whether a stay of proceeding is granted in favour of the ship-owning debtor. Here, the courts of Hamburg and Bremen are taking different views and as observed in more general terms about the shift of COMI internationally, the German maritime insolvency proceedings are encountering the phenomenon of 'forum shopping' as well. The main issue in all three jurisdictions is the relationship between the maritime arrest procedure and the insolvency proceeding, the automatic stay in particular. This is not too surprising. The findings in Chaps. 2 and 3 of this book have shown that the insolvency policies of the three jurisdictions are similar and that maritime law's concepts, especially the maritime lien, are globally well established and recognised by all leading shipping nations.

However, the analysis of the maritime insolvency issues showed that almost all legal questions are domestic. International aspects in those cases may add another complicating layer, which circles mostly around conflict of laws questions, but the core problems remain national. Especially the interplay of ship arrest and automatic stay can be called the guiding and problematic thread of maritime insolvency.

The international harmonisation of maritime insolvencies will cover the next section of this book. There is already a lack of harmonisation at national levels and thus the establishment of an international approach is even more challenging. Still, an international harmonisation tool could provide clearer guidelines for maritime insolvencies and should serve as a model concept for an efficient and pragmatic handling of maritime cross-border insolvencies. Whether this worthwhile harmoni-

sation can be achieved by a state driven top-down harmonisation process—through international treaties, conventions or model laws—or by insolvency contract clauses as a mean of a private bottom-up harmonisation is an open question, which will be guiding through the following and concluding part of this book.

4.3 Maritime Insolvency Under Existing Harmonisation Rules

The preceding sections of this book have shown that maritime insolvency is almost always linked with cross-border issues and the interplay of maritime and insolvency law is a source of legal complication. Any efforts to harmonise this specific legal field have to start with the question whether the existing harmonisation rules suffice or new ones have to be introduced. The existing harmonisation instruments to examine in the following are the EU Insolvency Regulation and the UNCITRAL Model Law on Cross-Border Insolvency.[101] Both sets of rules are relatively modern and share the concept of modified universalism, which was developed over the years by leading academics in international insolvency law. The EU Insolvency Regulation takes direct effect in 27 of 28 EU Member States and the UNCITRAL Model Law receives more and more acceptance, as the number of countries incorporating this Model Law into their national laws is rising year by year. Whether or not the existing harmonisation rules give adequate guidance and solutions for the special legal issues of maritime insolvency is going to be examined in the following section.

4.3.1 EU Insolvency Regulation and Maritime Insolvency

The EU Insolvency Regulation is applicable in all EU Member States except for Denmark. Insolvency proceedings in Germany and England & Wales are within the scope of the EU Insolvency Regulation. The Regulation does not contain a special legal regime for maritime cases and the treatment of maritime creditors in an insolvency of the ship itself or the shipping company operating the ship. The insolvency of a ship or the shipping company is usually accompanied by legal issues on creditors' rights vested on the ship by maritime liens or ship mortgages. Hence a focus has to be placed on Art. 8 of the EU Insolvency Regulation, which deals with third parties' rights *in rem*. Maritime liens are a classic example of such third parties' rights *in rem*.

Art. 8 of the EU Insolvency Regulation states:

Third parties' rights *in rem*

[101] For detailed display of the EU Insolvency Regulation see in Sect. 2.2.3.2 and for the UNCITRAL Model Law on Cross-Border Insolvency respectively in Sect. 2.2.3.3.1.

1. The opening of insolvency proceedings shall not affect the rights *in rem* of creditors or third parties in respect of tangible or intangible, moveable or immoveable assets, both specific assets and collections of indefinite assets as a whole which change from time to time, belonging to the debtor which are situated within the territory of another Member State at the time of the opening of proceedings.
2. The rights referred to in paragraph 1 shall, in particular, mean:
   (a) the right to dispose of assets or have them disposed of and to obtain satisfaction from the proceeds of or income from those assets, in particular by virtue of a lien or mortgage;
   (b) the exclusive right to have a claim met, in particular a right guaranteed by a lien in respect of the claim or by assignment of the claim by way of a guarantee;
   (c) the right to demand assets from, and/or to require restitution by, anyone having possession or use of them contrary to the wishes of the party so entitled;
   (d) a right *in rem* to the beneficial use of assets.
3. The right, recorded in a public register and enforceable against third parties, based on which a right *in rem* within the meaning of paragraph 1 may be obtained shall be considered to be a right *in rem*.
4. Paragraph 1 shall not preclude actions for voidness, voidability or unenforceability as referred to in point (m) of Art. 7(2).

The special treatment of third parties' rights *in rem* according to Art. 8 forms a deviation from the general rule of *lex fori concursus* stipulated by Art. 7 of the Regulation.[102] Rights under Art. 8 are not dealt with in accordance with the insolvency rules of the Member State where the insolvency proceeding was opened as a main proceeding (*lex fori concursus*), but by the laws of that Member State where the asset is located (*lex rei sitae*).

The newly drafted Art. 8 goes beyond its stipulation in subsection 1 and gives clearer guidance on the question, which third parties' rights actually are rights *in rem*, with the result that creditors and third parties holding such rights can still enforce them despite the opening of an insolvency proceeding in another EU Member State. The clarification of the Art. 8 (2)–(4) is necessary, as the common law term "right *in rem*" was translated differently across the official languages of the EU Member States and led to confusion.[103]

But Art. 8 does not define an important issue for the case of ship insolvencies: what does "*situated*" under Art. 8 (1) EU Insolvency Regulation mean? For land property the question is easy to answer, but moveable assets like ships form a special class of objects. If the shipping company files for insolvency in EU Member State A and the ship is in EU Member State B at that time, the wording may suggest that a creditor of the ship with a right *in rem* may enforce his right in Member State B regardless of the insolvency proceeding in Member State A. An Italian court did not make this conclusion but took into account that ships may be movable assets, but like land property, ships are registered in special ship registers that allow a degree of publicity for the mortgagors and other main creditors.[104] Under Art. 2 (9) (iv) of the EU Insolvency Regulation, the term "*situated*" regarding ships is defined

[102] See for this and the following sentence Fehrenbach (2014), p. 19; Moss et al. (2009), p. 60.

[103] See Berlingieri (2014), p. 5.

[104] See for this and the following Svitzer Salvage BB v. Celia Schiffahrtgesellschaft mbH & Co. Reederei KG (2013) Il Diritto Marittimo, on p. 69.

as located in that Member State where the ship is publicly registered.[105] Based on that definition, the Italian court dismissed a creditor's claim, secured by a maritime lien and against a ship arrested in Italy, because the ship company had filed for insolvency in Germany and the arrested ship was registered in Germany. Hence, the Italian court saw the requirement that the ship be "*situated within the territory of another*[106] *Member State at the time of the opening of proceedings*" unfulfilled.

Relying on the ship register when determining where the ship is 'situated' under the EU Insolvency Regulation leads to the effect that the mobility of a ship, often claimed to be the main source of international conflict of laws, does not cause any trouble for cases within the jurisdiction of the EU Insolvency Regulation and the exemption of Art. 8 EU Insolvency Regulation does not apply to those ship insolvencies, where the ship registration and the filing for insolvency fall together in the same Member State.

As a result, it is impossible for maritime lienholders to enforce their claims if the ship's insolvency is dealt with under the EU Insolvency Regulation's scope and its Member States' jurisdictions. This can be exemplified by a common situation in the maritime industry in Europe: The German shipping company files for insolvency in Germany. At the same time, one of its ships or its single asset ship is arrested in another Member State by a maritime lienholder. The arrest has to be lifted if the ship is registered in Germany, which is usually the case. The maritime lienholder is deprived of the chance to force an arrest of the ship and is left to register his secret claim with the insolvency court administering the insolvency proceeding in Germany. Hence, the EU Insolvency Regulation establishes a certain amount of clarity for both debtors and creditors in maritime insolvency proceedings. Within the scope of the EU Insolvency Regulation, the disturbance by maritime lienholders and their claim enforcements are banned for the benefit of legal certainty and an orderly and efficient insolvency proceeding. As research of the numbers of arrest and main spots for ship arrest has shown, with the UK, Gibraltar and the Netherlands, three main actors in international ship arrest are located within the jurisdiction of the EU Insolvency Regulation and therefore ship arrest procedures in these countries have to be halted in case a shipping company files for insolvency in another EU Member State where the company's ships are also registered.

But as soon as the scope of the EU Insolvency Regulation ends, the question whether an arrest procedure could be voided by a foreign insolvency proceeding has to be assessed newly. The following section will look at the provisions of the UNCITRAL Model Law on Cross-Border Insolvency and how this Model Law deals with the particularities of a maritime insolvency.

[105] See Moss et al. (2009), pp. 61, 62.

[106] Underlining emphasis by the author of this book.

4.3.2 UNCITRAL Model Law on Cross-Border Insolvency and Maritime Insolvency

The UNCITRAL Model Law on Cross-Border Insolvency was drafted in the spirit of international insolvency law's approach of universalism. Thus the Model Law shares a basic feature with the EU Insolvency Regulation. But as much as these two main legal codes on international insolvency share their aims and basic features, the Model Law, as well as the EU Insolvency Regulation, does not provide special guidance when it comes to maritime cross-border insolvency. Especially the most important issue of maritime insolvency, the conflict of the insolvency proceeding with the action *in rem*, enforceable mainly by maritime lienholders, is not addressed in these international legal codes.

The silence of the Model Law on the topical conflict of maritime arrest and insolvency procedures has caused criticism.[107] Unlike the EU Insolvency Regulation, the UNCITRAL Model Law on Cross-Border Insolvency does not even provide a clause like Art. 8 EU Insolvency Regulation to solve the problem of which law should apply to third parties' rights *in* rem in an international insolvency proceeding. This is due to the concept of the Model Law to foremost provide a basis for the procedural issues of international insolvency law.

The lack of a conflict of laws provision on rights *in rem* causes even more uncertainty, as the Model Law offers the possibility of an insolvency-typical stay of proceedings in its Artt. 20 and 21. Allowing a stay for foreign main proceedings on one hand, and not recognising the existence of maritime arrest procedures on the other almost automatically causes the problem of creditors being deprived of their status and rights as secured creditors with high priority. Courts have reacted to this conflict by granting a leave from the stay on the application of the creditor, if the creditor is able to prove his lien-secured claim.[108] Nevertheless, debtors as well as the debtor's creditors are exposed to a high degree of uncertainty in maritime cross-border insolvencies under the regime of the UNCITRAL Model Law on Cross-Border Insolvency.

Under the current legal framework of the Model Law, a 'run for recognition' is likely to be initiated between the debtor and its creditors in a maritime insolvency. The debtor knows the trading route of the ship, often its only asset, and will try to protect the ship from creditor-driven arrest procedures, which are time- and capital-consuming, by applying for recognition of the foreign insolvency proceeding as a main proceeding to safeguard the trading of the ship, as this recognition is usually accompanied by the granting of a stay of proceedings. Adversely, the creditor holding a maritime lien against the ship will try to receive recognition of its status as a secured creditor by the foreign courts along the ship's trading route to be able to enforce its lien-secured claim by an action *in rem*.[109] Such a 'run for recognition'

[107] See Buchanan J in STX Pan Ocean Co Ltd (receivers appointed in South Korea) Yu v STX Pan Ocean Co Ltd [2013] 223 FCR 189.

[108] See Soars (2016), p. 16.

[109] See Soars (2016), p. 33.

does not embody the ideal situation of legal certainty and fairness. The present situation is uncertain and unfair, because without legal grounds set out in the UNCITRAL Model Law on Cross-Border Insolvency the courts of traditional seafarer-nations[110] recognise the prevalence of maritime law over insolvency law. The reason to privilege the maritime creditors might root in the courts' understanding that the maritime industry has developed such particular security interests out of the pragmatism of an ever international trade and commerce by ship, but nonetheless the modern approaches of the UNCITRAL should have taken into account that maritime law and insolvency law need to be harmonised.

4.3.3 Results on Existing Harmonisation Rules

The EU Insolvency Regulation and the UNCITRAL Model Law on Cross-Border Insolvency have been major steps to realise a harmonisation of international insolvency. Both codes breath the spirit of modified universalism and provide a clear guidance for debtors as well as creditors on the central questions of where the COMI of the debtor lies and which jurisdiction's insolvency and material laws apply to the creditors' rights and claims. Nevertheless, the special structures and enforcement proceedings of maritime law and hence the cases of maritime insolvency are not recognised in these international harmonisation codes. Of course, such far-reaching and for general acceptance designed harmonisation laws cannot take into account every single industry with its special security rights and procedures. But especially the missing acknowledgement of the maritime actions *in rem* produces uncertainty and therefore calls for a special chapter of the EU Insolvency Regulation and the UNCITRAL Model Law on Cross-Border Insolvency.[111] The EU Insolvency Regulation may have produced a workable solution, in case the places of insolvency filing and ship registry do not fall apart, but still the Regulation does not secure that maritime creditors are able to enforce their rights and secure their priority status in the main insolvency proceeding. Such a granting would have helped to solve one of the main tensions in international maritime insolvency.

4.4 Alternative Harmonisation Rules for Maritime Insolvency

The EU Insolvency Regulation and the Model Law on Cross-Border Insolvency are the two most prominent and most accepted international codes for a harmonisation of international insolvency law. But due to the lack of maritime-specific rules in

[110] See Soars (2016), p. 33.

[111] The CMI international working group on Maritime Cross-Border Insolvency specifically proposed this approach—see Davis (2016), pp. 216–218. The proposals of the CMI will be discussed later in this chapter.

these two codes, the issue of harmonisation of maritime and insolvency proceedings remains to be topical. Alternative approaches are taken with the goal to establish quick and efficient international insolvency or out of court restructuring procedures for the maritime industry. The following section will examine these efforts and the chances to achieve a higher degree of legal certainty and efficiency.

4.4.1 Private Harmonisation Rules

Apart from specifically maritime approaches to international insolvency, other concepts might offer solutions for maritime cross-border insolvencies as well. There are no other industry specific approaches in transnational insolvency, but practical solutions have been found to deal with the challenges of parallel proceedings and assets located in different jurisdictions.

From the debates over the dualism of universalism and territorialism in international insolvency, a third way of dealing with international insolvency has evolved, contractualism.[112] This third approach gives an internationally operating company a chance to "*specify in its corporate charter the jurisdiction that will handle any bankruptcy proceeding involving that entity*".[113] The stipulation in the corporate charter allows the company to choose between universalism and territorialism. In other words, the company may stipulate that its insolvency or the insolvency of all its global subsidiaries shall be dealt with at the court of its COMI only, which is a purely universalistic approach. Or the company opts for an administration of the insolvency proceedings at each jurisdiction where the corporate entity has establishments separately, hence a strict territorialistic approach. The freedom to choose between the two approaches is seen to give companies the chance to find a more ideal way to deal with the possibility of financial default and the following insolvency procedure.[114] Furthermore, this freedom to choose the insolvency forum gives the company and its creditors certainty of the jurisdictions and laws involved in a possible insolvency.

As flexibly as companies can handle and influence their COMI, the corporate charter can be changed as well, thus leaving creditors in doubt as to which insolvency regime will apply in the end. This uncertainty can be easily met by creditors, who can alter their loan agreements with the company by introducing a requirement to inform about any changes in the insolvency selection clause.[115]

Another potentially negative effect of contractualism in international insolvency is the effect of choosing a foreign insolvency system that forces creditors to adapt to unknown or at least unfamiliar legal codes and rules, with the result that creditors

[112] See Rasmussen (1999/2000), p. 2254.

[113] Rasmussen (1999/2000), p. 2254.

[114] See Rasmussen (1999/2000), p. 2260.

[115] See Rasmussen (1999/2000), p. 2263.

might raise their interest rates to respond to this legal uncertainty.[116] This danger can be put into perspective when taking US company law into account. The laws of all 50 States of the USA differ on the subject of companies. Over the decades, Delaware's company law has crystallised to be the most favoured of all. At the beginning, creditors might have struggled with Delaware law but soon it became the standard law on corporations in the USA and the information deficit was relativised.[117] The same will happen when more and more companies choose to include insolvency clauses in their company charters. From today's perspective, it is very likely that the use of such clauses will lead to a further manifestation of the supremacy of US insolvency law. The USA can be described as a "*debtor haven*",[118] but the current trend of international maritime companies striving for a restructuring procedure in the USA will also have the effect that the US insolvency institutions, courts as well as insolvency trustees, will become even more specialised and thus efficient. Furthermore, it is unlikely that in a free market of credit the companies will choose jurisdictions in their insolvency clauses to fully frustrate their creditors' claims.[119] To the contrary, the private ordering of companies aims at finding an ideal jurisdiction for an effective restructuring or liquidation procedure with a balancing of the debtor's and creditors' interests.

The proposal of private ordering to cope with the challenges of international insolvency has been seized on the frequent use of Cross-Border Insolvency Agreements (CBI Agreements). As an alternative to the Model Law and the EU Insolvency Regulation, "*debtors, creditors, financiers and others through their professional advisers are utilising Cross-Border Insolvency Agreements*".[120] The 2009 adopted UNCITRAL 'Practice Guide on Cross-Border Insolvency Cooperation' describes the CBI Agreement as

> an agreement entered into, either orally or in writing, intended to facilitate the coordination of cross-border insolvency proceedings and cooperation between the courts, between the courts and insolvency representatives and between insolvency representatives, sometimes also involving other parties in interest.[121]

The parties to insolvency procedures conclude these CBI Agreements and courts in civil as well as common law jurisdictions have already approved these agreements.[122] The CBI Agreements can be described as "*soft law*"[123] and are developing into "*customary international commercial law*".[124] One of the first and most prominent cases in which a CBI Agreement was concluded is the insolvency case of *In re*

[116] See LoPucki (1998/1999), pp. 738, 739.

[117] See Rasmussen (1999/2000), p. 2262.

[118] Rasmussen (1999/2000), p. 2264.

[119] See for this and the following Rasmussen (1999/2000), p. 2273.

[120] Mason (2012), p. 107.

[121] UNCITRAL (2009).

[122] See Mason (2012), pp. 107, 108.

[123] Mason (2012), p. 108.

[124] Wessels (2008), p. 8.

Maxwell Communication[125] in 1991. In this case, the agreement was referred to as a protocol and it resolved the conflicting issues in an insolvency proceeding started in England & Wales but with the company's main assets being located in the USA. Due to the lack of any standards or rules of cooperation in international insolvency at that time, the way the US and English courts and insolvency representatives managed to work out this protocol is even more remarkable.[126]

The more often these CBI Agreements are used, the more likely they will be established at international levels and both companies as well as loan creditors will accept these agreements as workable tools to effectively administer complicated international insolvency procedures. In other words, "*CBI Agreements may well prove to be one of the most useful strategies for resolving complex cross-border insolvency issues*".[127]

But as effective as these CBI Agreements may prove, there remains a doubt whether they are working effectively in the context of maritime insolvency. The strength of protocols and CBI Agreements is that they are binding on the main parties involved. In a maritime insolvency however, the number of creditors is often unknown, due to the secret nature of maritime liens. If the insolvency representative and the main creditors of the shipping company agree on a protocol that facilitates the administration of the international insolvency, this protocol cannot prevent maritime lienholders from enforcing their claims wherever they may find the company's ships arrest-able. Hence the protocol or CBI Agreement does not work effectively in international insolvency with a maritime background. These tools of contractualism work to harmonise and improve international insolvency procedures and the respective court to court cooperation, but the tensions between insolvency law and maritime law remain unsolved.

4.4.2 CMI Approach

The Comité Maritime International (CMI) is an independent organisation dedicated to promote harmonisation in international maritime law. Already in 2010 the CMI established an international working group (IWG), in reaction to the 2008 shipping crisis, to address the challenges of maritime cross-border insolvency. The IWG has not published much on the issue yet, but in its latest report dated April 2016, the IWG has outlined some approaches which it finds fit to promote a future harmonisation of maritime cross-border insolvency.[128]

Over the past years, the IWG has analysed the existing instruments of harmonisation, especially the EU Insolvency Regulation and the UNCITRAL Model Law on Cross-Border Insolvency. The conclusion of this analysis is that these codes do

[125] Maxwell Communications Corporation plc (No. 2) [1992] B.C.C. 757 (C.A.).

[126] See Weiss (2010/2011), p. 289.

[127] Mason (2012), p. 126.

[128] See for this and the following on the IWG's work Davis (2016), pp. 216–218.

not provide for an adequate handling of the special situation of maritime insolvency. In order to further promote the process of international harmonisation the CMI will—very pragmatically—encourage those nations having a significant maritime industry to incorporate the UNCITRAL Model Law, if not already implemented. An example for a still reluctant country is Germany. Besides this soft approach of lobbying for the existing harmonisation tools, the IWG considers the proposal of a protocol to the UNCITRAL Model Law. This protocol shall be an add-on to the Model Law to particularly cover the maritime specific *in rem* actions. A draft of such a protocol was not provided by the CMI yet. Furthermore, the IWG is working on a "*set of best practices*",[129] which should address the typical legal issues of international maritime insolvencies. Such a set for the maritime industry can build on the existing guidelines published for example by the ALI.[130]

As modest as these proposals may sound, the IWG is sceptical about the realisation of a protocol to the UNCITRAL Model Law.[131] This stance may be too cautious and the time to lobby for a protocol has come. Already 20 years ago, when the UNCITRAL Model Law was in the making, the call was made that "*any international insolvency treaty should recognize the primacy of admiralty law over maritime assets*".[132] This call has remained unheard until today and the current situation of uncertainty in maritime cross-border insolvency shows the need for a special protocol.

The proposal of a special maritime protocol may sound demanding, but it seems to be the only way to actually change the current situation in maritime insolvencies. It is fair to say that the maritime industry is just one of many different branches of industries, but the importance of the shipping industry for global trade and commerce cannot be underestimated. This importance justifies the special treatment with an industry specific protocol. Further justification for a maritime supplement to the Model Law can be found in the reasoning of Judge Binnie in the Canadian case of *Holt Cargo Systems Inc*, where he identifies the policy for making an exception for maritime liens and their enforcement from the universalist approach.[133]

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[129] Davis (2016), p. 217.

[130] For the ALI Guidelines see above at Sect. 2.2.3.3.2.

[131] See Davis (2016), p. 218.

[132] Alwang (1996), p. 2642. Alwang, in support of a special protocol to international insolvency treaties, made the following concluding statement on p. 2646: "*An international insolvency treaty must recognize the primacy of admiralty law over the vessel and maritime lienors. A treaty vesting control over the disposition of the debtor's maritime assets in the same court as the rest of the debtor's assets will not successfully preclude a foreign court from arresting ships and adjudicating the maritime claims. A provision for the exclusive application of admiralty law merely recognizes and accepts such a result. The consequences of such a provision for the non-maritime parties to the bankruptcy proceeding are minor. Yet, such a practical provision will eliminate the risks placed on maritime lienors, the needless expenses arising from the supervision of maritime lienors in the bankruptcy proceeding, and the increased cost of maritime credit that would result from the application of both laws to the same debt. Drafters of an international insolvency treaty should realize that recognizing the primacy of admiralty law over maritime assets steers the most appropriate course*".

[133] *Holt Cargo Systems Inc v ABC Containerline NV (Trustees of)* [2001] 3 SCR 97, at para. 27:

4.4.3 A "Middle Path of Reciprocal Comity"[134]

The doctrine of *custodia legis*, developed in the US maritime insolvency debate, has been often proposed to be a solution of the conflict of insolvency law and maritime law. It is based on the concept that the jurisdictions or courts where the vessel is located have the power to administer the proceeding. This doctrine has a similar approach as the COMI concept in general international insolvency law. The COMI determines the main proceeding and thus which jurisdiction's laws shall govern the international insolvency in a universalist approach. The insolvency laws of different countries do not fall apart drastically, but the different policies of maritime law and insolvency law can lead to total contradiction. Hence, under the *custodia legis* doctrine, a decision to place the proceeding under one jurisdiction is always a decision against the other, with a possible major different outcome for the debtor's assets and its creditors.[135]

In striving for a mediating way to administer maritime insolvencies Davies suggests

> a middle path that achieves the main goal of universalism, recognizing the primacy of the insolvency proceeding, while also preserving the right of admiralty claimants to secure their claims by proceeding against the debtor's assets wherever they may be found.[136]

This middle path is based on the idea of reciprocal comity. Reciprocal comity is a concept that has been developed in international insolvency law. The advocates of universalism in international insolvency have come to the conclusion that "*cooperation in cross-border bankruptcy cases cannot be a one way street*".[137] The pure universalism, where only the rules and the law of the main proceeding's jurisdiction apply, has been labelled as unfair, in particular for the debtor's creditors.[138] The creditors entered in business relations with the debtor relying on certain security interests and their priority. This reliance can be frustrated if the security interests

> The reason for this privileged status for maritime lienholders is entirely practical. The ship may sail under a flag of convenience. Its owners may be difficult to ascertain in a web of corporate relationships (as indeed was the case here, where initially Holt named the wrong corporation as ship owner). Merchant seamen will not work the vessel unless their wages constitute a high priority against the ship. The same is true of others whose work or supplies are essential to the continued voyage. The Master may be embarrassed for lack of funds, but the ship itself is assumed to be worth something and is readily available to provide a measure of security. Reliance on that security was and is vital to maritime commerce. Uncertainty would undermine confidence. The appellant Trustees' claim to 'international comity' in matters of bankruptcy must therefore be weighed against competing considerations of a more ancient and at least equally practical international system - the law of maritime commerce.

[134] See Davies (2016), p. 196.

[135] Davies calls this "*zero sum game: whichever body of law wins, someone will regard the outcome as illegitimate or inappropriate*" in Davies (2016), p. 197.

[136] Davies (2016), p. 197.

[137] Janger (2010/2011), p. 458.

[138] See for this and the following Janger (2010/2011), p. 456.

become subject to a foreign insolvency proceeding and hence a possibly different priority scheme.[139] To give creditors more certainty, which results in a more reliable granting of financial credit, reciprocal comity suggests that the main proceeding has to acknowledge the principles of asset distribution of the ancillary proceeding.[140]

This reciprocal comity cannot only be assigned to the cross-border aspect of maritime insolvency, but to the dualism of maritime and insolvency laws and procedures as well. To work effectively, the court of the maritime arrest procedure has to stay the process as soon as the debtor files for insolvency. At the same time and in order to be reciprocal, the insolvency court of the main proceeding would need to give maritime creditors the same priority status for their security interests as they would enjoy in a usual arrest procedure.[141] On one hand, this reciprocal comity would ensure that the insolvency proceeding and thus the liquidation of the debtor's assets or the debtor's efforts of reorganisation, is not interrupted by an asset binding maritime arrest, while on the other hand, the long established recognition and priority of maritime claims would not be frustrated by an insolvency proceeding. This ensures that the insolvent shipping company can either pursue a restructuring effort without the imminent threat of business infringements by arrest procedures or choose to liquidate its assets in an orderly manner and without the pressure of an arrest-following ship auction. In both scenarios, the proceeds are likely to be higher and thus the satisfaction of the maritime creditors, who would have had the chance to arrest the ship, is not diminished as they still enjoy priority over other creditors.

The assignment of reciprocal comity to cases of maritime cross-border insolvency is an innovative and promising approach that can help to overcome the tensions between insolvency and maritime proceedings. The strength of this concept is the balancing of contradicting interests and it can be rightly labelled as a 'middle path'.

The problem of reciprocal comity in maritime insolvency lies in its practicality. The insolvency court of the main proceeding has to apply foreign priority and credit security laws, the *lex causae*. The application of foreign law by courts is a time consuming process, as the court needs to adapt to a different legal reasoning. This may be not too problematic in maritime cases, as maritime law has reached a fairly high degree of international harmonisation and acceptance, nevertheless courts would need time to apply foreign law. Here it is of utmost importance that especially the courts of arrest or the legal representatives of the arresting party provide the insolvency courts of the main proceeding with a detailed report on what security interests the debtor's creditor is enforcing and which rank this claim takes in the priority scheme of the arrest jurisdiction. Ideally, this report should be in English to overcome any language barrier in these international proceedings and the courts involved should remain in constant communication over the proceeding. Any delay due to an insufficient legal report on the *lex causae* or the simple need for translation

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[139] For a detailed display of the insolvency priority schemes see for Germany at Sect. 2.1.2.1.3, for England & Wales at Sect. 2.1.2.2.2 and for the USA at Sect. 2.1.2.3.3.

[140] See Janger (2010/2011), p. 458.

[141] See Davies (2016), pp. 211, 212.

of legal documents, may have negative effects in the time-sensitive process of restructuring procedures. Furthermore, the reciprocal comity may reach its limits where jurisdictions are not willing to apply foreign law and instead rely on the principle of *lex fori*, which is the English approach on dealing with foreign maritime liens.[142] In that case the comity of the arresting jurisdiction would be a one way street, as the English courts will not recognise the status of the creditor under the *lex causae*, with the effect that creditors who are secured by maritime liens unknown to English maritime law will be downgraded in their priority ranking and thus will lose their superior position as maritime lienholders. This lack of reciprocity makes it highly unlikely that courts would halt arrest procedures in favour of an English insolvency proceeding, as the status of maritime lienholders in an English insolvency proceeding is unsure and eventually disadvantageous for maritime claimants, who otherwise enjoy a very strong position in arrest procedures.

Despite the troubles caused by the *lex fori* principle in England & Wales, Davies' 'middle path of reciprocal comity' appears to be a very promising and practicable way to conciliate the adversarial policies and procedures of maritime and insolvency law. But this concept is very dependent on the cooperation and communication of the courts and insolvency representatives involved. The English language has to be the base for that, as it has been for the maritime industry and its specific laws since decades.

The 'middle path' approach is also in line with the common practice of settlements between the administrator and the arresting party, where the maritime lienholder is separately satisfied and in exchange drops his arrest-claim for the benefit of the debtor and the other creditors.[143] If the maritime creditor to whom the arrest procedure is available enjoys priority over all other creditors, he may be satisfied in advance to either make the ship available for shipping again or leave the liquidation and realisation of the asset's value to the administrator. This 'redemption solution' can be criticised as an obvious infringement to the *pari passu* principle, the basic feature of insolvency law, but the prior satisfaction of arrest-threatening creditors is in the end in the best interest of the remaining creditors. The 'redemption solution' can be justified with the 'middle path' approach, which acknowledges the realities of maritime law: maritime liens allow the arrest of ships and rank over any other creditors' claims, while the arrest procedure is diametrically opposed to the insolvency procedure.

[142] See Davies (2016), p. 213.

[143] In the recent Hanjin Shipping insolvency the ship *Hanjin New York* "*was released from arrest*" after a settlement, see Ang (2016), p. 18.

4.4.4 The Hanjin Insolvency: A Test for International Insolvency Law

The South-Korean Hanjin Shipping Corporation ("**Hanjin**") looked back at a long history of container transport as the seventh largest shipping company in the world. Under the pressure of the on-going shipping crisis, Hanjin's deteriorating financial situation made the company collapse and lose a hardly fought battle, between the large container shipping companies over ever lower freight rates. Ultimately, on 31 August 2016, Hanjin filed for insolvency and on the next day, the Seoul Central District Court ordered the commencement of a rehabilitation procedure in order to grasp the chance to restructure and thus rescue Hanjin's business operations.[144] Already on 2 September 2016, Hanjin filed under US Bankruptcy Code's Chapter 15 for recognition of foreign procedures and for a stay of proceedings at the US Bankruptcy court in Newark, New Jersey. In particular the issue of an automatic stay was important to allow Hanjin's ships to enter US ports without the risk of arrest procedures. On 9 September 2016, the US Bankruptcy court recognised the Korean rehabilitation proceeding and granted an automatic stay. Despite the timely legal response, many ships of Hanjin had to face immanent ship arrest procedures in ports all over the world. Hanjin ordered its ships not to enter ports of those countries that did not recognise the Korean rehabilitation procedure, with the consequence that many Hanjin container ships, carrying cargo worth USD 14 billion, had to remain in the open sea.[145]

Hanjin's insolvency was again a test for the interplay of maritime and international insolvency law, revealing whether pragmatic and legally reliable answers could be found. The first impression was that the chaotic stranding of Hanjin's ships was a sign that it is still a long way to find solutions for international maritime insolvencies. But after a few weeks, it became clear that not only the US Bankruptcy courts recognised the South Korean proceeding, but many other important countries.[146] The global recognition of the South Korean insolvency proceeding shows that the theory-born universalism in international insolvency law is now established in practice and only the size of the bankrupt shipping company prevented a quicker and more orderly procedure from the beginning. The recognition and the granting of relief were important for Hanjin in two aspects: First, the ships were able to deliver their cargo and thus pursue their business operations. Second, Hanjin's fleet of container ships was not exposed to a piecemeal ship arrest procedure, but the fleet was kept together under the supervision of the South Korean administrator. On 17

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[144] See for this and the following: Goodman (2016).

[145] See *Hanjin Shipping gets multimillion-dollar loan to unload stranded cargo* (2016), The Guardian available at https://www.theguardian.com/world/2016/sep/22/hanjin-shipping-korea-creditor-shareholder-pay-unloaded (last visited on 10 June 2018).

[146] By 1 November 2016, the largest industry nations had recognised the South Korean reorganisation proceeding and granted relief from arrest proceedings (Japan, United Kingdom, Singapore, Germany, Belgium, Canada, Australia and USA). In Spain, Italy and France, the Hanjin- administrator had applied for such recognition and granting of relief, see Goodman (2016).

February 2017, the Seoul Central District Court declared Hanjin officially bankrupt and held that the "*company's liquidation value was worth more than its operational value*".[147] There is a high likelihood that Hanjin's liquidation value would have been significantly lower if the ship-arrest procedures had been enforced.

Even though the business and financial restructuring did not work out in the end, the orderly insolvency procedure was achieved with the worldwide barring of ship—arrest proceedings. At the same time, in line with the approach of reciprocal comity, settlements of the insolvency administrator with maritime creditors of the ships acknowledged the priority of claims secured by maritime liens, but saved the ships from arrest procedures.[148]

Surprisingly, and probably a sign of change in international maritime insolvency law, the Singapore approach to ship—arrest had been altered in the course of the Hanjin insolvency. In the past, Singapore was a creditor—friendly stronghold in South-East Asia for ship—arrests.[149] Singapore's maritime courts were a creditor—favoured jurisdiction due to the courts readiness to intervene with insolvency proceedings for the benefit of maritime lienholders.[150] This approach changed in the recent Hanjin proceedings. The Singapore High Court recognised the South Korean rehabilitation procedure two weeks after its opening in South Korea and granted the restrain and stay order in assistance of proceeding, allowing Hanjin's ships to enter Singapore's harbour without being exposed to the arrest—risk.[151] The new position of the Singapore High Court has been criticised for overlooking the "*uniqueness of the maritime lien as a preferred maritime claim in rem, as well as the public interest behind such maritime liens*".[152] It is correct that the recognition of a foreign insolvency proceeding together with the granting of relief from arrest procedures interferes with maritime law. But the Singapore High Court understood that in this case, the reach of its decision would be beyond Singapore and affect Hanjin's restructuring globally.[153] Furthermore, the Hanjin recognition has to be seen against the background that Singapore is about to incorporate the UNCITRAL Model Law on

[147] See *Seoul Central District Court declared Hanjin Shipping bankrupt* (2017), Maritime Herald, available at http://www.maritimeherald.com/2017/seoul-central-district-court-declared-hanjin-shipping-bankrupt/ (last visited on 10 June 2018).

[148] See above at Sect. 4.4.4.

[149] See Franks et al. (2017), p. 8.

[150] The maritime creditor friendly approach was confirmed in Beluga Chartering GmbH (in liquidation) v Beluga Projects (Singapore) Pte Ltd (in liquidation) [2014], 2 SLR 815.

[151] Re Taisoo Suk (as foreign representative of Hanjin Shipping Co Ltd [2016] SGHC 195, 2 SLR 787.

[152] See Ji (2017).

[153] "*The applicant foreign representative of Hanjin argued that the application made was essential part of the series of applications that Hanjin had made across the world to prevent piecemeal and haphazard resolution of the company's difficulties. Any such disparate treatment would imperil Hanjin's rehabilitation and there would be a disorderly scramble amongst Hanjin's creditors to act quickly to seize and/or exercise their lien on vessels and containers which constituted Hanjin's principle business asset*", Ang (2016), p. 13.

Cross—Border Insolvency in 2017.[154] The Model Law emphasises on a modified universalism with global recognition of foreign main insolvency proceedings. Even though the Model Law has not yet been incorporated, the Singapore court was guided by the universalistic approach.

4.4.5 Conclusion on Alternative Harmonisation Rules for Maritime Insolvency

At the moment there are no harmonisation rules for the special case of maritime insolvencies in place, but alternative approaches have been made or are in the making. Despite the lack of international harmonisation in this field, the industry and the insolvency representatives were able to manage numerous proceedings, but the bottom line was almost always a complaint about inefficiency and loss of time due to parallel or even contradicting procedures, notably the conflict of insolvency's automatic stay and the maritime arrest proceeding.

A non-specific maritime approach is the concept of contractualism. Protocols and Cross-Border Insolvency ("**CBI**") Agreements effectuate this modern approach. The reliance on contractual agreements between the main insolvency parties allows the determination of the jurisdictions and courts involved with certainty. The strength of this contractualistic approach lies in its ability to harmonise international insolvency procedures and the vital court-to-court communication and cooperation. Despite these virtues, the private ordering of maritime insolvencies seems to be hard to accomplish. The superior position of maritime lienholders, whose security rights are secret and with which the ships may be encumbered at any time, makes it difficult to contractually plan the insolvency proceeding of a maritime entity. Even if the insolvency court, representative and the main creditors of the shipping company agree on a protocol or the shipping company relies on an insolvency clause, the maritime lienholders are not bound by these covenants and can enforce their lien secured claims in globally accepted arrest procedures. Hence, contractualism offers an interesting and practice-approved approach on international insolvency, but it does not solve the conflicts at the interplay of maritime enforcement proceedings and procedures of insolvency laws.

Coming from a maritime perspective, the CMI proposed a specifically maritime supplement to the UNCITRAL Model Law on Cross-Border Insolvency, which should help to establish the maritime particularities, especially the rights *in rem* enforcement, in the context of international insolvency. It is a very pragmatic approach to use the Model Law as a vehicle to promote the harmonisation of international maritime law. The role model for a maritime supplement extending the Model Law could be the Art. 8 EU Insolvency Regulation, which embodies a deviation from the principle of universalism and stipulates the application of *lex rei sitae*

[154] See for this and the following: Ji (2017).

instead of *lex fori concursus*. Nevertheless, even if the CMI is able to lobby for such a supplement and the UNCITRAL incorporates these maritime codes, the project is still hard to realise. First of all, the whole process of lobbying, drafting and then finally incorporating is very time consuming. The shipping crisis is still not of the past, but such a process can easily take up to 10 years. In the meantime, new practical approaches could have been established. Furthermore, it is not certain whether the CMI's effort of a special protocol to the Model Law would be acknowledged. Already in 1996, during the drafting process of the Model Law, the shipping industry faced financial distress and legal research had already urged the lawmakers to "*recognize the primacy of admiralty law over the vessel and maritime lienor*".[155] These calls remained unheard. Additionally, many major shipping nations, like the USA and UK, have already incorporated the Model Law. The process of altering the Model Law with a maritime chapter could therefore not halt at international level, but the lobbying of the CMI would have to go down to the national legislators as well.

Davies made the most realistic of the three different harmonisation proposals for maritime international insolvency with his 'middle path of reciprocal comity'. This approach manages to bring together the guiding elements of international insolvency—the concept of procedural stay, COMI and main/ancillary proceedings—and of maritime law—the arrest procedure and the super priority of claimants secured by maritime liens. The idea of reciprocal comity is well established in international insolvency and is often the base for protocols between courts and insolvency representatives of different jurisdictions. The inclusion of maritime law into this reciprocal comity puts the insolvency proceeding into the centre of procedure, halting the arrest procedure, but with the reciprocal element the maritime creditor security system is taken into account as well. The balancing nature of this approach promises the highest degree of international acceptance. A hindering factor could be the strict *lex fori* approach of some jurisdictions, in particular England & Wales, and the strong reliance on a functioning communication and cooperation between the courts of insolvency and maritime arrest. But with today's means of communication, the realisation of a functioning system of reciprocal comity appears to be as realistic as never before and the time seems to have come that the tensions between maritime and insolvency law can be finally eased, if not solved. Furthermore, the court-to-court communication has made international progress through various harmonisation and guideline projects, initiated by the UNCITRAL as well as the ALI. These projects have set the ground for an effective application of the reciprocal comity approach.

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[155] Alwang (1996), p. 2646.

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Chapter 5
Conclusion

Maritime cross-border insolvency is a situation with multi-layered topics and legal issues. The calls for harmonisation in this field are numerous. The examination in the second chapter has shown that the insolvency laws of Germany, England & Wales and the USA do not diverge substantially. The three jurisdictions all share the principles of facilitating restructuring procedures and creditor satisfaction. This common ground helps in administering cases of international insolvency, where courts have to open their legal minds to foreign procedures and approaches. In the field of international insolvency, the UNCITRAL Model Law on Cross-Border Insolvency and the EU Insolvency Regulation have been milestones in the long development of a modified-universalistic approach to cross-border insolvency. The two codes have improved the efficiency of international insolvency procedures and helped establishing guidelines for the court-to-court communication and cooperation.

Maritime law as the antagonist in maritime cross-border insolvencies has an ancient and international background. Keeping in mind the roots of this legal system helps to understand the legal particularities that evolved over the centuries and cumulated in the maritime specific security interest of maritime liens. But as old as the concept of maritime liens may be, the maritime industries, as well as the national legislators, have found ways to deal with these security interests. Hence, these liens are not causing as much trouble as before the age of electronic instant communications. Just England & Wales takes a rather complicating stance on maritime liens by applying a strict *lex fori* rule and thus courts in England & Wales do not accept alien maritime liens, like those for necessaries. Germany and the USA take a very liberal approach to foreign liens and grant those liens the same status as their domestic equivalents.

The main problem with maritime liens in an international context is that in cases of ship insolvencies they add to a series of other complicated cross-border/jurisdiction problems. Especially the interplay of maritime arrest procedures, available to maritime lienholders as an action *in rem*, and the insolvency proceeding, with its staying measures, has caused much legal and practical trouble. Thus, the focus on

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any harmonisation efforts in the field of maritime cross-border insolvency should not be placed on international harmonisation of either insolvency or maritime law, but on the interplay of and resolution of any conflict between these two legal systems.

Maritime insolvency triggers the intersection of these distinct legal codes and brings to light that the two systems are established on two completely different legal concepts and principles. The insolvency system is in place to provide the debtor with a chance to rescue his business and furthermore guarantees fairness among the debtor's creditors, during a restructuring procedure as well as in distributing the proceeds of a liquidation process. In contrast, the base of maritime law is the certainty for creditors that they can enforce their claims against the shipping company or the ship itself, no matter where the ship is located. A single maritime creditor can arrest the ship and enforce his lien-secured claim without any regard to an eventual issue of fairness to other creditors or the debtor. This divergence of principles behind the two legal systems is the main source of legal conflict and has produced numerous articles and proposals for harmonisation.

The well-established codes of the EU Insolvency Regulation and the UNCITRAL Model Law have not helped solving the tensions in maritime insolvency and the relatively modern approach of contractualism, relying on CBI Agreements and protocols, may be working for other industries and is supported by liberal scholars, who believe that the freedom of contract rectifies all international problems, but the maritime industry cannot fully rely on it. Maritime lienholders possibly would not be included in these agreements and protocols, but are still in the position to arrest the vessel, regardless of any on-going insolvency or restructuring proceeding. The CMI has proposed a maritime specific supplement to the UNCITRAL Model Law, but remains sceptical about the chances of realisation and a long legislative procedure might outdate this approach. The most promising and pragmatic harmonisation approach is based on reciprocal comity, where the maritime arrest procedure is halted and the vessel is only released on the commencement of an insolvency proceeding, if the insolvency court in turn accepts to give the maritime claimant the same priority status that he otherwise would have enjoyed in a maritime procedure. This approach is particularly promising, because it can build on the already established achievements of international insolvency institutions, which have introduced guidelines and principles of court-to-court communication and cooperation. The feasibility of an orderly international insolvency restructuring and liquidation of a shipping company was recently tested in the Hanjin case. This case showed that on one hand the modified universalism, embodied in the UNCITRAL Model Law, helped the South Korean administrator to safeguard Hanjin's fleet from arrest procedures and on the other hand the maritime lien holders were satisfied in settlements aside. This pragmatism of a 'redemption solution' has proven to be effective in maritime cross-border insolvency.

But as useful as a harmonisation of maritime insolvency may be, recent trends have shown that the need for such international harmonisation might be diminishing over the next couple of years. The supremacy of US insolvency law paired with the financial and economic clout of the USA have led to a steadily growing number of

foreign corporate groups striving for restructuring and even liquidating procedures in the USA, in particular New York. The insolvency procedures are easily available for foreign companies and the US insolvency system provides solutions that are particularly attractive for shipping companies operating large numbers of one-ship companies organised in corporate groups. This forum shopping in international insolvency leads to a specialisation on the side of courts and insolvency practitioners as well as an improved insolvency- experience of the maritime industry. From a transnational perspective, the downside of this concentration on the US insolvency market is that the urge to globally harmonise the insolvency codes and rules as well as the interplay of maritime law and insolvency law becomes less strong and the pressure of legal problems in maritime insolvency fades. Shipping companies choosing the USA as their insolvency and restructuring forum are attracted by the international approach the US bankruptcy courts are taking and the flexibility of these courts in dealing with maritime particularities.

This book concentrated on the three jurisdictions of Germany, England & Wales and the USA, because these three countries are still main players in international maritime trade and shipping. The focus had to be placed on them to ensure that this book would not get lost in a comparison of too many jurisdictions. Nevertheless, the Asian market already plays a major role and this position will be further strengthened in the future. As a result, all international harmonisation efforts have to acknowledge the Chinese, Korean, Japanese, and Singapore approaches to maritime cross-border insolvency, to mirror today's realities of a strong involvement of Asian market players in almost any international maritime insolvency. The UK's referendum to leave the EU adds another interesting political aspect to international legal harmonisation. In the negotiations between the EU and the UK on the terms of this British secession, it will be interesting to see, whether the legal integration will be resolved as well, or whether the benefits of the existing EU legal integration and harmonisation (EU Insolvency Regulation in particular) are so strong that the UK will wish to remain part of such legal unity.

For the future, the efforts of the CMI are important and in order to actually achieve a higher degree of certainty in maritime cross-border insolvency, the implementation of a special maritime protocol into the UNCITRAL Model Law on Cross-Border Insolvency is a challenging task. It will be interesting to see how the goal of a maritime supplement will be achieved. The process may take years, but as the end of the recent shipping crisis, so is the emergence of the next crisis. After all, all efforts of harmonisation have to stand the test of practice, and insolvency and maritime legal practitioners have to solve legal issues at the intersection of maritime law and insolvency law already. Whether they resort to the US insolvency system or convince their local insolvency or arrest courts to cooperate with the respective other, the shipping crisis has produced legal creativity that should not be squandered, but seized and turned into new legal approaches, like the realistic and practical approach of reciprocal comity. Singapore's revised view on the interplay of insolvency and arrest procedures during the Hanjin insolvency is a clear sign of innovation and courts' readiness to adapt to the reality of global insolvency procedures in the maritime sector.

This book sets a spotlight on a very particular legal issue and for many, the maritime industry and jurisprudence remains alien. However, all international concepts of company, commercial, insurance and insolvency law are put to a real test in cases involving the maritime sector. This particular industry has experienced globalisation long before any other and was always forced to find ways to deal with international legal challenges. The answers to these challenges have often been criticised and some would be ready to abolish the maritime creditor security system. This seems rash, as the lessons hardly learned in maritime insolvency cases should be transformed into legal concepts for all other economic branches and the well-established system of maritime law should not be tampered with, as in the end, a functioning maritime industry and trade are too important for world economy and an improving global living standard—

navigare necesse est!