# Cross-border insolvency and admiralty: a middle path of reciprocal comity

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## *1. Introduction*

When a shipowner becomes insolvent, or when it appears that it soon may be so, creditors often move to arrest its ships or attach its other assets wherever in the world they can be found, using admiralty procedures designed to protect the interests of local claimants. When this occurs, a familiar conflict arises, between insolvency law and admiralty law. Admiralty law would allow the creditor to proceed against the shipowner's assets where they were seized, notwithstanding the existence of insolvency proceedings in the debtor's home country. Indeed, one of the principal purposes of the traditional admiralty procedures is to allow local creditors to get satisfaction of their claims, notwithstanding the insolvency of a distant foreign shipowner. In contrast, in insolvency law, the "golden thread" of universalism calls for courts in other countries to cooperate with the courts in the country of the debtor's insolvency to ensure that all of its assets are distributed to its creditors under a single, orderly, system of distribution.[1] If the debtor's assets have been seized by admiralty judicial process in another country, the principle of universalism calls for them to be released, and for the admiralty creditors to participate in the debtor's insolvency proceedings.

At first sight, the underlying imperatives of these two bodies of law appear to be irreconcilable. It seems that one or other must prevail at the expense of the other. If admiralty prevails, the admiralty proceedings in the country of arrest or attachment will proceed as usual, notwithstanding the existence of insolvency proceedings in the debtor's home country.[2] If

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1 *Re HIH Casualty & General Insurance Ltd* [2008] 1 W.L.R. 852, 861-62, per Lord Hoffmann.

2 See, e.g., *Holt Cargo Systems Inc. v. ABC Containerline N.V.* [2001] 3 S.C.R. 90 (admiralty proceedings in Canada allowed to proceed, notwithstanding the existence of insolvency proceedings in Belgium).

insolvency prevails, the admiralty proceedings must be discontinued so as to ensure all creditors participate equally in the insolvency proceedings.[3] Predictably, maritime lawyers prefer the first alternative: this is, after all, why admiralty procedures have existed for hundreds of years. Equally predictably, insolvency lawyers prefer the second alternative: to them, the right to proceed against the debtor's assets in admiralty amounts to little more than an illegitimate form of preference. This appears to be a zero sum game: whichever body of law wins, someone will regard the outcome as illegitimate or inappropriate.

The goal of this article is to suggest a third way, a middle path that achieves the main goal of universalism, recognizing the primacy of the insolvency proceedings, while also preserving the right of admiralty claimants to secure their claims by proceeding against the debtor's assets wherever they may be found. This middle path depends upon the notion of reciprocal comity, by which each country – that of the admiralty arrest or attachment and that of the insolvency proceedings – respects the legitimacy of the other's proceedings and laws.[4] Respect should be mutual. If respect is not reciprocated, it is no more than enforced acquiescence or self-abnegation.

The UNCITRAL Model Law on Cross-Border Insolvency[5] implements the concept of universalism by requiring enacting countries to stay any proceedings against a debtor upon recognition of the existence of insolvency proceedings in the debtor's centre of main interests (COMI).[6] The E.U.'s Insolvency Regulation[7] (soon to be the Recast Insolvency Regulation)[8] implements a modified form of universalism, giving primacy to insolvency proceedings in the

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3 See, e.g., *Evridiki Navigation Inc. v. The Sanko Steamship Co.*, 880 F.Supp.2d 666 (D.Del., 2012)(admiralty proceedings in the United States terminated because of the existence of insolvency proceedings in Japan).

4 See Edward Janger, "Reciprocal Comity," 46 *Tex. Int'l L.J.* 441 (2011).

5 *UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation* (UNCITRAL Secretariat, 2014).

6 Model Law, Art. 20.

7 Council Regulation (E.C.) 1346/2000 on insolvency proceedings.

8 Regulation (E.U.) 2015/848 of the European Parliament and Council of 20 May 2015 on insolvency proceedings (recast), which will take effect on 26 June 2017.

debtor's COMI and the law of the country where they are opened (the *lex concursus*), but preserving pre-existing rights *in rem* granted by the laws of other E.U. member states.[9] The most basic notions of comity demand that a country where the debtor's assets have been arrested or attached using admiralty procedures must recognize the primacy of insolvency proceedings in the debtor's COMI. Reciprocal comity demands that the country of the insolvency proceedings recognize and respect the legitimacy of the security granted by the admiralty procedures in the country of arrest or attachment.

Both the Model Law and the Insolvency Regulation can accommodate a reciprocal comity approach of the kind recommended here. This article explains how, focusing mainly on the Model Law, which, although not yet widely adopted, has been enacted in several important maritime jurisdictions, including Australia, Canada, Greece, Japan, Korea, South Africa, the U.K., and the United States.[10]

The appropriate relationship between the law of the country of arrest or attachment and the law of the opening of insolvency proceedings depends in part upon the order in which proceedings are commenced. The next section of this article explores the different possible permutations.

## 2. Three permutations

One of the most troublesome aspects of the relationship between cross-border insolvency and admiralty proceedings is the fact that the nature of that relationship changes according to the order in which the various proceedings are brought. This is true not only as a matter of priority and precedence, but also, as a practical matter, in relation to the assets of the debtor themselves. In particular, the extent of the debtor's insurance cover for pre-existing liabilities will depend upon the order in which proceedings are brought.

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9 Insolvency Regulation, Arts 4, 5; Recast Insolvency Regulation, Arts 7, 8.

10 UNCITRAL, *Status: UNCITRAL Model Law on Cross-Border Insolvency (1997)*, available at http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model_status.html (last visited 7 April 2016).

There are three significant moments in the kind of case under consideration here: the commencement of admiralty arrest or attachment proceedings (A); the opening of insolvency proceedings in the debtor's COMI (I); and recognition of the insolvency proceedings as a foreign main proceeding (FMP) in a country that has enacted the Model Law (R). These three events can occur in three possible sequences: A-I-R, I-R-A, and I-A-R.[11] The three permutations raise different implications about the relationship of reciprocal comity between the country of arrest/attachment and the country of the FMP. As a practical consequence, it follows that there cannot be a single, "one size fits all" solution to the legal issues raised in these cases. The appropriate international solution must depend upon the sequence of events.

*(a) A-I-R: admiralty proceedings before insolvency proceedings*

This permutation is the one that most pointedly raises the supposed competition between insolvency and admiralty. Admiralty claimants may have proceeded against the debtor's vessel(s) before its insolvency either because they have learned of the possibility of an impending insolvency or in the ordinary course of things, unaware of the possibility that the operator of the vessel(s) against which they are proceeding is in sufficiently dire straits that it may soon be forced into insolvency in its COMI. The admiralty claimant's knowledge or intention is largely irrelevant, of course. All that matters for present purposes is that the admiralty claimant has proceeded to enforce what admiralty law regards as a secured claim before insolvency proceedings were opened. Should the subsequent opening of insolvency proceedings bring an end to the pre-existing admiralty proceedings, thereby quite possibly extinguishing the security that those admiralty proceedings give to the claimants, forcing them to participate in the foreign insolvency? Or should the admiralty claimants' "first strike" against one of the main assets of the debtor be allowed to stand, possibly giving them what amounts to a preference over other creditors?

[11] There are six possible combinations of the three variables A, I and R: AIR, ARI, IRA, IAR, RIA, RAI. Because recognition of an FMP cannot possibly precede the opening of insolvency proceedings in the COMI, R cannot precede I, which removes the theoretical combinations ARI, RIA and RAI.

The UNCITRAL Model Law deliberately left that question up to enacting states, thereby eschewing the possibility of an internationally uniform answer. Article 20(2) of the Model Law modifies the effect of the mandatory stay called for by Art. 20(1) by providing:

> The scope, and the modification or termination, of the stay and suspension referred to in paragraph 1 of the present article are subject to [*refer to any provisions of law of the enacting State relating to insolvency that apply to exceptions, limitations, modifications or termination in respect of the stay and suspension referred to in paragraph 1 of the present article*].

UNCITRAL's "Guide to Enactment and Interpretation" states that the purpose of Art. 20(2) is to limit the effect of the mandatory Art. 20(1) stay by reference to any exceptions or limitations that may exist under the law of the enacting country, such as local laws allowing the continuation of pre-existing claims by secured creditors.[12] The Guide to Enactment says that an insolvent debtor enjoying the benefit of Art. 20 must accept the imposition of restrictions by the enacting country, even if they are different, and possibly more stringent, than they would be under the law of the FMP.[13] That is consistent with a reciprocal comity approach, because it requires both the enacting country (the country of arrest/attachment) and the country of the FMP to acknowledge and respect the laws of the other. The country of arrest/attachment must respect the existence of the FMP in another country by staying the existing proceedings in its courts, but the country of the FMP (and the debtor invoking insolvency protection) must respect the fact that the country of arrest/attachment may choose to preserve the priority of claims secured before the insolvency proceedings were opened.

Article 20(2) means that a country enacting the Model Law could provide that the mandatory Art. 20(1) stay does not apply to a pre-existing action by any secured claimant,[14]

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12 *UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation* (UNCITRAL Secretariat, 2014), p. 85, para. 183.

13 Ibid, p. 83, para. 178.

14 See also *UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective* (UNCITRAL Secretariat, 2014), p. 56, para. 165.

including one who has proceeded in admiralty to seize a ship by arrest or attachment. Predictably, different countries that have enacted the Model Law have "filled in the blank" in Art. 20(2) in different ways. Although some enacting countries have provisions allowing secured claimants to continue to proceed against an individual debtor's assets notwithstanding a subsequent bankruptcy filing,[15] some, such as Japan[16] and (perhaps) South Africa,[17] make exactly the opposite provision in relation to corporate debtors, providing no "safe harbor" for pre-existing claims by secured creditors but forcing all of them to participate in the subsequently-declared insolvency. The United Kingdom provides that a pre-existing admiralty claimant is not subject to the Art. 20(1) stay if a claim involving a corporate defendant has been "completed," meaning that there has been a judicial seizure *and sale* before the insolvency proceedings are opened.[18] The result of such a provision is that the admiralty claimant can continue to proceed against the proceeds of a judicial sale notwithstanding the opening of insolvency proceedings, but if the

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15 See, e.g., Insolvency Act 1986 (U.K.), s 285(4).

16 Act of Recognition of and Assistance for Foreign Insolvency Proceedings (No. 129 of 2000), Arts. 27-29.

17 Cross-Border Insolvency Act 2000 (S.A.), s. 20(2) makes the mandatory Art. 20(1) stay subject to the requirements imposed by Companies Act 1973 (S.A.), s. 359, which suspended all pre-existing proceedings against a company once a winding-up order was made unless prompt notice was given to the liquidator. However, Companies Act 1973 (S.A.) was repealed by Companies Act 2008 (S.A.) without consequential amendment of Cross-Border Insolvency Act 2000 (S.A.), s. 20(2), which leaves the position unclear.

18 Cross-Border Insolvency Regulations 2006 (U.K.), Art. 20(3)(a) provides that "in the case of a debtor other than an individual," the Art. 20(1) stay does not affect any right "to take any steps to enforce security over the debtor's property" if that right would have been exercisable against the debtor company if it had been the subject of a winding-up order under the Insolvency Act 1986 (U.K.). Insolvency Act 1986 (U.K.), s. 183(1) provides that where a creditor has issued execution against the goods of a company and that company is subsequently wound up, the claimant cannot retain the benefit of the execution unless it has been "completed" before commencement of the winding up, which means (s. 183(3)(a)) "completed by seizure and sale." (The Cross-Border Insolvency Regulations 2006 (U.K.) were made by the Lord Chancellor and the Scottish Ministers pursuant to powers conferred by the Insolvency Act 2000 (U.K.), s. 14.)

admiralty proceedings have not reached the point of judicial sale when insolvency proceedings are opened, the claimant cannot continue to proceed in admiralty but must participate in the insolvency proceedings. Some enacting countries, such as New Zealand and Kenya, have "filled in the blank" in Art. 20(2) by giving the court an open-ended discretion to order, upon application by any creditor (including, presumably, a pre-existing admiralty claimant), that the Art. 20(1) stay should not apply upon any conditions that the court thinks fit.[19] Australia[20] and Canada[21] have adopted (or apparently adopted)[22] an interesting intermediate position, which does not exempt pre-existing secured claims from the mandatory Art. 20(1) stay if the insolvent debtor is in administration, but allows them to continue if the insolvent company is in liquidation. This would mean that the proceedings would be stayed if the insolvency proceedings in the FMP were to be some form of rehabilitation, so that the corporate debtor still had some prospect of surviving its insolvency and so still needed "breathing space," but not if the company were in liquidation without any prospect of survival.

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19 See, e.g., Insolvency (Cross-Border) Act 2006 (N.Z.), Sch. 1, Art. 20(2); Insolvency Act 2015 (Ken.), s. 720, Sch. 5, para. 22(2)

20 Corporations Act 2001 (Cth), s. 440B provides that secured parties cannot enforce their secured claims while the company is in administration; Corporations Act 2001 (Cth), s. 471C provides that the mandatory stay of proceedings under s. 471B when a company is being wound up in insolvency does not affect a secured creditor's right to realize or otherwise deal with its security interest.

21 Companies' Creditors Arrangement Act 1985 (Can.), s. 11.02(1)(a); Bankruptcy and Insolvency Act 1985 (Can.), s. 271(3) make the stay subject to the exceptions that would apply in Canadian domestic proceedings. Bankruptcy and Insolvency Act 1985 (Can.), ss. 69(2)(a), 69.1(2), 69.3(2) allow proceedings by secured creditors to continue; *Federal Business Development Bank v. Quebec* [1988] 1 S.C.R. 1061.

22 The Australian completion of Art. 20(2) has been described as "beguilingly ambiguous" (see *Kim v. Daebo International Shipping Co. Ltd* (2015) 232 F.C.R. 275, 277, [7], per Rares J.; *Hur v. Samsun Logix Corp.* (2015) 109 A.C.S.R. 137, 141, [21] per Rares J.) because it simply refers to Corporations Act 2001 (Cth), Chapter 5: see Cross-Border Insolvency Act 2008 (Cth), s. 16(b). Corporations Act 2001 (Cth), Chapter 5, has a variety of different stay provisions that affect the position of secured creditors differently at different points in the process of insolvency.

The United States did not "fill in the blank" in Art. 20(2) at all, perhaps because it did not enact Art. 20 in the form suggested by the Model Law. Chapter 15 of the Bankruptcy Code contains no provision modifying the effect of the mandatory stay upon recognition of an FMP. Indeed, far from referring to a local provision preserving the effect of pre-existing proceedings in relation to secured claims, the Chapter 15 provision mandating a stay upon recognition of an FMP cross-refers to a local provision that specifically applies the mandatory stay to (among other things) "any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of [the insolvency proceedings]."[23] Thus, the United States is to be grouped with Japan and (perhaps) South Africa, as a country providing no "safe harbor" for pre-existing claims by secured creditors.[24]

However the enacting country "fills in the blank" in Art. 20(2), it is important in the A-I-R permutation to determine which pre-existing admiralty claims count as secured claims, and which do not. It seems beyond doubt that maritime lien claims should be regarded as secured claims. The traditional view of an action to enforce a maritime lien is that it is the perfection of an inchoate right that the claimant has over the liened vessel from the moment the claim arises.[25] The process is often described as "foreclosure," which highlights the idea that the claimant has a kind of property right or charge over the liened ship, analogous to a mortgage or *hypothec*.[26] Common law countries disagree about what kinds of claim, and how many, give rise to a maritime lien, but they do not disagree about the secured effect of such claims when they do arise.[27] More difficult is the question whether a non-lien claim enforced by the admiralty procedure of arrest or attachment constitutes a secured claim for these purposes. Admiralty

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23 11 U.S.C. § 1520(a)(1); 11 U.S.C. § 362(a)(5).

24 See above, notes 21 to 17.

25 *Harmer v. Bell (The Bold Buccleugh)* (1851) 7 Moo.P.C. 267, 284; 13 Eng.Rep. 884, 890.

26 In *The Nestor*, 18 F.Cas. 9, 13 (C.C.D. Me. 1831), Justice Joseph Story described the effect of a maritime lien as a "tacit hypothecation."

27 The history of the disagreement between the American and English views of maritime liens is considered in Martin Davies, "In Defense of Unpopular Virtues: Personification and Ratification," 75 *Tul. L. Rev.* 337, 341-50 (2000).

claims that can be enforced *in rem* by arrest of a ship are sometimes described as being secured by a "statutory lien," because they are conferred by statute and not by the general maritime law, although the claimant's "lien" attaches only at the time of commencement of proceedings *in rem* and not at the time the claim arose, as a maritime lien does.[28] There is English authority for the proposition that a statutory right to proceed *in rem* does make the claimant a secured creditor for purposes of subsequently-opened insolvency proceedings.[29] Recent cases in Australia also support the proposition that an admiralty claimant who has proceeded *in rem* is a secured claimant for purposes of subsequently-opened insolvency proceedings.[30] Thus, in those enacting countries that have "filled in the blank" in Art. 20(2) by allowing pre-existing secured claims to continue, notwithstanding recognition of an FMP, both maritime lien and "statutory lien" claims should not be subject to the mandatory Art. 20(1) stay.

If the country of arrest or attachment does not make an exception to the mandatory stay for pre-existing secured claims, it must stay any admiralty proceedings (with the possible exception of claims based upon maritime liens, a point that is considered in further detail below in the context of I-R-A) and release any security that has been given in relation to the admiralty claim. Unfortunately, that is likely to have the net effect of making all claimants worse off. If the admiralty proceedings predate the insolvency and recognition (i.e., if A comes before I and R), the security is likely to take the form of an undertaking by a P. & I. Club given in consideration of the claimant either releasing the ship in question from arrest or refraining from arresting it.[31] Typically, the P. & I. Club letter of undertaking takes the form of an agreement between the Club and the claimant, and so it cannot be regarded as an asset of the insolvent debtor shipowner that

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28 *C. & C.J. Northcote v. The Owners of the Henrich Bjorn: The Henrich Bjorn* (1886) 11 App. Cas. 270, 277.

29 *Re Aro Co. Ltd* [1980] Ch. 196.

30 *Programmed Total Marine Services Pty Ltd v. Ship Hako Endeavour* (2014) 229 F.C.R. 563, 569, [22], per Allsop C.J.; *Kim v. Daebo International Shipping Co. Ltd* (2015) 232 F.C.R. 275, 277, [8], per Rares J.; *Yakushiji v. Daiichi Chuo Kisen Kaisha* [2015] FCA 1170, [20], per Allsop C.J.

31 The ship's P. & I. Club would not give the usual undertaking if the shipowner is in any kind of insolvency proceedings at the time of the admiralty claimant's arrest or attachment: see the consideration of I-R-A and I-A-R below.

could be entrusted to the foreign representative under Art. 21(1)(e) of the Model Law.[32] Although the Club's undertaking to satisfy claims is obviously an asset in one sense, it is not a fungible, transferable asset that can be realized by anyone other than the admiralty claimant. If the (former) admiralty claimant participates in the FMP after the admiralty proceedings in the country of arrest/attachment have been stayed, it increases the number of claims against the insolvent debtor without any corresponding increase in the assets available to satisfy those claims. The admiralty claimant is worse off because it loses the security it previously had for payment of its claim, and the other creditors are worse off because their likely recovery is diminished by the participation of another creditor claiming against the assets of the insolvent debtor. The Club could not be forced to increase the assets of the insolvent debtor in the FMP by transferring its undertaking to satisfy any claims, because that undertaking is given to prevent arrest or attachment of the debtor's ship to enforce a particular claim, something that can no longer occur.[33]

That being so, it would be unwise for a liquidator/administrator/trustee in bankruptcy to seek release of a previously-given Club letter of undertaking when applying for recognition of the debtor's insolvency proceedings as an FMP. Recognition should preclude subsequent action against the debtor's assets by admiralty claimants (that would be the I-R-A permutation, considered below), but it should have no impact on pre-existing admiralty claims secured by a letter of undertaking.

### *(b) I-R-A: insolvency and recognition proceedings before admiralty proceedings*

At first sight, this permutation seems to have the most obvious solution. Any admiralty claimant who arrests or attaches a ship after an order recognizing the FMP has already been made seems clearly to be acting in contravention of the court's recognition order. That is plainly true, with the

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32 Erik Røsæg, "Shipowner's Limitation of Liability and Bankruptcy" in *Festschrift für Dieter Martiny zum 70 Geburstag* (Mohr Sieback, 2014), p. 1201.

33 In any event, Club rules typically contain an "ipso facto" termination of cover in the event of the shipowner's insolvency: see below.

possible exception of maritime lien claims, which are regarded as being claims against the personified ship itself, rather than claims against the shipowner.

The significance of that distinction was considered at some length by Buchanan J. of the Federal Court of Australia in *Yu v. STX Pan Ocean Co Ltd (South Korea),*[34] who held that a stay of proceedings under Art. 20(1) of the Model Law should not preclude a claimant from subsequently bringing an action *in rem* to enforce a maritime lien. *Yu* held that because a maritime lien creditor has a secured interest against the ship itself dating from the moment of the event from which the lien arose, rather than merely an *in personam* right against the ship's owner, the Art. 20(1) stay should not apply to a maritime lien claim, which should be allowed to proceed against the ship.[35] Accordingly, the *Yu* court held that when an Art. 20(1) stay has been ordered upon recognition of an FMP, any warrant for arrest of a ship owned or chartered by the foreign debtor should be considered by a judge of the court, rather than by the Admiralty Registrar, so that the judge can determine whether the interest sought to be vindicated by the action *in rem* is a maritime lien.[36] Orders of this kind have routinely been made since *Yu* when recognizing FMPs of ship operators.[37]

The same maritime lien issue arose, but was not decided, in the United States in *In re Daewoo Logistics Corp.,*[38] in which a stevedoring company made a Rule C arrest of a ship

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34 (2013) 223 F.C.R. 189.

35 Cross-Border Insolvency Act 2008 (Cth), s. 16 provides that for purposes of Art. 20(2), the Art. 20(1) stay is subject to the operation of the Corporations Act 2001 (Cth), Chapter 5, which includes s. 471C. Similarly, Art. 20(4) provides that the Art. 20(1) stay does not affect the right to request commencement of a proceeding under stipulated local laws, left blank in the Model Law itself. Section 16 does not, in its terms, apply s. 471C to Art. 20(4) as well as Art. 20(2), as Buchanan J. in *Yu* held that it does (see 223 F.C.R. 189, 202-3, [41]), but that appears to be a drafting omission, as the corresponding "blank" in Art. 20(4) would otherwise be left blank.

36 *Yu*, (2013) 223 F.C.R. 189, 203, [48], per Buchanan J.

37 See, e.g., *Kim v. Daebo International Shipping Co. Ltd* (2015) 232 F.C.R. 275; *Hur v. Samsun Logix Corp.* (2015) 109 A.C.S.R. 137; *Yakushiji v. Daiichi Chuo Kisen Kaisha* [2015] FCA 1170.

38 461 B.R. 175, 2011 AMC 2617 (Bankr. S.D.N.Y. 2011).

chartered, but not owned, by a time charterer (Daewoo) that was in rehabilitation proceedings in its COMI, Korea. The stevedoring company's claim was based on an allegation that it had a maritime lien over the ship for necessaries provided to the ship in the United States. The ship was released from arrest upon the giving of substitute security. Before the arrest occurred, the U.S. Bankruptcy Court for the Southern District of New York had recognized the Korean rehabilitation proceedings as an FMP, and the insolvent debtor (the time charterer) moved for an order holding the admiralty claimant in violation of the recognition order. The Bankruptcy Court held that the mandatory stays imposed as part of the recognition order terminated at the close of the foreign debtor's rehabilitation, which had occurred before the arrest. That rendered the *Yu*-like question moot, as there were other reasons for concluding that the arresting admiralty claimant had not violated the recognition order, and should be allowed to proceed to enforce its maritime lien. Nevertheless, the *Daewoo* facts provide a nice illustration of one aspect of the relationship between recognition of an FMP and a maritime lien claim. The *Yu* order that has become commonplace in Australia refers to ships "owned or chartered" by the foreign debtor in a recognised FMP. An enthusiastic supporter of the doctrine of personification would gladly accept the proposition that the personified ship is not the same legal person as its owner in insolvency proceedings in its COMI,[39] but even a personification sceptic might find it acceptable to allow a maritime lien claim to continue against a ship chartered, but not owned, by the foreign debtor. The plaintiff in *Daewoo* asserted a maritime lien over a ship that was not one of the foreign debtor's assets. There is no obvious reason why such a claim should be paralysed because of the existence of insolvency proceedings involving a time charterer, which has only the commercial disposition of the chartered ship, without any possessory right to it.

In contrast, in *In re Daebo International Shipping Co. Ltd*,[40] a stevedoring company and other creditors made Rule B attachments of a ship "leased" by a foreign debtor whose Korean rehabilitation proceedings had been recognized as an FMP by the U.S. Bankruptcy Court for the Southern District of New York. The "lease" was not a typical demise charterparty, but a sale-

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[39] I confess to being an enthusiastic supporter myself: see Martin Davies, "In defense of unpopular virtues: personification and ratification," 75 *Tul. L. Rev.* 337 (2000).

[40] 543 B.R. 47 (Bankr. S.D.N.Y. 2015).

and-leaseback arrangement that the foreign debtor had previously entered into with one of its creditors as a means of repaying a debt owed to that creditor.[41] Thus, there were two key differences from the *Daewoo* proceedings just described: (1) it was at least arguable that the ship was one of the foreign debtor's assets;[42] and (2) the admiralty process of seizure was not a purported foreclosure of a maritime lien under Rule C, but attachment of property under Rule B pursuant to an *in personam* claim against the foreign debtor. The Bankruptcy Court quite properly vacated the Rule B attachments, holding that if the ship was one of the foreign debtor's assets, the recognition order precluded seizure of it, and if the ship was not one of the foreign debtor's assets, it could not be attached as property of the defendant under Rule B.

The contrast between *Daewoo* and *Daebo* throws a peculiarly American light on the *Yu* distinction, helping to illustrate where it is controversial and where not. If the foreign debtor is only time charterer of the ships in "its" fleet, then the order recognizing the FMP in the I-R-A permutation should not preclude arrest or attachment of any ships in that fleet, which are clearly not assets of the foreign debtor, which had only the commercial disposition of the ships in question. If the foreign debtor actually owns the ships arrested after the recognition order, the court's response should depend upon the court's attitude to maritime liens and the doctrine of personification, which means that in most countries, the ship should be released from arrest/attachment after a recognition order has been made.

Even from the point of view of a personification sceptic, there seem to be sound reasons for allowing arrest proceedings pursuant to a true maritime lien to continue. All common law countries agree that a maritime lien survives sale of the liened ship, other than a judicial sale. If the foreign debtor were to buy a ship subject to maritime liens as a result of the previous owner's debts, those pre-existing maritime lien claimants could still proceed against the ship in question. This buttresses the view that, although the ship can quite properly be regarded from one point of view simply as one of the assets of the foreign debtor to be dealt with in the insolvency, it is not

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41 Ibid., at 50.

42 The ship was listed as one of the foreign debtor's "tangible assets" in the Korean rehabilitation proceedings: see *In re Daebo*, 543 B.R. at 50. The claimants argued, without success, that the "lease" was a sham transaction designed to defraud creditors.

absurd to regard it as an independent legal person capable of satisfying its own debts, which may or may not be the same as those of its owner.

*(c) I-A-R: admiralty proceedings during insolvency proceedings*

In practice, this may perhaps be the most common permutation. Once admiralty creditors learn of insolvency proceedings opened by the insolvent shipowner debtor in its home COMI, they are usually not slow to proceed in admiralty wherever they can find assets belonging to the foreign debtor, in an attempt to secure their claims without needing to participate in the foreign insolvency. Admiralty claimants in countries that have enacted the Model Law must try to act before an order recognizing the shipowner-debtor's insolvency proceedings as an FMP has been made, in order to try to stay ahead of the game, and to get their secured (or arguably secured) claims into court before any prospect of the mandatory Art. 20(1) stay being made upon recognition of the FMP – in other words, before they are in I-R-A territory.

If an admiralty claimant arrests or attaches a ship after its owner has opened insolvency proceedings in its COMI, there is every prospect that the arrest or attachment will actually take place, without being pre-empted by the provision of security by the ship's P. & I. Club (or other liability insurer). This is a key difference from the A-I-R situation, in which the shipowner's P. & I. Club can be expected to give security for the admiralty claims, given that the shipowner remains solvent at the time when the claims are brought. I-A-R is different. P. & I. Club Rules typically provide that the opening of insolvency proceedings by the shipowner, even rehabilitation proceedings, automatically terminates the shipowner's cover under the mutual insurance scheme that is the essence of such associations.[43] Such provisions are often called "cesser" clauses, although (obviously) they differ from the cesser clauses that typically appear in voyage charterparties; in some countries they are referred to as "ipso facto" clauses because they

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[43] The reason for such a provision is that any doubt about the shipowner's insolvency calls into question its ability to act as a co-insurer, as well as an assured, which is a fundamental aspect of the mutuality concept that underlies P. & I. insurance.

purport to take effect automatically upon the shipowner's insolvency (or possibly even before). Rule 29 of the U.K. Club Rules is typical of this kind of provision:[44]

> (A) An Owner shall forthwith cease to be insured by the Association in respect of any and all ships entered by him or on his behalf upon the happening of any of the following events:
>
> …
>
> ii. Where the Owner is a corporation, a) upon the passing of any resolution for its voluntary winding up (other than voluntary winding up for the purposes of company or group reorganisation), b) upon an order being made for its compulsory winding up, c) upon its dissolution, d) upon a receiver or manager being appointed of all or part of its business or undertaking, e) upon its commencing proceedings under any bankruptcy or insolvency laws to seek protection from its creditors or to reorganise its affairs.

The country of arrest or attachment may or may not recognize the "ipso facto" effect of the Club's purportedly automatic cancellation of the insurance cover provided to a now-insolvent shipowner. Some countries, such as, for example, the U.K., accept that "cesser" clauses of this kind are effective, on the basis that the insurer has the ability to stipulate the terms upon which it will provide cover. In *Belmont Park Investments Pty Ltd v. BNY Corporate Trustee Services Ltd*,[45] the U.K. Supreme Court held that the venerable English "anti-deprivation rule,"[46] which strikes down any provision in a contract vesting property of a debtor in someone else in the event of the debtor's bankruptcy, does not automatically invalidate provisions in executory contracts that take effect upon insolvency. In *Re Pan Ocean Co. Ltd*,[47] it was accepted by both parties that an "ipso facto" termination of a long-term contract of affreightment upon the event of the

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44 The 2016 version of the U.K. Club Rules is available at: http://www.ukpandi.com/fileadmin/uploads/uk-pi/Latest_Publications/2016_Publications/RULES_ONLY.pdf (last visited March 28, 2016).

45 [2012] 1 A.C. 383.

46 See, e.g., *Ex parte Mackay; Ex parte Brown; In re Jeavons* (1873) L.R. 8 Ch. App. 643; *Money Markets International Stockbrokers Ltd v. London Stock Exchange Ltd* [2002] 1 W.L.R. 1150.

47 [2014] Bus.L.R. 1041.

shipowner's insolvency was valid under English law, the governing law of the contract, notwithstanding the fact that it would have been invalid under Korean law, the law of the shipowner's insolvency. Morgan, J. in *Pan Ocean* explained as follows why that outcome was consistent with *Belmont Park*:[48]

> The contractual provisions which were under review in [*Belmont Park*] were triggered by the relevant company filing for Chapter 11 protection in the US Bankruptcy Court. Judge Peck sitting in the U.S. Bankruptcy Court for the Southern District of New York made a declaration that the contractual provisions in question were ineffective because they were in breach of the U.S. Bankruptcy Code: see *Re Lehman Bros Holdings Inc.,* 422 B.R. 407. Nonetheless, the contractual provisions were governed by English law and the English courts held that they were effective under English law.

In the light of such cases, it seems clear that the "ipso facto" effect of "cesser" clauses in P. & I. Club Rules would most probably be regarded as valid and effective as a matter of English law, even if they were to be regarded as ineffective by the law of the bankrupt shipowner's COMI.

Other countries, such as the United States, regard the "ipso facto" effect of clauses of this kind as invalid, as the *Pan Ocean* court's reference to the *Lehman Brothers* case makes clear.[49] In *In re Probulk, Inc.*,[50] the U.S. Bankruptcy Court for the Southern District of New York held emphatically that "ipso facto" clauses in P. & I. Club Rules were rendered invalid by the U.S. Bankruptcy Code, with the result that the insurance rights of insolvent shipowners continued after their petition for bankruptcy, notwithstanding the provisions of the Club Rules. The court said:[51]

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48 Ibid. at [17].

49 See, generally, Andrea Coles-Bjerre, "Ipso Facto: The Pattern of Assumable Contracts in Bankruptcy," 40 *N.M. L. Rev.* 77 (2010).

50 407 B.R. 56 (Bankr. S.D.N.Y. 2009).

51 Ibid. at 60-61.

> The Clubs' argument … rests on a so-called 'cesser' clause in their contracts, providing that insurance automatically terminates in the event that a member of the Club (the insured) passes 'a resolution for a voluntary winding up.' They claim that this clause results in a termination of coverage even before a bankruptcy or insolvency filing, apparently recognizing (without conceding) that the U.S. Bankruptcy Code may invalidate certain forfeitures that result from the act of filing a petition under Title 11. The Bankruptcy Code is not so easily evaded. There is no question that in the circumstances at bar their insurance rights constituted property of the debtors … Section 541(c)(1)(B) of the Bankruptcy Code[52] provides, with exceptions not applicable here, that an interest of the debtor in property becomes property of the estate notwithstanding any provision in an agreement ... or applicable nonbankruptcy law ... that is conditioned on the insolvency or financial condition of the debtor…There is thus no question that the debtors' insurance rights continued notwithstanding the Clubs' attempt to deem them terminated as a consequence of the resolutions of the boards of directors of the debtors authorizing a bankruptcy filing and the prospective appointment of a trustee or custodian.

If the country of arrest or attachment takes the same view as the United States, the P. & I. Club may be restrained by court order from cancelling coverage, and ordered to provide security according to the terms of the ship's entry with the Club. That is what happened in *In re Probulk, Inc*. If that does occur, the situation will be the same as under A-I-R, as the security given by the Club is "property of the debtor" only in the country of arrest or attachment, and cannot be transferred to the FMP. For that reason, it would be in all creditors' interest for their representative to pursue enforcement of the insurance contract in the country of arrest or attachment, rather than trying to repatriate all assets to the FMP, as the A-I-R situation shows.

Among common law countries, the only other countries that expressly nullify ipso facto clauses are: Barbados, Canada and New Zealand (in limited cases).[53] Among civil law countries, ipso facto clauses are nullified (at least in some cases) in: Belgium, Finland, France, Norway, Poland, Portugal, Sweden, and Spain.[54]

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[52] 11 U.S.C. § 541(c)(1)(B).

[53] Philip R. Wood, *Principles of International Insolvency* (2d ed., 2007), para. 16-030.

[54] Ibid.

On the other hand, if the country of arrest or attachment acknowledges the "ipso facto" effect of the Club's cancellation of cover immediately upon the shipowner's opening of the insolvency proceedings or even before, as the U.K. does, it is likely that the ship will actually be seized pursuant to judicial process in the country where the admiralty claimants proceed, unless the insolvent shipowner can somehow find some other security (such as a bond or bank guarantee) to offer to avert the judicial seizure. In those circumstances, the country where the ship has been seized must decide whether to release the ship once the recognition order is made, or to allow the admiralty claims to proceed on the basis that they are secured claims that were made before the order recognizing the FMP was made. As we have already seen in relation to the A-I-R permutation, some countries allow pre-existing secured claims to survive the recognition of an FMP under the Model Law, but others do not.

Thus, the I-A-R permutation would produce a "race to the courthouse" in those countries allowing pre-existing secured claims to continue, notwithstanding recognition of the FMP. Once insolvency proceedings are opened, creditors would be encouraged (if they needed any encouragement) to secure their claims by arrest or attachment wherever they found one of the debtor's ships. Conversely, the foreign representative might move quickly to seek recognition pre-emptively in as many Model Law countries as possible, so as to put the proceedings into I-R-A mode rather than I-A-R mode. Some Model Law countries, such as Japan, have made legislative provision to deal with that possibility, providing that if there are insolvency proceedings that may constitute an FMP and recognition proceedings are pending, any judicial seizure may be put on hold until the recognition occurs.[55] That approach may even be taken where there is no specific statutory authorization to do so, on grounds of judicial economy. For example, in *Evridiki Navigation Inc. v. Sanko S.S. Co.*,[56] the U.S. District Court for the District of Maryland ordered release of a ship that had been seized by admiralty claimants even before the making of an order recognizing the shipowner's insolvency proceedings as an FMP, because "it

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[55] Act of Recognition of and Assistance for Foreign Insolvency Proceedings (No. 129 of 2000), art. 25(2)("Where a petition for recognition of foreign insolvency proceedings is filed, the court may issue a stay order under the provisions of the preceding paragraph even before issuing an order on the petition.")

[56] 880 F.Supp.2d 666, 2012 AMC 1817 (D.Md. 2012).

appears inevitable that those claims [i.e., the admiralty claims] will never be adjudicated in this Court."[57]

If the admiralty claimant wins the "race to the courthouse" by arresting or attaching the debtor's ship before an order recognizing a foreign FMP has been made, and if that claim is allowed to continue, notwithstanding the later recognition order, the country of arrest/attachment would retain custody of the ship, at least initially. In those circumstances, it might well be best for the court in the arresting country to exercise its discretion under the Model Law, Art. 21(1)(e), to entrust the seized ship to the foreign representative so that it can be treated as an asset for the benefit of all creditors, not merely those who seized it by judicial process. Article 21(2) provides that such an order can only be made where it is "in the interest of the creditors" to do so. Here, "the creditors" appears to mean local creditors, not all creditors. Although the Guide to Enactment of the UNCITRAL Model Law says that Art. 21(2) is designed to protect "local interests," meaning the interests of "local creditors,"[58] it also says, in relation to Art. 22, that it is not advisable to take only the interests of local creditors into account when considering the exercise of discretionary relief under Art. 21.[59] Thus, for example, the U.S. enactment of Art. 21 requires the court to be satisfied that "the interests of creditors in the United States are sufficiently protected,"[60] but the U.S. enactment of Art. 22 provides that discretionary relief under Art. 21 may be given "only if the interests of the creditors and other interested entities, including the debtor, are sufficiently protected."[61] In *S.N.P. Boat Service, S.A. v. Hotel le Saint James*,[62] the U.S. Bankruptcy Court for the Southern District of Florida harmonized these different emphases in the following way (emphases in the original):[63]

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57 Id., at 674.

58 *UNCITRAL Guide to Enactment*, supra note 12, para. 192.

59 Ibid, para. 198.

60 11 U.S.C. § 1521(b).

61 11 U.S.C. § 1522(a).

62 407 B.R. 56 (Bankr. S.D.N.Y. 2009).

63 483 B.R. 776, 784 (Bankr. S.D. Fla. 2012).

> Thus, according to the Model Law, a bankruptcy court *must* be satisfied that local creditors' interests are "sufficiently protected" before allowing a foreign representative to distribute property in a foreign proceeding, and though not an express requirement, is *not precluded* from satisfying itself that *foreign creditors'* interests are "sufficiently protected" before allowing a foreign representative to distribute property in a foreign proceeding.

This interpretation points in the direction of a "reciprocal comity" solution, taking into account the interests of both the country of arrest/attachment and the country of the FMP. The most obvious way in which the country of arrest/attachment can satisfy itself that the interests of local creditors are protected is to take steps to ensure that the FMP country should continue to recognize the secured status of the pre-existing admiralty claims given by the arresting/attaching country after the asset has been entrusted to the creditors' representative.

For example, in *In re Atlas Shipping A/S*,[64] a Danish shipowner was declared bankrupt by a court in Denmark, the shipowner's COMI. Several creditors then used the admiralty procedure of Rule B attachment in the United States to attach funds of the Danish shipowner in New York banks. The case thus stood in the I-A-R posture, because the plaintiff's seizure of the debtor's funds in New York occurred before recognition of the Danish bankruptcy proceedings as an FMP. After the U.S. Bankruptcy Court for the Southern District of New York recognized the Danish proceedings as an FMP under Chapter 15 of the U.S. Bankruptcy Code (the enactment of the UNCITRAL Model Law),[65] the Danish foreign representative asked for an order vacating the Rule B attachments and entrusting the attached funds to her under the U.S. enactment of Art. 21 of the Model Law,[66] so that she could remove those funds from the United States and make them subject to administration by the bankruptcy court in Denmark. The court turned the funds over to the Danish foreign representative, noting:[67]

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64 404 B.R. 726, 2009 AMC 1150 (Bankr. S.D.N.Y. 2009).

65 11 U.S.C. § 1515.

66 11 U.S.C. § 1521.

67 404 B.R. 726, 742 (Bankr. S.D.N.Y. 2009).

> The foreign representative acknowledged … that if the relief is granted, it is without prejudice to creditors' rights, if any, to assert in the Danish bankruptcy court their rights to the previously garnished funds. This is sufficient protection to the creditors here.

The court acknowledged, however, that: "It will then be up to the [Danish] court to determine what benefit, if any, [these creditors] should enjoy from having obtained" the Rule B attachments in the United States.[68]

Reciprocal comity would require the country of the FMP to grant the admiralty claimants the same secured status in the bankruptcy proceedings that they obtained in the country of arrest/attachment. The country of arrest/attachment would act with comity by respecting the primacy of the insolvency proceedings (the FMP) in the country of the debtor's COMI, but the country of the FMP would respect the secured status legitimately conferred by the admiralty law of the country of arrest/attachment.

In order for the FMP country were to take that view, at least in relation to maritime liens, it would have to take the position that the conferral of maritime liens is a matter of substance, not procedure, so that recognition of foreign maritime liens is governed by the *lex causae*, not the *lex fori*. That is the position taken in Canada,[69] Germany (at least in cases not entirely within the EU),[70] Australia,[71] and, possibly, China.[72] If, however, the FMP forum regards security as a

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68 Ibid, at 747.

69 *Todd Shipyards Corp v. Altema Compania Maritima S.A. (The Ioannis Daskelelis)* [1974] S.C.R. 1248; *Marlex Petroleum Inc. v. Ship Har Rai* [1987] 1 S.C.R. 47; *Holt Cargo Systems Inc. v. ABC Containerline N.V.* [2001] 3 S.C.R. 907.

70 Einführungsgesetz zum Bürgerlichen Gesetzbuche (EGBGB), Art. 45(2).

71 *Reiter Petroleum Inc. v. Ship Sam Hawk* [2015] FCA 1005.

72 Law of the People's Republic of China on the Laws Applicable to Foreign-related Civil Relations (2010), Art. 37 provides that in the absence of any choice by the parties, rights *in rem* in movable property are governed by "the law of the place where the property is located when the legal fact occurs," which would be the law of the place of arrest or attachment, it seems.

matter of procedure to be determined by the *lex fori*, as does the U.K.,[73] Singapore,[74] and Croatia[75] the arresting country should not release the property to the foreign representative without an undertaking by that representative to give the admiralty claimant the same secured status as it would have if the admiralty proceedings were allowed to continue in the country of arrest/attachment.

Even if the country of the FMP recognizes maritime liens from other countries as substantive rights giving the claimants secured status in the insolvency proceedings, it must make a further determination about whether to give those secured claims the same priority that they would enjoy under the law of the arrest/attachment. As a practical matter, it seems unavoidable to conclude that matters of priority, as opposed to recognition of secured status, must be determined by the *lex fori* of the FMP.[76] To give foreign secured claims the same priority that they enjoy under the law that confers their secured status might lead to insoluble conundrums, if each of several recognized *leges causae* gives a different priority to secured claims of particular kinds. Reciprocal comity requires the country of the FMP to recognize the legitimacy of the secured status conferred upon the admiralty claims by the law of the country of arrest/attachment. It does not, and arguably cannot, require the country of the FMP to give the same priority among secured claims that the country of arrest/attachment would do.

When both the country of the FMP and the country of arrest/attachment are within the E.U., the applicable law is dictated by the Insolvency Regulation[77] (and, with effect from 26 June

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73 *Bankers Trust International Ltd v. Todd Shipyards Corp (The Halcyon Isle)* [1981] A.C. 221.

74 *The Andres Bonifacio* [1993] 3 S.L.R.(R.) 71; *Precious Shipping Public Co. Ltd v. OW Bunker Far East (Singapore) Pte Ltd* [2015] 4 S.L.R. 1229.

75 Reply of the Croatian Maritime Law Association to the Comité Maritime International's International Working Group on Cross-Border Insolvency Questionnaire, Question 15.

76 See Martin Davies and Kate Lewins, "Foreign maritime liens: should they be recognised in Australian courts?" (2002) 76 *Aust. L.J.* 775.

77 Council Regulation (E.C.) 1346/2000 on insolvency proceedings.

2017, the Recast Insolvency Regulation),[78] which provide that the law applicable to insolvency proceedings is the law of the country where the proceedings were opened (the *lex concursus*),[79] except in the case of rights *in rem*, which are not affected by the opening of insolvency proceedings, and so are governed by the law of the country conferring them (the *lex causae*).[80] The English text of Article 5(2) of the Regulation (Art. 8(2) of the Recast Regulation) provides that rights *in rem*:

> [S]hall, 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 a 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.

Article 5(2)/8(2) has different shades of meaning in the 23 other official languages, with the result that it is difficult to be certain whether a claim pursued by arrest or attachment can constitute a right *in rem* for purposes of the Regulation.[81] Thus, there may even be some doubt about whether a claim secured by a maritime lien is a right *in rem* for purposes of Art. 5(2)/8(2).[82]

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78 Regulation (E.U.) 2015/848 of the European Parliament and Council of 20 May 2015 on insolvency proceedings (recast).

79 Insolvency Regulation, Art. 4; Recast Insolvency Regulation, Art. 7.

80 Insolvency Regulation, Art. 5; Recast Insolvency Regulation, Art. 8.

81 Giorgio Berlingieri, "Defaulting Shipowners and the Regulation of their Insolvency Status," available at http://www.comitemaritime.org/Uploads/Cross%20Border/Defaulting%20shipowners%20and%20the%20regulation%20of%20their%20insolvency%20status,%20by%20Giorgio%20Berlingieri.doc (last visited 4 April 2016).

82 Ibid.

It seems unlikely, however, that arrest or attachment of a ship to secure non-lien claims will be regarded as a right *in rem* for these purposes, and so such claims will fall to be determined by the *lex concursus* in the FMP, depriving the admiralty claimants of any priority they might have obtained by arresting or attaching the debtor's ship before insolvency proceedings were opened.[83] If that is the case, the "reciprocal comity" approach advocated here has no prospect of success in relation to cases entirely within the European Union.

### *3. Conclusion*

Comity should not be a one-way street. If the courts of the country of arrest/attachment defer to the superior jurisdictional claims of the court of the FMP, they should be entitled to expect the reciprocal degree of respect that the court of the FMP should recognize claims of security legitimately granted by that country's laws. In the A-I-R permutation, the country of arrest/attachment must respect the existence of the FMP in another country by staying the existing proceedings in its courts, but the country of the FMP (and the debtor invoking insolvency protection) must respect the fact that the country of arrest/attachment may choose to preserve the priority of claims secured before the insolvency proceedings were opened. In the I-R-A permutation, if the country of arrest/attachment recognizes maritime liens as effective against the arrested ship (or other property) itself, the country of the FMP should respect that fact, even when the country of arrest/attachment stays its own proceedings to require claimants to participate in the insolvency in the FMP. In the I-A-R permutation, the courts of the country of arrest/attachment should concede primacy to the courts of the FMP, but should be entitled to demand, in return, that those courts grant reciprocal respect to the secured status granted by arrest or attachment in the country where admiralty proceedings were brought. The middle way of reciprocal comity requires mutual respect, not enforced acquiescence or self-abnegation on the part of either country.

[83] Ibid.