

**THE ROLE OF THE TRUSTEE**

**BY**

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*No international  
convention or international  
bankruptcy*

## Extracts of judgments from New Zealand, Canada and U.S.A.

"The third factor in this balancing exercise is the international. When fortunes cross international boundaries at the click of a mouse, when the scale of international transactions - and the consequent scale of international bankruptcies - is as fast as instantaneous as it is and when the courts and litigants in one country can have confidence that their rights and obligations will be properly acknowledged by courts and litigants in other countries, in this court's view it is appropriate that solutions to the legal problems created by international transactions, and by cross-border insolvency in particular, should reflect modern international commercial practice and not be anachronistically encumbered by dictates from another age derived from different circumstances...

Comity can be extended to the judgment of the commercial court of Antwerp and recognition can be extended to the Belgian liquidation recognizing that neither is in breach of natural justice or contrary to public policy."<sup>1</sup>

"The rationale underlying the granting of comity to a final foreign judgment is that litigation should end after the parties have had an opportunity to present their cases fully and fairly to a court of competent jurisdiction. The extending of comity to a foreign bankruptcy proceeding, by staying the continuance of an action against a debtor or its property, has a somewhat different rationale. The granting of comity to a foreign bankruptcy proceeding enables the assets of a debtor to be disbursed in an equitable, orderly and systematic manner, rather than in an haphazard, erratic or piecemeal fashion."<sup>2</sup>

"Unless an injunction is issued, it appears to this Court that one or more parties in interest may relinquish or dispose of property of the Debtors' in the United States, or will commence or continue the prosecution of judicial, administrative or regulatory actions against the Debtors, and their property in the United States, including the Debtor's vessels, and/or seek to retain assets of the Debtors or the arrest and foreclosure sale of the Debtors vessels, thereby interfering with or causing harm to the Petitioner's efforts to administer the Debtors' estates pursuant to the foreign proceedings, and that as a result the Petitioners will suffer immediate and irreparable injury for which they will have no adequate remedy at law"

I believe in the relief I just spoke about here and addresses some of the concerns raised by the creditors yesterday, and some of the concerns raised by the Debtor."<sup>3</sup>

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<sup>1</sup> J. Williams, in *Turners and Growers Exporters Ltd. v. Ship Cornelis Verolme* (1996, High Court of New Zealand, AB 724, 9<sup>th</sup> October 1996).

<sup>2</sup> A. Derek Guthrie, in *Antwerp Bulkcarriers v. Holt Cargo Systems Inc.* (Superior Court in Bankruptcy of Montreal, Canada, N° 500 11 004112 963, June 28, 1996).

<sup>3</sup> Arthur J. Gonzalez, in re : *Frans De Roy and Thierry Van Doosselaere, as Trustees of ABC Containerline N.V.*, United States Bankruptcy Court Southern District of New York, N° 96 B 42281, May 15, 1996.

## 1. Actual situation at the start of the bankruptcy

ABC Containerline was founded in 1978 and was an independent shipping line.

During its existence it developed in what became known as the ABC-group.

The ABC-group consisted of five companies: the N.V. Sea Lanes, the N.V. Ocean Carriers Shipholding, the N.V. ABC Containerline, the N.V. Antwerp Bulkcarriers and the N.V. Med Containerline Antwerp. Each were Belgian corporations (in dutch naamloze vennootschap, in french société anonyme), with their principal office located at 4<sup>th</sup> floor, North Trade Buildings, Noorderlaan 133; P.O. Box 50, B-2030 Antwerp, Belgium.

The group employed about 280 people: 150 seamen and 80 people in the offices in Antwerpen.

The business of the group was the international carriage of goods by sea, including a cargo and container liner service between various ports, e.g. Australia, New Zealand, the U.S.A., Canada and Europe, employing vessels owned and/or chartered by one or both of them.

The group was financed by a Belgian State Bank known as “Nationale Maatschappij voor Krediet aan de Nijverheid”, which obtained, held and still holds, mortgages on all of the said vessels, in particular, the “Brussel” and the “Antwerpen”.

At the time of the bankruptcy, the group's estate, mainly consisting of six ships, was scattered all over the world:

- mv Helen, bulkcarrier, on her way from Paramaribo to Port Kaiser, Jamaica;
- mv Deloris, bulkcarrier, at anchor off the Bahamas
- mv Brussel, container-bulkcarrier, arrested at anchor off Halifax, Canada,
- mv Ellen Hudig, container-bulkcarrier, at anchor off Haifa, Israël
- mv Antwerpen, container-bulkcarrier, at anchor off Singapore
- mv Cornelis Verolme, container-bulkcarrier, arrested at anchor off Auckland, New Zealand.

All our ships had a safe manning according BZI (Belgische Zeevaartinspectie), the BZI is the Governmental Agency and part of the Belgian Ministry of Transport, dealing with maritime matters.

On regular basis, our captain and crew were relieved at the end of their contract or if required on other occasions.

In accordance with the continuity and safety of our ships, the captain and the crew were not relieved all at the same time.

The mv Cornelis Verolme, as an example, remained with one captain, two mates, one chief engineer, one second engineer, two AB's and one cook at anchor in the bay of Auckland

The mv Antwerpen and the mv Brussel, mv Helen and mv Deloris were owned by Antwerp Bulkcarriers N.V., mv Ellen Hudig and mv Cornelis Verolme were owned by ABC Containerline.

The mv Helen and the mv Deloris were mostly time-chartered and not on a round-the-world service route.

The mv Brussel, mv Ellen Hudig, mv Antwerpen, mv Cornelis Verolme and the mv Martha II (also belonging to the ABC-group, but owned by a Luxembourg company called S.A. Combo Carriers), were on an eastbound round-the-world service route with stops in the U.K., continental Europe, Israël, Singapore, Australia, New Zealand, the Southern and Norther U.S.A. and Canada.

All these ships had cargo on board.

The crew on board our vessel had a labor agreement called "collective agreement for officers registered in the Belgian Merchant Navy Pool, sailing under the Luxembourg Flag" (1991).

Some of the ships also had passengers on board, because the Ellen Hudig, Martha II, Cornelis Verolme, Antwerpen and Brussel had accomodation to carry between 3 and 9 passengers, in what was called a "sail around the world in 98 days cruise".

The ABC-group owned for 100 % most of their agencies in the ports where their ships called.

The ABC-group was decreed to be bankrupt on the 5<sup>th</sup> of april 1996 by the 11<sup>th</sup> Divisional Court of the Commercial Court of the Judicial District of Antwerp, Belgium, Mr. H. Heirbaut was appointed as Judge-Commissioner, and Mr. Thierry Van Doosselaere and Mr. Frans De Roy as trustees in bankruptcy. The trustees are both practicing lawyers as well as experienced trustees in bankruptcy, in Antwerp, Belgium.

At the time of the bankruptcy of the group, several vessels were under arrest by the groups's creditors (including in particular, U.S. creditors) at various ports throughout the world including Halifax, Singapore and Auckland. Creditors, including certain U.S. creditors, have caused the vessels to be seized in an effort to collect on outstanding amounts due from the debtors. Some of the claims by creditors (resulting in the arrest of the groups's vessels) appeared to have been advance in more than one jurisdiction.

The ABC-group also had a cooperation with TNT Ltd

At the beginning of the 1990's, the mv TNT Express was incorporated in the ABC-group and changed her name into mv Martha II.

Prior to the bankruptcy, in January 1996 the Mv Martha II was arrested by here mortgagee Den Norske Bank, in Australia and proceedings were started to auction here. This was the beginning of the end of the ABC-group.

The total liability is about 6 miljard BF, this amount equals 251 mio. New Zealand Dollars, and 220 mio Australian Dollars <sup>4</sup>.

When the group filed for bankruptcy in Belgium, the books and records were in disarray and principal(s) of the group had in effect abandoned the group, to the extent that the joint trustees had to take urgent measures to determine the location and condition of each of the ships owned or operated by the debtors, as well as the situations of the crews and the various agents.

The trustees had no knowledge of the debtors or their operations, prior to the appointment as joint trustees by the Belgian Court. The first concern was to preserve the principal assets of the debtors, namely, the vessels owned by the debtors, some of which had been blocked or detained at various ports around the world and required their immediate attention on behalf of the mass of creditors of the debtors.

In order to deal with the very difficult situation with respect to the debtors, the trustees traveled extensively and separately to the countries where the vessels were situated, as well as to the U.S.A., where they had to act quickly to engage legal counsel to represent the interests of the trustees for the bankruptcies of the debtors as well as meet with the representatives of several of the claimants who had taken action against the said vessels and the group, and also with the charterers of several of the vessels and with various domestic agents.

By the effect of the Belgian judgment, the creditors ceased to have any rights to arrest the vessels in any jurisdiction in the world.

The Belgian Bankruptcy Law prohibits the arrest or execution by creditors of the debtor's property to enforce preferential/lien claims and the same prohibition applies to the general or unsecured creditors.

Trustees, are charged in law, under their mandate and duties in virtue of Belgian bankruptcy provisions found in the Belgian Commercial Code, them to take possession of all of the assets, wherever situated, of the debtors, in such a way as to allow us to liquidate and/or deal with the assets in a manner which is consistent with their duties under Belgian law.

Trustees are also charged with the duty to marshal the assets of the debtors for the purpose of an orderly distribution to the creditors of the debtors.

For such purpose, the trustees made applications in jurisdictions throughout the world in which legal actions had been commenced by creditors or where the debtors did business to direct the submission of all claims to the Belgian bankruptcy proceedings and to otherwise

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<sup>4</sup> as per september 9<sup>th</sup> 1997

lift the arrests and prevent any further seizure or arrest so that the assets could be dealt with and liquidated in an orderly manner in accordance with and pursuant to Belgian law.

Towards that end the Belgian trustees also sought the cooperation of the New Zealand courts with the Belgian courts, which are administering the Belgian bankruptcy of ABC.

In the High Court of Auckland, New Zealand, the trustees sought recognition of the effect of the Belgian bankruptcy, sought accordingly prohibition of the continuation of these proceedings against the property of ABC and sought prohibition of the exercise or enforcement of the alleged rights against the property of ABC (9<sup>th</sup> August 1996).

In 1990 the Luxembourg legislator enacted a law creating a Luxembourg flag. Many Belgian shipowners at that time changed from Belgian flag to Luxembourg flag for tax reason matters.

## **2. Belgian Bankruptcy legislation<sup>5</sup>**

The Belgian bankruptcy law is part of the Belgian Commercial Code (hereafter referred to as Com.C.), known under Book II, called "Faillissementswet" (bankruptcy law), enacted 18<sup>th</sup> April 1851<sup>6</sup>

Three provisions have to be met in order to be declared bankrupt :

1. The debtor is a trader
2. He has suspended payments
3. He has absence of credit worthiness (= i.e. that the creditors refuse to extend credit)

There are three kinds of bankruptcy declarations (with the same result leading to a bankruptcy judgment) :

1. Bankruptcy by acknowledgment (i.e. that the debtor goes to the commercial court and hands over his balance sheet and asks to be declared bankrupt (obtaining bankruptcy on his own petition);
2. Bankruptcy declared at the request of one or more creditors;
3. Bankruptcy ex officio whereby the commercial court declares a bankruptcy after intervention by the district attorney on the basis of information gathered by the non-official institution for commercial inquiries at the court of commerce.

Jurisdiction in bankruptcy matters, including composition, is vested in the court of commerce of the bankrupt's domicile.

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<sup>5</sup> Dalhuizen J.H. , On International Insolvency and Bankruptcy, (New York: Matthew Bender, release number 4, 1983).

<sup>6</sup> Belgian Official Gazette, called Belgisch Staatsblad or Moniteur Belge, 24<sup>th</sup> April 1851.

Domicile is defined for matters of jurisdiction and procedure, as the place where a person is registered with the municipal authorities.

The bankruptcy is declared by the court having jurisdiction over the judicial district of the domicile of the debtor at the time of ceasement of payment.

If the bankruptcy is declared in Belgium, the litigations arising out of the bankruptcy have to be brought exclusively before the court having jurisdiction over the judicial district in which bankruptcy was declared.

Concerning the judicial agreement, every request has to be brought before the court having jurisdiction over the judicial district of the domicile of the requestee. (art. 631 of the Belgian Judicial Code)

In the case of legal persons (companies), domicile is held to be the place of central control and management. This will usually be the place specified in the deed of incorporation.

The automatic stay becomes operative when the bankruptcy court pronounces the bankruptcy.

The Belgian bankruptcy law is specifically designed to ensure the just treatment of all holders of claims against the estate and the bankruptcy file and all actions taken in connection with the bankruptcy are available for review to all creditors at the clerk of the Commercial Court's Office<sup>7</sup>.

A judge-commissioner (normally a judge sitting in the court of commerce as a commercial judge), and one or more trustees (who are barristers) are appointed by the Bankruptcy Court.

#### Legal mission of the Judge-Commissioner

The judge-commissioner is appointed to supervise the trustee<sup>8</sup>, pledge to oath in front of the judge commissioner, hears the bankrupt person<sup>9</sup>, decides on the exemptions<sup>10</sup>, supervises the verification process<sup>11</sup>, and the composition of the assembly<sup>12</sup>.

He further determines the distribution amongst the creditors and determines its amount<sup>13</sup>.

#### Legal mission of the trustee

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<sup>7</sup> article 506 Com. C.

<sup>8</sup> article 470 Com.C.

<sup>9</sup> article 485 Com.C.

<sup>10</sup> article 476 Com.C.

<sup>11</sup> article 501-502 Com.C.

<sup>12</sup> articles 509-511 Com.C.

<sup>13</sup> article 561 Com.C.

One of the initial obligations of the trustees is the notification to all interested parties and claimants of which actions are pending and invitation to present those claims in the Belgian proceedings.

The trustees, have already transmitted approximately 600 letters to creditors worldwide,, and have encouraged the major trade journals around the world (including Lloyd's List, the U.S. Journal of Commerce) to carry stories regarding the Belgian bankruptcy proceedings.

They carry out the bankruptcy's administration under the supervision of the judge-commissioner and the court;

They represent the debtor's as well as the creditor's general interests;

They collect the rents due to the debtor and sells all properties (personal estate as well as real estate).

Litigation concerning personal estate and real estate against the debtor must be continued or directed against the trustee<sup>14</sup>, and retains a provision for liquidation proceedings (liquidation des biens), while in composition proceedings (règlement judiciaire) the trustee only assists the debtor in actions brought against him.

The trustee claims the annulment of the bankrupt's actions during the 'suspect period'; A suspect period is the period between the declaration of the bankruptcy and the date of suspended payments.

The court will give that date as being preceded maximum six months before the bankruptcy date.<sup>15</sup>

Payments made before the suspect period are void when they are of a fraudulent nature and detrimental to the creditors.

The trustees serve the rights of all creditors and not the individual rights of each creditor (sues other persons and/or companies for all claims which are intended to realise more assets).

Insofar as actions taken by the trustees on behalf of the estate, the trustees acts for the benefit of all creditors, and the creditors have a right to challenge or object to any such action.

The trustee can sue the company's director in their possible liability (a director or other board-member - de jure or de facto - of a bankrupt company can be sued on behalf of the creditors in order to recover the damages incurred as a result of the commission of fraude or neglecting the duty owed to the debtor company<sup>16</sup>).

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<sup>14</sup> article 452 Com.C.

<sup>15</sup> article 442 Com.C.

<sup>16</sup>The directors can beheld liable on basis of article 62, 63ter Com.C. and article 1382 Civil Code.

Personal liability of managers and directors results notably through late petitioning of voluntary bankruptcy<sup>17</sup> and through intentional misrepresentation or through the commission of a bankruptcy delict.

In Belgium the trustee is responsible for the administration of the estate and its preservation.

The debtor is dispossessed<sup>18</sup> but does not technically lose title.

“The judgment approach, which is more common in France, Belgium, Luxembourg and Italy, views bankruptcy largely as a private law judgment, ascertaining and elaborating on the rights of the debtor and the creditors. The assignment approach is particular to common law countries, notably England and the United States and defines bankruptcy in terms of a “private law” transfer to the trustee of title to the estate with the trustee becoming the “temporary owner of the debtor’s property.”<sup>19</sup>

In addition, any litigation commenced by the trustee in order to set aside preferential or fraudulent payments is considered a public action and available for review by creditors.

Finally, the trustees are obliged to respond to all inquiries from claimants and creditors, and any delay in response regarding any such inquiry can be compelled by simple application to the commercial courts.

The trustees collect the assets, may, with the consent of the judge-commissioner, grant exemptions<sup>20</sup>, sell perishable goods immediately<sup>21</sup> and has the possibility to continue the business pending liquidation or composition<sup>22</sup>

The trustees take over the pending law suits<sup>23</sup> and is taught to be able to request performance under or repudiate executory contracts and may invoke the avoidance of fraudulent conveyances.

The trustees liquidate the estate and distribute the dividends<sup>24</sup> subject to the judge-commissioner’s supervision and the latter’s decision as to the level of the dividend

Set-offs in bankruptcy are not allowed.

The Belgian Bankruptcy Court (the Belgian trustee) can sell a ship free and clear of maritime liens because, of course, this Court can deal with the liens (adjudicate, determine and rank).

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<sup>17</sup> A petition of a debtor within three days is obligatory in Belgium when the debtor is aware of his cessation of payments (article 440 Com.C.)

<sup>18</sup> article 444 Com.C.

<sup>19</sup> Dalhuizen, § 1.01, p. 2-12

<sup>20</sup> article 476 Com.C.

<sup>21</sup> article 477 Com.C.

<sup>22</sup> article 529 Com.C.

<sup>23</sup> article 452 Com.C.

<sup>24</sup> article 528 Com.C.

The Belgian trustee in bankruptcy can conduct the business of the debtor for limited periods with the authorization of the Commercial Court, which in this case has been obtained by the Belgian trustees in bankruptcy on 9<sup>th</sup> May 1996 by the commercial court of Antwerpen.

### Liquidation

In Belgium, the equitable distribution of the proceeds remains the essential characteristic of bankruptcy. To this effect an automatic stay becomes operative when the bankruptcy court pronounces the bankruptcy.

What is equitable in this respect, is a matter of statutory definition as it is in each other state, and, consequently, a matter of public policy.

In Belgium, the opening of bankruptcy is published in the Official Gazette, (In dutch Belgisch Staatsblad, in French Moniteur Belge) <sup>25</sup>

The known creditors are given notice by the trustee in bankruptcy and the trustee in bankruptcy also publishes in newspapers the opening of the bankruptcy.

As to the time limit for filing claims, the judge establishes the period for exceeding twenty days from the date of the adjudication, for the presentation of claims, which are filed with the clerk of the bankruptcy court <sup>26</sup>and for the subsequent verification meeting with the possibility of an additional delay for foreign creditors<sup>27</sup>

Claims contested at the meeting are referred to the bankruptcy court for dispute and settlement <sup>28</sup>

Secured creditors have a right to separate recovery but only upon filing of their claims <sup>29</sup>except for the first mortgage holder. <sup>30</sup>

Tax authorities may go their separate way as well.

Claims secured by the traditional mortgage, pledge, or non-possessory security, to the extent recognized, must be filed with the trustee <sup>31</sup>

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<sup>25</sup> article 472 Com.C.

<sup>26</sup> article 496 Com.C.

<sup>27</sup> article 497 Com.C.

<sup>28</sup> article 502 Com.C.

<sup>29</sup> article 454 and 564 Com.C.

<sup>30</sup> articles 496 and 498 Com.C.

<sup>31</sup> article 496-498 Com.C.

Non-filing does not affect the right to claim later, but recovery is limited to moneys not yet distributed.<sup>32</sup> Secured creditors must file<sup>33</sup> under threat of losing their separate execution right.<sup>34</sup> They will not qualify for a dividend in respect of any deficiency.

Further, the determination of the categorization of claims and the ranking (i.e. priority)-viz-a-viz other creditors is reviewed and authorized by the Commercial Court.

The bankruptcy relates back to the date of cessation of payments which is fixed by the court, but the retro-activity cannot exceed six months<sup>35</sup> with an additional ten-day period for the voiding of fraudulent conveyances or preferences<sup>36</sup>. The suspect period is increased by a further 10 days prior to it for purposes of fraudulent conveyance provision of the act.<sup>37</sup>

The bankruptcy court decides on verification disputes<sup>38</sup> homologation of compositions<sup>39</sup> and excusability of the debtor<sup>40</sup>

A court action is always necessary to obtain an avoidance of a number of transactions, like gifts, transactions without adequate consideration, payments of unmatured debts and of mature debts in other than the established means of payment and the granting of liens for the existing debts.

This system is supplemented by the ordinary Actio Pauliana of article 1167 of the Belgian Civil Code, reinstated in article 448 of the Com.C. and in bankruptcy invoked by the trustee before the bankruptcy court, notable to cover transactions from before the suspect period.

The trustee collects and sells publicly the assets belonging to the estate, subject to supervision by the judge-commissioner<sup>41</sup> and distributes the dividend upon approval by the judge-commissioner<sup>42</sup> therefore the appointment of the trustee is terminated by producing the final accounts, distributes the money and afterwards applies for discharge.

### Maritime implications

The maritime liens (privilèges maritimes) are preferential by law according to article 23 of the Belgian maritime law (Sea Law)<sup>43</sup>.

#### *Art. 23*

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<sup>32</sup> article 508 Com.C.

<sup>33</sup> article 542 and 544 Com.C.

<sup>34</sup> article 508 Com. C.

<sup>35</sup> article 442, Com.C.

<sup>36</sup> article 445 Com.C.

<sup>37</sup> article 445 Com.C.

<sup>38</sup> article 502 Com.C.

<sup>39</sup> article 517 Com.C.

<sup>40</sup> article 534 Com.C.

<sup>41</sup> article 528 Com.C.

<sup>42</sup> article 561 Com.C.

<sup>43</sup> Book II of the Belgian Commercial Code

- §I. Are solely privileged to the vessel, to the freight earned during the voyage, during which the privileged debt claim was caused, and to the accessories of the vessel and the freight, originated since the beginning of the voyage :

- 1° The judicial costs and expenses due to the State paid in the common interest of the creditors for the preservation of the vessel or in order to arrive at the sales and the distribution of the profits; the tonnage, fire or dockage charges and other similar public charges and taxes; the pilotage dues, the watching and preservation charges from the entering of the vessel in the last port onwards;
- 2° The debt claims resulting from the labor agreement of the captain, the seamen and other persons serving on board of the vessel;

2°bis The amounts, based on the labour agreement of the captain, the seamen and other persons serving on board of the vessel, due to the Hulp- en Voorzorgskas voor Zeevarenden onder Belgische Vlag (Help and Precaution Fund for Seamen sailing under Belgian flag), as well as the contributions secured by the last mentioned.

- 3° The salvage moneys and the contribution of the vessel to the gross average;
- 4° The remunerations due in the case of a collision or other navigation accidents, as well as because of damage, caused to the constructions of ports, docks and navigable fairways,; the remunerations due in case of bodily injuries suffered by the passengers or the seamen; the remuneration due in case of loss or damage of the cargo or the travelling equipment;
- 5° The debt claims resulting from agreements or actions, closed or done by the captain by virtue of his legal competencies outside his home port and necessary for the preservation of the vessel or for the continuation of the voyage, irrespective of the captain being or not being at the same time the owner of the vessel and whether or not the debt claim is his or his creditors, repairers, financiers or other contractors.

- § II. As accessories to the vessel and freight, mentioned in § I afore-mentioned, are to be understood :

- 1° The remunerations due to the owner because of material damage suffered by the vessel and not repaired, or because of loss of freight;
- 2° The remunerations due to the owner because of gross average, as far as this consists of either material damage suffered by the vessel and not repaired, either of loss of freight;
- 3° The wage, due to the owner for assistance or salvage till the end of the voyage, after deduction of the sums granted to the captain and to the other persons serving on the vessel. Toll is equated with freight. Benefits, resulting from insurance agreements due to the owner are not considered accessories of the vessel or the freight, neither are premiums, subsidies or other compensations of the State. As a deviation from the afore-mentioned first paragraph, the privilege, on behalf of the persons serving on board the vessel, extends to the whole of the freight, due for all of these voyages, made during the same labour agreement.

Although there is not much Belgian authority, it has been generally accepted that Belgian courts generally recognize foreign maritime liens <sup>44</sup>

<sup>44</sup> Brussel May 12<sup>th</sup> 1956, Jur.P. d'Anvers, 1957, p. 195

Article 22 of the Sea Law states that the change of nationality does not damage the rights which the ship is entitled to. The vastness of these rights is governed by the laws of the country under whose flag it sailed legally at the moment of the change of nationality.

According to article 19 of the Sea Law, the priority rights amongst creditors of a sea-going vessel originate from either privileges or mortgages. The privileges depend on the quality of the debt claim; they always have priority over the mortgages. (hypothec).

A mortgage agreement gives rise to a mortgage.

Notice is given in the registers of the Hypotheekbewaarder (keeper of the hypothec books). These registers are open to public inspection. This is the only place where one can consult the official registers.

In Belgium there are no jurisdictional conflicts between bankruptcy and admiralty courts, because the bankruptcy judge and the admiralty judge are judges of the same Court of Commerce.

A claim for necessities gives no rise to a statutory right in rem in Belgium, but this claim is given a maritime lien status.<sup>45</sup>

The International Convention for the Unification of certain rules of law relating to maritime liens and mortgages, was signed at Brussels, April 10<sup>th</sup> 1926. A later convention was signed at Brussels on May 27<sup>th</sup> 1967.

Belgium ratified the international convention for the Unification of certain rules relating to liens and mortgages, dated April 10<sup>th</sup> 1926.

Belgium did not ratify the International Convention for the Unification of certain rules relating to maritime liens and mortgages of May 27<sup>th</sup> 1967, although Belgium already enacted by law the possibility to mortgage a ship under construction.

The Liens and Mortgages Conventions do not refer to "necessaries". The term "necessaries" has a different meaning in each jurisdiction. Necessaries generally means goods and services supplied to a ship. A claim for necessities only gives rise to a statutory right in rem<sup>46</sup>.

In Belgium certain necessities have a maritime lien status.

In the U.S.A. the definition of necessities is very broad as reads 46 US Code 1971 : "Any person furnishing repairs, supplies, towage, use of dry dock or marine railway, or other necessities, to any vessel, whether foreign or domestic, upon the order of the owner of such vessel, or of a person authorized by the owner, shall have a maritime lien on the

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<sup>45</sup> "the action in rem provides merely a procedural remedy to the claimant : it does not create a "special legal vested right in the creditor or claimant which did not exist previously" (Tetley, chapter 14, Necessities, p. 237-238); "The end result has been a definition which is broader than that given in the basic English judgments defining necessities" Tetley, necessities, p. 249

<sup>46</sup> Tetley, Maritime Liens and Claims, p. 233, chapter 14, 1989

vessel, which may be enforced by suit in rem, and it shall not be necessary to allege or prove that credit was given to the vessel.”<sup>47</sup>

The right to foreclosure is limited in time, namely between the date of the judgment of the bankruptcy and the closing of the verification of the debt claims<sup>48</sup>

### Unity and universality<sup>49</sup>

The Belgian legislation has opted for the universality of the bankruptcy, which is not embodied in the Belgian bankruptcy law, but is recognized under the Belgian conflict of

laws rules. The most appropriate form to deal with all the claims of the worldwide creditors, is in Antwerp at the Commercial Court. There is only one forum that can deal exactly with all claims and this in respect to the equal treatment of all creditors, moreover to prevent that some creditors may receive more than what is owed to him because they may have filed a claim in different jurisdictions on the different ships.<sup>50</sup>

The Belgian bankruptcy law proclaims the principle that all creditors of a bankrupt company are treated equally and have in principle the same priority rank, although some are more equal than others, therefore we have to refer to the Belgian laws dealing with liens (named in Dutch “voorrechten” or in French “privilèges”). The principal of a stay against all the assets of the bankrupt estate has to be considered not only in Belgium, but also outside Belgium.

“La jurisprudence belge a toujours reconnu le principe de l’unité et le principe de l’universalité de la faillite : un seul tribunal est compétent, d’après elle, pour prononcer la faillite, c’est celui du domicile du commerçant dont le crédit est ébranlé et qui cesse ses paiements; et cette déclaration de faillite prononcée par le tribunal étranger, quand le failli est domicilié dans son ressort, a pleine efficacité en Belgique, elle y a force de chose jugée sans exequatur<sup>51</sup>

These principles were derived from the works of Savigny in the 19<sup>th</sup> century.

These principles are of public order. They have as a goal to respect article 8 of the priorities and mortgage law<sup>52</sup> that states that all the assets of the debtor constitute the common fund for all the creditors, so that the totality of the assets of the debtor enter into the bankrupt mass and by this an equality exists among the creditors.

This principle is the only way to achieve the equality between all creditors as there can only be one bankruptcy proceeding, one trustee or group of trustees, one estate and one mass of creditors.

<sup>47</sup> Tetley, *Maritime Liens and Claims*, p. 249, chapter 14, 1989

<sup>48</sup> article 454 Com.C.

<sup>49</sup> See also Yoine J. Goldstein, *Trans-Border Insolvencies an Emerging consensus*, Meredith Lectures 1994.

<sup>50</sup> Article 631 Judicial Code

<sup>51</sup> Pouillet, *Manuel de Droit International Privé Belge*, nr. 505, p. 634-635, 1947; *Les Nouvelles*, pagina 308, nr. 1027.

<sup>52</sup> enacted 18<sup>th</sup> December 1851

These principles are the opposite of the theory of territoriality.

According to the principle of territoriality a debtor can be declared bankrupt in every country where the assets of the debtor are located, the natural consequence of the application of the theory of territoriality is the fact that several bankruptcies will exist on the same time and for each of them a different competent court and subsequent legislation<sup>53</sup>.

Although the principles of universality work well on a national scale, sovereignty of all members in the international community seriously, hampers the application of these principles as was recognized by Huber (infra).

The universality approach is the only approach which recognizes the principles of every bankruptcy, namely to create one estate, to be divided by one bankruptcy in order to achieve the fundamental principles of fairness and justice.

Therefore it arises also that when estate adheres the territoriality view, it becomes very difficult to be recognized in another state where the universality principle is proclaimed.<sup>54</sup>

Several international reform initiatives have however emerged to try and unify the legislation on an international basis and adapt the legislation to an increase of international trade. The two most important initiatives if regarded by the number of involved states are the UNCITRAL-project and the Convention on Insolvency proceedings of the European Union<sup>55</sup>.

Although these initiatives are still in a draft phase, the approach of proposing a model law enables states to adopt their legislation even to these drafts as a number of states already did. A renewed Belgian legislation based on the European Union draft convention will be in force from 1<sup>st</sup> of January 1998).

The International Bar Association adopted in 1989 a Model International Insolvency Cooperation Act (M.I.I.C.A.) which proclaims the universality theory<sup>56</sup>.

*The ultimate goal of model legislation for international insolvency corporation is universality which envisages a single administration providing protection of the insolvent debtor's estate from dismemberment, and an equitable distribution of assets among both*

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<sup>53</sup> Geinger, T.P.R., 1992, p. 115-144, nr. 8

<sup>54</sup> In re : Morguard Investments Ltd. v. De Savoye (1990) 3 S.C.R. 1077, The Supreme Court of Canada, relied upon the decision of the Supreme Court of the United States in Hilton V. Guyot, 159 U.S. 113 (1895) : "In a highly integrated world economy, politically organized in a diversity of more or less autonomous legal systems, the function of conflict rules is to select, interpret and apply in each case the particular local law that will best promote suitable conditions of interstate and international commerce, or, in other words, to mediate in the questions arising from such commerce in the application of the local laws ... This formulation suggests that the content of comity must be adjusted in the light of a changing world order."

<sup>55</sup> 70 Am.Bankr. L.J.563 (1996)

<sup>56</sup> Yoine J. Goldstein, Trans-Border Insolvencies an Emerging consensus, Meredith Lectures 1994, p. 185-185

*domestic and foreign creditors in the liquidation, or the equitable administration of the estate in a reorganization, composition or rehabilitation proceeding. Insofar as possible, such universality shall be the guiding principle of all efforts towards international insolvency cooperation.*

As said above, these conventions are still in a draft phase, thus leaving only the principles of international private law for continental legislation<sup>57</sup> and comity<sup>58</sup> for common law states, to provide an answer for any dispute arising from an international trade relationship.

### 5. Proceedings undertaken by the trustees<sup>59</sup>

The trustees started their proceedings in New York, Southern District Bankruptcy Court, in order to obtain a stay for all creditors in the United States and for all American creditors inside the U.S.A. as well as outside the U.S.A.

As the ABC-group had a 100 % owned office in New York and Philadelphia, there was a venue in the United States, more specifically in New York, for a bankruptcy proceeding to be started.

Instead of applying for a full blown bankruptcy proceeding, the trustees took the opportunity to apply for an ancillary bankruptcy as allowed by the United States Bankruptcy Code Section 304<sup>60</sup>.

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<sup>57</sup> Belgian Private International Law on Bankruptcy matters

- I. Belgian courts have jurisdiction solely on the basis of domicile.
- II. The orders of the Belgian courts extend to the entire estate of the bankruptcy, wherever located (universality);
- III. Foreign orders by the courts of the bankrupt's domicile will be recognized and enforced in Belgium.

The status of securities, mortgages, liens, general and special privileges, set off between debts, reservation of ownership, right of retention, right of recovery is complicated and it is necessary to apply different laws cumulatively, i.e.

1. The lex fori
2. The lex contractus
3. The lex loci delicti commissi
4. The lex rei sitae
5. The lex fori concursus

<sup>59</sup> The actions of the trustees were at an initial stage mostly based on the principles set out by Dicey & Morris's rule 160 ( DICEY & MORRIS, *The Conflict of Laws*, Volume 2, London: Sweet & Maxwell, 12<sup>th</sup> edition, 1993, rule 160, p 1137-1147

<sup>60</sup> Section 304 (11 U.S.C. § 304)

- a) A case ancillary to a foreign proceeding is commenced by the filing with the bankruptcy court of a petition under this section by a foreign representative.
- b) Subject to the provisions of subsection <sup>©</sup> of this section, if a party in interest does not timely controvert the petition, or after trial, the court may -
  - (1) enjoin the commencement or continuation of -
    - (A) any action against -
      - (i) a debtor with respect to property involved in such foreign proceeding; or
      - (ii) such property, or

The trustees filed a petition in New York, Southern District Bankruptcy Court and also filed for a stay of the proceedings against the debtor and order that the property of the debtor be turned over to the Belgian trustees in bankruptcy.

Furthermore, the trustees submitted to the Commercial Court in Antwerp, requests (called in Dutch "verzoekschriften") that the Commercial Court should issue letters of request from the Commercial Court in Antwerp seeking the assistance of the Courts of New Zealand, U.S.A., Canada, Singapore and Haifa in relation to the proceedings in those courts.

The question was if these courts would give effect to these requests<sup>61</sup>.

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- (B) the enforcement of any judgment against the debtor with respect to such property, or any act or the commencement or continuation of any judicial proceeding to create or enforce a lien against the property of such estate;
  - (2) order turnover of the property of such estate, or the proceeds of such property, to such foreign representative; or
  - (3) order other appropriate relief.
- c) In determining whether to grant relief under subsection (b) of this section, the court shall be guided by what will best assure an economical and expeditious administration of such estate, consistent with -
- (1) just treatment of all holders of claims against or interests in such estate;
  - (2) protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceeding;
  - (3) prevention of preferential or fraudulent dispositions of property of such estate;
  - (4) distribution of proceeds of such estate substantially in accordance with the order prescribed by this title;
  - (5) comity; and
  - (6) if appropriate, the provision of an opportunity for a fresh start for the individual that such foreign proceeding concerns.

<sup>61</sup> The requests were conceived as follows:

1. That the assets located in the port of Singapore, be delivered into the possession of the trustees in bankruptcy, so that they can proceed to the sale of the assets in question, locally or in any other place they deem more appropriate, and to the division of the proceeds amongst the creditors in observance of all their rights and in conformity with Belgian legislation;
2. That, in conformity with Belgian legislation, all measures of seizure against the assets be suspended and that every movable legal claim may only be prosecuted, introduced or executed against the trustees in bankruptcy;
3. That all Courts under whose jurisprudence assets of the bankruptcy be located, be requested - in accordance with the generally accepted principles of Common Law - to recognize the petitioners qq. In their capacity of trustees in bankruptcy with the power and the duty to take possession of, to realize and to confirm all assets of the bankruptcy wherever they should be located;
4. That those same Courts be requested - in accordance with the mentioned principles of Common Law - to assist the Belgian courts in the compliance with and the execution of the three dispositions mentioned above.

## 6. Proceedings USA

The Belgian trustees in bankruptcy filed a "Petition in a case Ancillary to a Foreign Proceeding" in the United States Bankruptcy Court Southern District of New York on April 26<sup>th</sup> 1996, praying for an Order for Relief, and an Injunction, be entered in favor of the Belgian bankruptcy, pursuant to Sec. 304 of the US Bankruptcy Code, and for such other and further relief as the Court may deem just and proper.

On 27<sup>th</sup> June 1996, Judge Arthur J. Gonzalez ordered a temporary restraining order, whereby all persons in the United States and those outside the United States, but subject to the jurisdiction of his Court are hereby enjoined and refrained from :

A. Relinquishing or disposing of any property of the Debtors in the United States, or the proceeds of such property to third parties, absent the consent of the parties or further order of this court.

B. Commencing or continuing any judicial, administrative or regulatory action or proceeding against the Debtors in the United States or any of their property in the United States, or any action anywhere with respect to property of the Debtors in the United States, including their vessels,

A. Commencing or continuing any act of any judicial, administrative or regulatory proceeding to create, perfect or enforce any lien, including any maritime lien, set-off, or other claim against the Debtors in the United States or any of their property in the United States, including their vessels. ...

During the 19<sup>th</sup> century the American jurists were still studying Roman and other roots of Continental Law, such as French and Dutch authorities<sup>62</sup>.

So, Joseph Story in his Commentaries on the Conflict of Laws, relied on the Dutch jurist Ulrich Huber (1636-1694) on "De Conflictu Legum Diversarum in Diversis Imperiis".

According to Huber, the rules of the conflict of laws can be reduced to three maxims<sup>63</sup>:

1. The laws of each state have force within the limits of that government and bind all subjects to it, but not beyond (*territoriality*)
2. All persons within the limits of a government whether they live there permanently or temporarily, are deemed to be subjects thereof (*comity*)

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<sup>62</sup> Lawrence M. Friedman, A History of American Law, 1985, Simon and Schuster, p. 260;  
G. Edward White, Justice Oliver Wendell Holmes, Law and the Inner Self, Oxford University Press, 1993, p. 131

<sup>63</sup> See Ernest G. Lorenzen, Huber's De Conflictu Legum, in Selected Articles on the Conflict of Laws, p. 376, 1947.

3. Sovereigns will so act by way of comity that rights acquired within the limits of a government retain their forces everywhere so far as they do not cause prejudice to the powers or rights of such government or of their subjects (*public policy*).

Comity being defined as follows

“Comity in the legal sense, is neither a matter of absolute obligation on the one hand, nor of mere courtesy and good will upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nations, having due regard both to the international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.”<sup>64</sup>

Comity

Courtesy, compaisance, respect; a willingness to grant a privilege, not as a matter of right, but out of deference and good will. Recognition that one sovereignty allows within its territory to the legislative, executive, or judicial act of another sovereignty, having due regard to rights of its own citizens. *Nowell v. Nowell*, Tex.Civ.App., 408 S.W.2d 550, 553. In general, principle of “comity” is that courts of one state or jurisdiction will give

effect to laws and judicial decisions of another state or jurisdiction, not as a matter of obligation but out of deference and mutual respect. *Brown v. Babbitt Ford, Inc.*, 177 Ariz. 192, 571 P.2d 689, 695.

Judicial comity.

The principle in accordance with which the courts of one state or jurisdiction will give effect to the laws and judicial decisions of another, not as a matter of obligation, but out of deference and respect<sup>65</sup>.

The US went from maxim one to maxim two, or from territoriality towards universality, although sometimes tempered by maxim three in case American creditors could be prejudiced<sup>66</sup>.

New York again being the place where from an international litigation point of view, the windows are open on the world.

The trustees asked the American judge to render judgment which was extra-territorial. The judge denied.

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<sup>64</sup> *Hilton v Guyot*, 159 US. 113(1895) as cited in Gary B. Born, *International Civil Litigation in United States Courts*, Kluwer Law International, 1996, p. 944.

<sup>65</sup> *Black's Law Dictionary*, p. 267

<sup>66</sup> *In re Culmer*, 25 Bankr. 621 (S.D.N.Y. Bankr. 1982).

Gonzalez : “The effort would then promote the overall call of section 304, insuring that the debtor’s assets are liquidated in a fair and orderly fashion in the Belgian bankruptcy and avoid the piecemeal dismemberment of this estate. The Court believes that the actions taken today by this Court send a signal consistent with the Congressional intent embodied in Section 304.”

On the 16<sup>th</sup> May 1996 the United States Bankruptcy Court, Southern District of New York, issued a temporary restraining order that enjoins creditors in the United States from disposing of any property of ABC Containerlines N.V. or Antwerp Bulkcarriers N.V. in the United States or commencing any proceedings against aforesaid companies or any of their property in the United States, the whole in the interest of international comity and so as to permit the expeditious and economical administration of the assets of the bankrupt companies and also to signal the courts of other jurisdictions of the court’s support for international comity.

Simply arresting a vessel will not give the arresting party preference over an otherwise valid priority maritime lien. The vessel sale proceeds will be generally distributed pursuant to the order of priority of maritime liens under United States maritime law.

The characteristic maritime lien is recognized under United States law are the following :

1. wages of the ship’s master and crew
2. salvage operations
3. general average claims
4. claims for breach of a charter party
5. preferred ship mortgages
6. claims under maritime contracts for repairs, supplies, towage, pilotage, wharfage, and other “necessaries”.
7. claims for maritime torts including personal injury and death, pollution and collision claims
8. claims for damage or loss of cargo
9. claims by the carrier of cargo for unpaid freight and demurrage

Under United States Maritime Law, liens for “necessaries” provided to foreign flag vessels in the United States, will take priority over a foreign mortgage. “Necessaries” have been interpreted to include services provided by U.S.A. bunker suppliers, stevedores and ship repairers.

Under United States Maritime Law, a claimant holding a maritime lien on a vessel cannot assert that lien on a sister ship of that vessel.

The New York Southern District Court has continued the T.R.O. in full force and effect pursuant to subsequent orders dated July 25<sup>th</sup> 1996, September 25<sup>th</sup> 1996, October 18<sup>th</sup> 1996, January 27<sup>th</sup> 1997, April 3<sup>rd</sup> 1997 and May 9<sup>th</sup> 1997.

## **6. Proceedings Bahama’s**

The Supreme Court of the Commonwealth of the Bahamas on the 22<sup>nd</sup> May 1996 set aside the issuance and service of the writ of Summons filed on the 10<sup>th</sup> April 1996 and served on the mv Helen en dismissed the action, and also ordered void the arrest of the mv Deloris pursuant to the Warrant of Arrest filed on 10<sup>th</sup> April 1996.

The trustees had moved the Supreme Court by summons dated and filed 29<sup>th</sup> April 1996 for an order, inter alia, to set aside the issuance and service of the writ of summons filed on 10<sup>th</sup> April 1996 and for an order avoiding the arrest of the mv Deloris on 10<sup>th</sup> April 1996.

The plaintiff supplied bunkers to the mv Ellen Hudig, mv Cornelis Verolme, mv Brussel and the mv Antwerpen. These ships belonged to the mv ABC Containerline.

The ships mv Ellen and mv Deloris belonged to the N.V. Antwerp Bulkcarriers.

The judgment was not relevant as to deal with the problem of comity, the Supreme Court proclaimed that the mv Deloris was not a ship against which the Admiralty jurisdiction of the Supreme Court could be invoked in rem in respect of the claim, because the bunker

agreement was made between ABC Containerline and the plaintiff, being a bunker supplier company.

## **7. Proceedings Israel**

In Haifa, the trustees posted a bond and the vessel was sold by the trustees in Antwerpen.

Proceedings are still going on.

## **8. Proceedings Canada**

On the 30<sup>th</sup> of March 1996 the mv Brussel was served with a warrant of arrest taken out in connection with the claim filed in the Federal Court of Canada by an American stevedore which asserted a claim for 414.586 USD, secured by a maritime lien under U.S. law, arrested the mv Brussel in Halifax.

On 5<sup>th</sup> April 1996, the ABC-group was declared bankrupt in Belgium.

Under Belgian law the bankruptcy suspends the execution proceedings. The mv Brussel at the time of the bankruptcy was arrested and an in rem proceeding had been started.

On May 9<sup>th</sup> 1996 the trustees applied to the Superior Court in Montreal Quebec for judicial recognition of the order of the Antwerp Commercial Court appointing the trustees of the bankrupt estate and recognizing the bankruptcy.

The Superior Court specified in its order that it was subject however to the rights, if any, of any creditors with claims secured under the laws of Canada, as by law provided.

The property of the bankrupt is deemed in Canada to be vested in the trustees.

On May 14<sup>th</sup> 1996 the Federal Court granted a default judgment in favor of the above mentioned American stevedore and recognizes his claim as holder of a maritime lien under US law. The court rejects an informal request made by the trustees to postpone the matter.

On May 17<sup>th</sup> 1996 the Federal Court issued an order directing that the mv Brussel be sold and that the proceeds of sale be deposited into court for eventual distribution. On June 12<sup>th</sup> the trustees applied to the Federal Court asking for permission to intervene in the proceedings for the purpose of suspending all proceedings pending the settlement of the bankruptcy in Belgium.

The trustees were granted standing in the Federal Court but were deferred the request for suspension indefinitely.

The Belgian mortgagee applied also to the Federal Court asking permission to intervene as mortgage creditor. The court grants standing. The trustees apply for payment out of all the proceeds of sale in accordance with the judgment of the superior court.

By order of the Federal Court on April 24<sup>th</sup> 1996, the cargo aboard the mv Brussel was ordered to be offloaded.

On June 10<sup>th</sup> 1996, the Commercial Court in Antwerp issues a letter of request to the Superior Court, sitting in Bankruptcy and Insolvency Matters in the District of Montreal, asking for its assistance and that the mv Brussels should be given to the trustees <sup>67</sup>.

The Superior Court of Quebec rendered judgment on the 19<sup>th</sup> June 1996. The judgment was issued ex parte, subject to the right of any interested party to appear on June 18<sup>th</sup> 1996 and object. A number of creditors had given notice of their intention to object, and the matter will proceed to a full hearing on June 26<sup>th</sup>.

On June 11<sup>th</sup> 1996 the same Superior Court had come in aid of the Commercial Court of Antwerp pursuant to the latter's request by its judgment of June 10<sup>th</sup> 1996, and was recognizing the trustees "with the duty and power to take possession of, realize upon and confirm the assets of the bankrupt situated in Canada, subject however to the rights if any of any creditors with claims secured under the laws of Canada, as by law provided".

This Court however permitted the sale of the ship mv Brussel to take place in accordance with the judgment rendered by the Federal Court of Canada, trial division, on May 17<sup>th</sup> 1996, provided that such sale is completed and the purchase paid in full by the close of business in Halifax, Canada, on July 12<sup>th</sup> 1996 and further ordered that in the event that said sale is completed as aforesaid, the net proceeds of such sale be paid promptly to the trustees for distribution amongst the creditors of the bankrupt in observance of all their rights and in conformity with Belgian law.

On June 14<sup>th</sup> 1996, a motion to stay proceedings was heard, but a default judgment was rendered by the Federal Court. An order of appraisal and sale had been granted. On

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<sup>67</sup> See note nr.61

June 11<sup>th</sup> the Superior Court, Province of Quebec, district of Montreal, sitting in bankruptcy and insolvency matters.

Between June 11<sup>th</sup> and June 21<sup>st</sup> 1996, many creditors of whom some are asserting claims secured by a maritime lien under U.S. law, file applications opposing the order in the Superior Court, sitting in Bankruptcy and Insolvency matters.

The judgment by Justice Irvin J. Halperin declared that the Superior Court had come in aid of the Belgian Commercial Court of the judicial district of Antwerp pursuant to a request contained in a judgment of the President of such court dated June 11<sup>th</sup> 1996 and recognized the petitioners as trustee in bankruptcy with the duty and power to take possession of, to realize upon and to confirm the assets of the bankruptcy situated in Canada. Furthermore order that all measures of attachment against the mv Brussel be suspended and declared that every movable legal claim may only be prosecuted, introduced or executed against the trustees in bankruptcy in Belgium, further order that the mv Brussel located in the port of Halifax, Canada, to be delivered into the possession of the petitioners, in their quality as trustees in bankruptcy, so that they can proceed to the sale of the ship in question, locally or in any other place they consider more appropriate, and to the distribution of the proceeds

among the creditors in observance of all their rights and in conformity with Belgian legislation.

On the 28<sup>th</sup> June 1996 the Superior Court of Quebec has modified the 11<sup>th</sup> June 1996 judgment tot the following extend :

1. The sale of the ship by the Federal Court is permitted;
2. The proceeds of sale are ordered, after payment of the sale expenses, to be remitted to the trustees;
3. If the sale does not take place, the ship is ordered to be turned over to the trustees immediately;
4. There is not provisional execution of the judgment notwithstanding appeal.

On July 9<sup>th</sup> 1996, the Federal Court in Halifax rejected a bid of USD 3 million as valid but insufficient. A new auction was ordered to take place on July 24<sup>th</sup> 1996.

By order of the Federal Court of Canada, dated July 24<sup>th</sup> 1996 in Halifax, this court sold the mv Brussel and the sale was completed on August 1<sup>st</sup> 1996.

On December 19<sup>th</sup> 1996 various creditors applied for directions for the proof of claims, their ranking and eventual payment.

The trustees applied for payment out of all the proceeds of the sale in accordance with the judgment of the Superior Court sitting in Bankruptcy and Insolvency matters.

On April 9<sup>th</sup> 1997, the Federal Court issued an order directing that ordinary maritime claimants file their claims in accordance with Belgian law and directed that all claimants should file a claim and proof their secured status. The Court rejected the trustees' motion for payment out of the proceeds of sale of the vessel. The trustees and the mortgagee filed an appeal from this order to the Federal Court of Appeal, since the secured creditors in total have claims exceeding 4.6 million USD.

The trustees and the mortgagee filed an appeal.

Creditors secured under Canadian law only have claims for a total amount of about 12.000 CAD.

The mortgagee supports the trustees' position and wishes that all claims be handled before the Commercial Court in Antwerp.

July 1997 : the Federal Court of Canada issued a stay against any payment out of the funds during the trustees' appeal, but directs that the proof process continues in the event that its order of april 9<sup>th</sup> is upheld.

The present status is that there is an appeal of the judgment of the Superior Court sitting in Bankruptcy Matters and there is an appeal of the judgment of the Federal Court.

The major issue in both appeals is whether the Belgian bankruptcy judgment will be fully recognized under the terms of comity and shall the proceeds of the mv Brussel be distributed according to the relevant laws to be made applicable by the Belgian Commercial Court in Antwerp.

Two of the secured creditors file an appeal in the Quebec Court of Appeal.

The appeal suspends the execution of the former judgment.

Canada has no problems with cross-border insolvencies between the provinces within Canada <sup>68</sup>, but has apparently not a common attitude towards foreign bankruptcy judgments. <sup>69</sup>

Here again, there is no appropriate legislation or treaties, but jurisdiction has to give a legal and practical solution.

A Canadian stevedore, would not have a maritime lien in Canada. Canadian courts, through private international law, recognize the American maritime lien.

So, if a U.S. maritime lien is recognized in Canada, why should a Belgian bankruptcy trustee or bankruptcy judgment not be recognized in Canada ?

Nobody denied in Canada that the natural forum for the bankruptcy is Belgium.

A U.S. creditor followed the ship to Canada. Why doesn't the U.S. creditor follow the ship to Belgium ?

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<sup>68</sup> Yoine J. Goldstein, Trans-Border Insolvencies an Emerging consensus, Meredith Lectures 1994, p. 166

<sup>69</sup> Jacob S. Ziegler, Canadian Perspectives On Transborder Insolvencies, Brooklyn J. Int'l L. ,vol XVII:3, p548-551.

## **9. Proceedings in Singapore**

The mv Antwerpen was sold by the High Court through the Sheriff, and this without any public auction, but to a buyer proposed by the trustees.

The trustees were paid, out of the proceeds, for the costs and expenses made necessary for the maintenance of the mv Antwerpen.

The High Court of the Republic of Singapore accepted the prospective buyer suggested by the trustees. A judicial sale through the Singapore Court's assistance took place and the Court and all the claimants were convinced that the price offered by the prospective buyers was higher than the appraised value of the vessel. This was the first time that this was done in Singapore.

Recognized surveyors gave quotations for the appraisal of the vessel.

There is a priority of creditors under Singapore law. Unsecured creditors share in the proceeds *pari passu*. The order of priorities is similar to other common law countries.

On 18<sup>th</sup> September 1996 the High Court of the Republic of Singapore ordered that the mv Antwerpen of the port of Antwerp, be sold by the Sheriff by private treaty. The mv Antwerpen was delivered on the 30<sup>th</sup> September 1996. The mv Antwerpen was a 24.353 gross registered tons.

## **10. Conclusions and prospects**

Trans-border bankruptcies will always be very complicated and the outcome will be uncertain, as long as there are no international treaties, dealing with this matter.

International business will give rise to more and more problems and unanswered questions in this field.

Big expenses in managing these trans-border bankruptcies will force some trustees in bankruptcy not to take any action abroad if the estate at the beginning of the bankruptcy do not financially permit them.

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