

## Chapter 15s under BAPCPA

“Where in the World Is Carmen San Diego, Ltd.?” A hypothetical case study, informed by the new chapter 15 and accompanying case law of a company that needs financial restructuring that is organized outside the United States, but with assets, securities and creditors both inside and outside the United States. A review of the major strategic issues for such a case.

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May 7, 2007

WHERE IN THE WORLD IS CARMEN SAN DIEGO, LTD.?

I. Carmen's Tale

There once was a company called Carmen San Diego, Ltd. or "Carmen" for short. Now, Carmen was in the oil drilling services business; she owned ten drilling barges and ships that she rented out to charter parties all over the world, including in the North Sea, the Indian Ocean, the Sea of China and the Gulf of Mexico. Carmen was owned by a group of five Texans, who used to be in the wild catting business in Texas and Oklahoma, but who pulled up stakes, raised some funds through a bond issuance and a bank loan, bought their oil drilling barges and ships and set up their charter office in Singapore. Dallas "Buck" O'Brien was the Chairman and CEO. Other than a few other employees in the charter office, the only other people working for Carmen were the captains, first mates and hands on the ships and barges. Carmen was organized under the laws of The Kingdom of Entrepreneurs and her board of directors met in the capital city of Entrepreneurs, four times a year. Other than one ship in dry dock for repairs in Hong Kong, the rest of Carmen's vessels were located in international waters. The ships and barges were registered in Panama.

Now, Carmen, Buck and the rest of the Texans were having a high old time, raking in the dough as the price of oil climbed above \$60 a barrel. The demand for drilling was climbing too, and each successive charter of their vessels was gaining a higher and higher charter rate. During this time, the Texans lived high on the hog, easily paid their debt service on their bonds and bank debt and did not think that they needed to save much funds for a rainy day. So, Carmen only had about \$50 million in its bank account in New York and the rest of the profits up until that time had been distributed to the Texan equity holders, including Buck. But, then, the rain started, and when it rained, it poured. First, Carmen lost 3 vessels in a "thousand year" storm in the Indian Ocean and insurers are contesting coverage. Second, Buck's right hand man (who was actually a woman and the head of the Singapore office) encountered an immigration status problem in Singapore, and was deported back to the U.S. Third, a combination of the announcement of higher oil reserves in Russia and Mexico than previously thought, a record output from Saudi Arabia, plus the start of a worldwide recession sent the price of oil back below \$40 a barrel and the demand for charters and charter rates started dropping precipitously. All of a sudden, Carmen, which had been the stuff dreams are made of, became a Maltese Falcon-like false treasure. A bond interest and amortization payment was due in three months, and Carmen's bank line was maturing in six months.

The bank debt was a \$250 million syndicated, secured revolving loan that was fully drawn, and was agented by Kitibank, N.A. or "Kiti" for short. Kiti was a U.S. national bank, headquartered in New York. The Kiti loan was governed by New York law and had a provision where Carmen agreed to jurisdiction in the state and federal courts in New York County, New York (Manhattan) for enforcement of the loan. All of Carmen's remaining vessels, its charter contracts and the receivables from those contracts were pledged to Kiti as collateral agent for the Kiti loan. Carmen's unsecured bond debt (\$300 million) was originally issued to persons outside

the United States, but was also governed by New York law, had a New York jurisdiction provision and had The Bank of New Amsterdam, headquartered in New York, as the indenture trustee for the bonds. In secondary market trading, the Carmen bonds had partially ‘repatriated’ to U.S. holders, so that now, about one-third of the bonds were in U.S. hands. At the time that it started metaphorically raining on Carmen, Carmen also had about \$50 million of unsecured trade debt owed to suppliers and vendors located all over the world.

Carmen’s board called in a crisis management firm, Umbrella Partners LLC, who advised the board that this was not the time to put the remaining fleet on the market, as at that moment a fire sale of the vessels would probably pay the Kiti loan back (though, not for sure), but would likely leave the unsecured bond and trade creditors without a recovery and would surely leave the good ole boys from Texas (the equity holders) wiped out. Umbrella Partners further advised Carmen’s board that it was likely that the price of oil would be back up above \$60 a barrel within an eighteen month time period, and that under a bare bones business plan the \$50 million that Carmen had in the bank could be husbanded to last that eighteen months, as long as Carmen made no payments on its existing bank, bond and trade debt. Umbrella Partners also suggested that the board call in lawyers from Restructuring Lawyers R US LLP to advise them on the insolvency regimes of Entrepreneurs, Singapore and the U.S., and how the differences in those regimes might affect Carmen and its creditor and equity stakeholders. Carmen’s board did just that.

Restructuring Lawyers R US LLP told the Carmen board that Singapore’s insolvency laws are based upon the U.K.’s Companies Act (prior to recent amendments) and only allow for ‘voluntary winding ups’ (which can only be done when all creditors will be paid in full) and for court supervised ‘administrations’. In a Singapore administration, an independent ‘administrator’ (usually partners from large accounting firms) would be court appointed and would immediately take control of Carmen’s business and assets. That administrator would then be charged with liquidating Carmen’s assets and distributing those assets to Carmen’s creditors in strict priority (secured first, claims of the administration second, unsecured third and equity last). Also, under Singapore law, nothing would prevent Kiti from exercising its rights to foreclose on the bank group’s collateral even after a Singapore administration was started. A petition for administration can be filed by the company in financial difficulty, but also, may be filed involuntarily by creditors after the due date for the debt of at least three creditors has passed three months without those creditors being paid.

Restructuring Lawyers R US also told Carmen’s board that The Kingdom of Entrepreneurs insolvency laws were similar to the U.S. Bankruptcy Code, except that in order to approve a plan of reorganization proposed by the company in financial trouble, instead of needing to have two-thirds in amount and a majority in number of creditors of any impaired class of creditors vote to approve the plan, the company would only need to persuade a majority in amount as well as a majority in number of all of the creditors (whether secured, unsecured or priority creditors), voting as one class, to approve the plan. The other main difference in the insolvency law of The Kingdom of Entrepreneurs (from the U.S. Bankruptcy Code) was that there was a super priority claim granted to employee claims and to tax claims of the Kingdom, such that such claims would even be paid ahead of secured creditors. Otherwise, The Kingdom of Entrepreneurs insolvency laws, like the U.S. Bankruptcy Code, allows a board of directors of a company in bankruptcy to maintain control over the assets and business of the debtor (subject

to court supervision for any transactions outside the ordinary course of business) and to have an exclusive time period to propose a plan of reorganization. Those laws also impose an “automatic stay” or statutory injunction against all creditor actions all over the world against the debtor or its property during the pendency of the insolvency proceeding (subject to the court involved having personal jurisdiction over creditors). The appointment of an independent trustee to take control of the company or the conversion of the insolvency proceeding to a liquidation proceeding is also possible, but only on a motion for cause shown (such as fraud, gross mis-management, etc.). Both in the U.S. and The Kingdom of Entrepreneurs reorganization petitions may be voluntarily filed with the authorization of the board of directors of a company, but may also be involuntarily filed by three creditors if they can show that the company is not generally paying its debts as they become due (i.e., not just that their individual debts were not paid).

The end of Carmen’s Tale is waiting to be written.

## II. Discussion

A. Modified Universality- Chapter 15 of the U.S. Bankruptcy Code based upon the UNCITRAL Model Law and the EU Directive

B. Where in the world is the center of main interests or center of gravity for the business of Carmen San Diego, Ltd.?—registered office, domicile, headquarters or executive office, location of assets, location of creditors, choice of law and jurisdiction of debt instruments.

C. Assuming that the procedures in The Kingdom of Entrepreneurs, Singapore and the U.S. comport with general notions of due process (notice, the opportunity to be heard by a neutral tribunal, etc.), what do you think the board of directors of Carmen should do? What should Kiti do? What should The Bank of New Amsterdam, as indenture trustee, bondholders and other unsecured trade creditors do? Should a U.S. Bankruptcy Court sitting in New York give recognition to insolvency proceedings initiated in Singapore? In The Kingdom of Entrepreneurs? As foreign main proceedings or non-main proceedings? If insolvency proceedings are first filed in The Kingdom of Entrepreneurs, should a U.S. Bankruptcy Court sitting in New York allow an involuntary chapter 11 petition initiated by three hedge funds that have purchased unsecured trade claims to go forward in the face of a motion to dismiss that petition by Carmen?

D. What, if any, are the public policy issues raised by the insolvency laws of The Kingdom of Entrepreneurs?

