

Time for arrest?

Admiralty prevails over the cross-border insolvency rules in the case of the “New Giant”

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Outline of presentation

- Introduction to Cross-Border Insolvency
- Historical tension between Admiralty and Insolvency law plus background to New Giant/STX case –Chronology in New Giant case
- Arguments advanced in favour of the Admiralty Claimants
- Arguments in favour of the Administrators
- Court Judgment in New Giant case (*You Sik Kim and Chun Il Yu v STX Pan Ocean Co. Ltd Auckland* [2014] NZHC 845)
- Where to from here



Introduction - the Overall Issue

- Insolvency Law and Admiralty Law have not developed in a unified manner.
- A ship may be the target of an admiralty action. The ship may also be an asset in an insolvency proceeding. The insolvency process could be based in another country as we are considering today.
- What legal process does the maritime claimant follow – admiralty or insolvency?
- What is the effect of the Insolvency (Cross-Border) Act 2006?



Introduction to Cross-Border Insolvency

- A. Different approaches historically – territorialism v universalism.
- B. Philosophy and enactment of the Model Law in New Zealand.
- C. Operation of Articles 17-21 of the Model Law as relevant to the New Giant case.



Introduction - philosophy of Model Law and enactment in New Zealand

- 1990's International efforts. Enactment NZ on 24 July 2008.
- Designed to be adopted by domestic law of jurisdictions.
- Procedural in nature – doesn't impose substantive insolvency law.



- Purpose of Model Law is to promote:
 - Cooperation between the Courts and other competent authorities of New Zealand and foreign states involved in cases of cross-border insolvency;
 - Greater legal certainty for trade and investment;
 - Fair and efficient administration of cross-border insolvencies that protect the interests of all creditors and other interested parties, including the debtor;
 - Protection and maximisation of the value of the debtor's assets; and
 - Facilitation of the rescue of financial troubled businesses thereby protecting investment and preserving employment.



Introduction - operation of Articles 17-21 of Model Law (Procedural and Quick)

- Foreign representative applies to High Court for recognition of foreign proceeding.
- If conditions of Article 17 met then recognised as foreign main proceeding.
- Consequences of recognition as a foreign main proceeding is automatic stay of proceedings concerning debtors assets, rights or liabilities.
- Article 20(1): gives Court wide discretion to vary stay.



Chronology

- 7 June 2013:** STX applied to Seoul District Court for the commencement of a Rehabilitation Proceeding under the Debtor Rehabilitation and Bankruptcy Act.
- 7 June 2013:** Preservation Order and Stay Order granted by Seoul District Court.
- 12-14 June 2013:** Claimants file in *rem* admiralty proceeding against *New Giant*.
- 17 June 2013:** Commencement of STX Rehabilitation Proceeding in Seoul.
- 25 June 2014:** Originating application made by STX in NZ Court under the Act.
- 1 July 2013:** High Court grants orders recognising the Korean Proceeding as a foreign main proceeding, with the consequences set out in Article 20(1) - Stay.



- *“The need for predictability and uniformity was so strong that even the common law courts, ever protective of their own ways, ceded jurisdiction to specialised courts of Admiralty applying the largely international laws of maritime commerce. As Professor Tetley, [in his text “Maritime Liens and Claims” (second ed. 1998)], writes, at page 56:*
- *Maritime law as we know it today is civilian in nature, finding its source in the lex maritima (the law maritime) which is a part of the lex mercatoria (the law merchant). Maritime law was codified, international law, and in England, it was apart from, and opposed to, its nearly mortal enemy, the common law”.*

Holt Cargo Systems Inc v Trustees of ABC Containerlines N.V.
[2001] 3 R.C.S. 907 (Supreme Court of Canada) at 924





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“The reason for this privileged status for maritime lien holders is entirely practical. The ship may sail under a flag of convenience. Its owners may be difficult to ascertain in a web of corporate relationships (as indeed was the case here, where initially Holt named the wrong corporation as ship owner). Merchant seamen will not work the vessel unless their wages constitute a high priority against ship. The same is true of others whose work or supplies are essential to the continued voyage. The Master may be embarrassed for lack of funds, but the ship itself is assumed to be worth something and is readily available to provide a measure of security. Reliance on that security was and is vital to maritime commerce. Uncertainty would undermine confidence. The appellant Trustees’ claim to “international comity” in matters of bankruptcy must therefore be weighed against competing considerations of a more ancient and at least equally practical international system – the law of maritime commerce”.

Holt Cargo Systems Inc v Trustees of ABC Containerlines N.V. [2001] 3 R.C.S. 907 (Supreme Court of Canada) at 925



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Debtor Rehabilitation and Bankruptcy Act

Article 44 (Order Given to Suspend Other Procedures, etc.)

- (1) When it is deemed necessary upon receiving an application for commencing the rehabilitation procedures, the court may order the discontinuation of the procedures falling under any of the following subparagraphs...
1. The bankruptcy procedure for the debtor;
 2. The auction procedures (hereinafter referred to as “compulsory execution based on the rehabilitation claim or the rehabilitation security right”) that are already in progress on the debtor’s assets for the compulsory execution, the provisional seizure, the provisional disposition or the exercise of the security right based on the rehabilitation claim or the rehabilitation security right.
 3. Litigation procedures for the debtor’s assets.
 4. ...



The Result

- The Judgment in New Giant
- Where to from here

