

GUIDANCE FROM THE SINGAPORE HIGH COURT ON THE INTERACTION BETWEEN INSOLVENCY AND ADMIRALTY LAW AND RESOLUTION OF TENSIONS BETWEEN THE TWO

Introduction

1. In The “Ocean Winner” [2021] SGHC 8, a decision delivered on 15 January 2021, the Singapore High Court analysed the interaction between insolvency law and admiralty law and addressed the tension between the statutory moratorium afforded by the insolvency regime and the ability of maritime claimants to protect their interests by way of admiralty actions such as filing of protective writs and ship arrests.

Background

2. On 17 April 2020, Ocean Tankers (Pte) Ltd (“OTPL”) filed an application for moratorium relief pursuant to s 211B of the Companies Act (“CA”). OTPL was granted an automatic moratorium that lasted for 30 days or until the date when the application was heard, whichever was earlier. On 22 April 2020, PetroChina International (Singapore) Pte Ltd (“PetroChina”) filed admiralty in rem writs (the “Writs”) against 4 ships (the “Vessels”), which OTPL had bareboat chartered, in respect of claims for misdelivery of cargo.
3. On 8 May 2020, OTPL entered appearances in these 4 actions and thereafter applied to set aside or strike out the Writs on the basis that there was a subsisting moratorium under s 211B of the CA and that PetroChina had not obtained leave of court to file the Writs. In particular, ss 211B(8)(c) and (d) of the CA (which have

been repealed and re-enacted as ss 64(8)(c) and (d) of the Insolvency, Restructuring and Dissolution Act (“IRDA”)) prohibit the commencement of any proceedings against the company, or any execution, distress, or other legal processes against the property of the company during the automatic moratorium period, without leave of court.

4. The relevant extracts from ss 211B(8)(c) and (d) of the CA are reproduced below:

Power of Court to restrain proceedings, etc., against company

...

(8) Subject to subsection (9), during the automatic moratorium period for an application under subsection (1) by a company —

...

(c) no proceedings (other than proceedings under this section or section 210, 211D, 211G, 211H or 212) may be commenced or continued against the company, except with the leave of the Court and subject to such terms as the Court imposes;

(d) no execution, distress or other legal process may be commenced, continued or levied against any property of the company, except with the leave of the Court and subject to such terms as the Court imposes;

Decision

5. OTPL's application failed. The Court held that ss 211B(8)(c) and (d) of the CA did not prevent the filing of the Writs without leave of court. First, the filing of the Writs did not constitute the commencement of "proceedings" against "the company" within the meaning of s 211B(8)(c) of the CA. Second, while a bareboat charter interest fell within the meaning of "property" under s 211B(8)(d) of the CA, the filing of the Writ did not constitute an "execution, distress or other legal process" under s 211B(8)(d).
6. On the first issue, the Court took the view that the purpose of the moratorium under s 211B of the CA is to postpone the enforcement of legal rights so that the company has breathing space to come up with a scheme of arrangement. It is not intended to deny the creation of substantive legal rights. In this connection, the filing of an admiralty writ only creates a security interest in the ship by way of a statutory lien in favour of the claimant, without which he has no right of action. This is to be contrasted with typical civil actions, where the filing of the writ of summons constitutes the commencement of proceedings to pursue the claimant's pre-existing legal rights. Therefore, the filing of the Writs cannot be said to be the commencement of "proceedings" within the meaning of s 211B(8)(c) of the CA.
7. Even if the filing of the Writs constitutes commencement of "proceedings" under s 211B(8)(c) of the CA, such "proceedings" must have been commenced against "the company", which is OTPL. The Court analysed past Singapore decisions and observed that an action in rem is an action against the ship and not against the shipowner or bareboat charterer. The action only transforms into a mixed action in rem and in personam after the shipowner or bareboat charterer enters an appearance in the action. It is only after the entry of appearance that any judgment can be enforced against the shipowner or bareboat charterer personally. The question is whether OTPL would have been personally liable for the actions in rem commenced by the Writs at the time when they were issued. Since OTPL did not enter an appearance at the time when the Writs were issued, the actions remained actions against the Vessels and OTPL would not have been personally liable at that point in time. Therefore, the filing of the Writs does not constitute the commencement of proceedings against "the company" (i.e. OTPL) under s 211B(8)(c) of the CA.
8. The Court noted that it is only now when OTPL has entered an appearance that the actions in rem then transform into mixed actions in rem and in personam and that OTPL can be personally liable. Given that there is a subsisting moratorium by virtue of the fact that OTPL is now under judicial management (this is to be contrasted with the automatic moratorium under s 211B of the CA as discussed above), PetroChina must obtain leave of court if it wishes to proceed with the claim, including service of the Writs on the Vessels and arrest of the Vessels.
9. On the second issue, the Court made it clear that the filing of the Writs is neither an "execution" nor a "distress" within the meaning of s 211B(8)(d) of the CA. On whether the filing of the Writs falls within the meaning of "other legal process" under s 211B(8)(d), the Court took the view that it must mean enforcement processes similar in nature to "execution" and "distress" proceedings. In other words, it must refer to processes to seize money or property of the company. The Court reiterated that the filing of an admiralty writs only creates a statutory lien and there is no element of enforcement by taking such a step. Therefore, the filing of the Writs does not fall within the meaning of "other legal process" under s 211B(8)(d) of the CA.

10. The Court then considered whether the Vessels can be said to be OTPL's "property" under s 211B(8)(d) of the CA. The Court was of the view that the purpose of s 211B(8)(d) is to expand the scope of the moratorium and cover the types of property interests which were not previously covered under s 210(10) of the CA. Since a leasehold interest is intended to be covered under the expanded scope of s 211B(8)(d), a bareboat charter interest should similarly be covered. The Court went on to say that, even if a bareboat charter interest falls within the meaning of "property" under s 211B(8)(d), the filing of the Writs is not an "execution, distress or other legal process" under s 211(8)(d). Therefore, s 211B(8)(d) is not satisfied.
11. In sum, the Court concluded that the filing of the Writs does not fall within the ambit of ss 211B(8)(c) and (d) of the CA. Accordingly, no leave of court was required in order for PetroChina to file the Writs and there was no basis for OTPL to set aside or strike out the Writs.
12. For completeness, although OTPL did not rely on it, the Court also considered the applicability of s 211B(8)(e) of the CA, which reads as follows:
- "[N]o step may be taken to enforce any security over any property of the company, or to repossess any goods under any chattels leasing agreement, hire-purchase agreement or retention of title agreement, except with the leave of the Court and subject to such terms as the Court imposes ..."*
13. The Court stated that the filing of the Writs is not a step taken to enforce the statutory lien. As such, it does not fall within s 211B(8)(e) of the CA.

Comments

14. This very recent decision in Singapore is instructive for maritime claimants looking to protect their interests by commencing admiralty actions against companies which are restructuring or facing insolvency proceedings. Importantly, it is now clear that the statutory moratorium under the previous s 211B of the CA (and the new s 64 of the IRDA) does not bar the filing of admiralty writs. A claimant can therefore preserve its statutory lien against the ship, protect its in rem claim from any transfer of ownership and prevent its claim from being time-barred by filing the admiralty writ notwithstanding the statutory moratorium. However, if the claimant wishes to proceed with service of the writ or arrest of the ship, leave of court would still be required.

If you have enquiries in any maritime related matters, please do not hesitate to get in touch with:



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