Korean shipping claims can now be heard in London arbitration

The latest chapter in the Pan Ocean saga sees the English court allowing parties to arbitrate in London notwithstanding Pan Ocean being subject to rehabilitation proceedings in Korea.

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Post the global financial crisis, it is not uncommon in the shipping community to witness companies going through administration, rehabilitation or other insolvency proceedings. Our Insight about the global dilemma faced in the OW Bunker case discusses the lack of *standardisation for coordinated handling of creditor demand* .

The recent developments in this Pan Ocean case involving Seawolf Tankers Inc (Seawolf) and Heidmar Inc (Heidmar) - *Re Pan Ocean Co. Ltd Pan Ocean); subnom another* v. *Pan Ocean Co Ltd and another [2015] EWHC 1500 Ch)* - may shed some light on how to handle claims against insolvent companies and the application of the Cross-Border Insolvency Regulations 2006 (CBIR 2006).

The backgroundIn June 2013, Pan Ocean commenced rehabilitation proceedings before the Korean Bankruptcy Court (rehabilitation proceedings) in Seoul where Pan Ocean is incorporated.

By this time, vessels owned or in the control of Pan Ocean were being arrested across various jurisdictions. As most of the charterparties involved contained a London arbitration clause, a number of arbitrations in London were also commenced against Pan Ocean.

At the same time, Pan Ocean also applied under Article 15 of CBIR 2006 to obtain a recognition order from the English court to recognise that the *main* foreign insolvency proceedings were ongoing in Korea and to stay the commencement of any actions or proceedings against Pan Ocean.

Cross-Border Insolvency Regulations 2006CBIR 2006 was enacted to give effect to the Model Law adopted by the United Nations Commission on International Trade Law in 1997. Its purpose is to provide cooperation between competent authorities of states involved in cases of cross-border insolvency. The Model Law has been adopted by many countries including South Korea and the UK.

Once foreign insolvency proceedings have been recognised in the UK, there is an automatic stay of certain actions, such as commencement or continuation of actions or proceedings against the debtor or its assets, or execution against a debtor's assets. The court can, however, modify or expand the terms of the automatic stay.

Seawolf and Heidmar's claims and the Korean rehabilitation proceedingsSeawolf operated a vessel pool managed by Heidmar and Pan Ocean time chartered a vessel named UNIVERSAL QUEEN to be run in the pool. After commencement of the rehabilitation proceedings, Pan Ocean withdrew the service claiming the time charter was terminated. Seawolf and Heidmar disputed this and claimed damages for more than USD 2 million. Pan Ocean argued that they were entitled to terminate the charterparty on the basis of an *ipso facto* clause (a clause permitting the parties to terminate the contract in certain circumstances), and to claim for unpaid hire.

Seawolf and Heidmar registered their claim in the rehabilitation proceedings in Korea, however the claim was rejected. They then lodged an application with the Korean Bankruptcy Court seeking a confirmatory judgment to recognise their claim. Despite the charterparty being subject to English law, the Korean court decided the substantive claim, holding that Seawolf and Heidmar's claim for damages failed. Next, Seawolf and Heidmar lodged an objection to the confirmatory judgment before

the Korean District Court. The objection was heard in June 2015 but the outcome has not yet been reported.

In parallel proceedings in November 2014 Seawolf and Heidmar made the application to the English Companies Court to modify its recognition order. They sought to refer the dispute to arbitration in London according to English law as agreed in the charterparty with Pan Ocean. The application was made however on the basis that they would not seek to enforce any arbitration award or subsequent judgement against the assets of Pan Ocean.

June 2015: English court's decision and reasoningIn reaching its decision to lift the stay and allow Seawolf and Heidmar's claim to be referred to London arbitration, the following factors were taken into account by the court:

• Seawolf and Heidmar have a genuine, arguable claim under the charterparty. The *ipso facto*
clause on which Pan Ocean relies does not cover the rehabilitation proceedings, as it refers only to proceedings in bankruptcy or similar proceedings. Furthermore, under English bankruptcy law, there is an arguable case that the clause offends the anti-deprivation principle and could be void and unenforceable.

• The parties chose London arbitration and English law to resolve disputes. They could have contractually agreed to change this in the event of insolvency but did not.

• The Korean court would need to hear expert evidence concerning English law, whereas arbitrators in London would not.

• The arbitration will not adversely affect the purpose, objective or results of the rehabilitation proceedings. Pan Ocean will in any event need to commence arbitration for its counter-claim. It would be wrong to determine Seawolf and Heidmar's case summarily in an insolvency process and allow Pan Ocean to proceed with its claim in arbitration.

• The court did not take into account whether the Korean court would ignore the arbitration in making its decision.

• On proportionality, the court claims are of significant value and justify the costs of an arbitration.

Concluding remarksThis case gives some guidance on the English court's robust approach to upholding the contractual rights and wishes of the parties to arbitrate a dispute and its readiness to lift a recognition order when necessary. However, the practical benefit of making such an application when at the same time the applicants do not seek to enforce the arbitral award, is questionable.

That said, the news at the end of July that Pan Ocean has been taken over by the Harim Group, gives meaning to the strategic move by Seawolf and Heidmar to modify the recognition order. Pan Ocean has been approved by the Seoul Central District Court to exit rehabilitation and should now have sufficient funds to repay its creditors. As a result, the decision in England has effectively helped reserve Seawolf's and Heidmar's claims against Pan Ocean.

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