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HARMONIZING LAWS AT SEA: THE COMPLEXITIES OF CROSS-BORDER MARITIME INSOLVENCY

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Abstract

Cross-border maritime insolvency typically arises in an event whereby shipping companies with both assets and creditors in many jurisdictions incur a complex cross-section of admiralty law and insolvency law. With the continued cross-border flows of ships and with companies owning assets and creditors located across borders, “it becomes hard to deal with insolvency. Some of the legal frameworks that oversee maritime insolvencies and are explored in this article include the UNCITRAL Model Law on Cross-border Insolvency, regional laws such as the European Insolvency Regulation, International Maritime Conventions, and Domestic laws such as those of the United States, China, India and the United Kingdom. Even though these legal frameworks are in place, there are still major hurdles, including the tensions between territorialism and universalism, confusion over where the Centre of Main Interests (COMI) is, a lack of legal provisions, and limitations in the recognition of foreign procedures. It is complicated by marine-oriented issues such as ship arrest and maritime liens, such that individual creditors may take action that conflicts with the objectives of collective insolvency. Hanjin Shipping bankruptcy provides a classic example of the real-life consequences of such problems, including stopping international trade and discrimination between creditors. To ensure effectiveness, equity and legal predictability in international maritime trade, the conclusion of this article brings to the fore the need to have a common international framework, better judicial cooperation and reforms of marine-specific insolvency.

Keywords - Cross-border maritime insolvency, Maritime liens, Ship arrest, UNCITRAL Model Law, Centre of Main Interests (COMI)

Introduction

Cross-border marine insolvency presents both legal and practical issues of special concern at the nexus of the admiralty law and insolvency law in a more globalised economy.¹ Shipping companies operate across multiple jurisdictions, deal with creditors globally, and possess highly mobile assets such as ships.² When such companies go through financial complications, the administration of the insolvency process becomes relatively harder to conduct because of their international activities. Due to the free-flowing environment of marine insolvency assets, compared to standard insolvency situations, it is particularly challenging to coordinate court systems and legal systems.

The legal framework that governs the law of cross-border maritime insolvency is a disjointed legal framework comprising of international treaties, regional laws and domestic laws.³ Whereas such frameworks as the UNCITRAL Model Law on Cross-Border Insolvency seek to encourage cooperation and recognition of international proceedings, regional frameworks, such as the European Insolvency Regulation, seek to facilitate processes within particular jurisdictions. Nonetheless, these structures lack the capacity to deal with issues that are peculiar to the maritime sector, including the rights of creditors to effect claims by arresting the ship and through marine liens. Consequently, the personal rights of admiralty law and the social goals of insolvency law occasionally conflict.

A balance between universalism and territorialism is one of the key problems in this sphere.⁴ Universalism encourages a co-ordinated, single, insolvency procedure which tends to result in simultaneous proceedings and varying results when territorial procedures enable local countries to have sovereignty over local assets. The process is complicated by the impossibility to define the Centre of Main Interests (COMI), as well as the variations in the acknowledgment of international procedures. Cross-border maritime insolvency is a delicate and poorly defined area which needs further harmonisation and collaboration in order to achieve stability, efficiency and equity in international maritime trade.⁵

Legal Frameworks Governing Cross-Border Maritime Insolvency

¹ Look Chan Ho, *Cross-Border Insolvency: Principles and Practice* (Sweet & Maxwell 2016) 3–5.

² Martin Davies and Anthony Dickey, *Shipping Law* (4th edn, Lawbook Co 2016) 1–3.

³ Look Chan Ho, 'The UNCITRAL Model Law on Cross-Border Insolvency' (2017) 32 *Journal of International Banking Law and Regulation* 214.

⁴ Jay Lawrence Westbrook, 'Universalism and Choice of Law' (2007) 23 *Penn State International Law Review* 625.

⁵ UNCITRAL, *Legislative Guide on Insolvency Law* (2005) pt 1, ch 1.

A mix of international frameworks, regional limitations and national laws govern cross-border marine insolvency. Shipping is a global operation and cross-jurisdictional transit of ships means that a single piece of legislation cannot be used to govern such an occurrence. Rather, it is the interplay of several legal systems that generally results in complexity. These frameworks have the primary aims of safeguarding creditor rights, promoting international collaboration, and a systematic process of handling insolvency.

1. UNCITRAL Model Law on Cross-Border Insolvency (1997)

One of the most significant international regulations to address insolvency cases with more than one country is the UNCITRAL Model Law on Cross-Border Insolvency.⁶

In easy language, it was developed to simplify matters as a company geographically spreads into more countries and ends up being financially instable. This law also promotes cooperation and coordination among courts in various countries instead of each country having its own case (this can end up being very confusing and conflicting).

As an example, in case a shipping company is liquidated in one country, other countries can formally accept that liquidation. This implies that they are able to support it by aiding in the control of assets of the company that are in their jurisdictions.

The Centre of Main Interests (COMI) is one of the significant concepts of this law. This is basically the primary location on which the business is done by the firm. It assists in determining which country would be the first in dealing with the insolvency case.

After a foreign insolvency proceeding is identified as the primary one, foreign courts can: stay proceedings against the company, preserve the assets of the company and collaborate with the foreign court to which the proceedings are assigned.⁷

However, there is a major drawback when it comes to maritime situations. The law does not specifically deal with maritime issues like ship arrests or maritime claims. Due to this, although the insolvency proceedings may be recognised internationally, the creditors can still go to a different country and attempt to seize (arrest) the ship in order to recover their money.

⁶ UNCITRAL, *Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation* (1997, updated 2013) pt I.

⁷ UNCITRAL Model Law (1997) arts 20, 21, 25.

2. European Insolvency Regulation 2015

Another important framework is the European Insolvency Regulation that applies in the European Union. It establishes one insolvency proceeding set according to the debtor COMI and ensures that a recovery is automatic in all EU member states.⁸ This facilitates efficiency since it avoids having numerous parallel proceedings. The regulation follows the principle of *lex concursus*, that is, the law of the country in which the insolvency procedures are initiated will apply, to establish consistency in the EU. Nevertheless, like the UNCITRAL Model Law, it does not fully address the problems of maritime law; the ship arrests and maritime lien can still be imposed in a number of situations.

3. International Maritime Conventions

Some of the maritime conventions influencing this area are as follows-

(a) Arrest of Ships Conventions

The rights of creditors to arrest ships to maritime claims are regulated by the International Convention on Arrest of Ships.⁹ It enables creditors to seize a vessel to claim and impose maritime liens. This convention enhances the rights of creditors but doesn't conform with the insolvency law, which attempts to protect individual efforts of enforcement.

(b) Maritime Liens and Mortgages Convention

Mortgages and Liens The International Convention on Maritime Liens and Mortgages defines:

- Types of maritime liens
- Priority of claims
- Rights of secured creditors

This convention guarantees that some creditors will have precedence, e.g. crew members and salvage operators. Nevertheless, such priorities are conflicting with the principle of equal distribution of insolvency.¹⁰

⁸ Regulation (EU) 2015/848, arts 3 and 19.

⁹ International Convention on Arrest of Ships 1999 (adopted 12 March 1999, not yet widely in force in all jurisdictions) art 1.

¹⁰ Roy Goode, *Principles of Corporate Insolvency Law* (5th edn, Sweet & Maxwell 2018) 67–70; Look Chan Ho, *Cross-Border Insolvency: Principles and Practice* (Sweet & Maxwell 2016) 45–48.

4. National Legal Frameworks

International systems are not entirely exhaustive, so national laws significantly contribute to the cross-border maritime insolvency.

(a) United Kingdom

UK adheres to the principle of modified universalism that enhances collaboration with foreign courts and safeguards local interests.

Important cases like *Re HIH Casualty*¹¹ and *Cambridge Gas*¹² indicate that the UK courts are ready to help in foreign insolvency proceedings. Nevertheless, a balance between insolvency and maritime law may still be provided by enforcing maritime claims at the admiralty courts.

(b) United States

The US has adopted the UNCITRAL Model Law through Chapter 15 of the Bankruptcy Code.¹³

This allows recognition of foreign insolvency proceedings¹⁴ and cooperation between US courts and foreign courts.¹⁵ The US courts can provide a protection to foreign debtors, in the cases that relate to the maritime, but they also have the interests of the maritime creditors, particularly in the cases of ship arrest.

(c) India

There is no complete cross-border insolvency regime in India as of now. Included in the Insolvency and Bankruptcy Code are limited provisions (Sections 234-235), which, however, are not in full force.¹⁶ India has offered to adopt the UNCITRAL Model Law, which has yet to be adopted.¹⁷ At the same time, maritime claims are governed by the Admiralty (Jurisdiction and Settlement of Maritime Claims) Act, which allows creditors to arrest ships.¹⁸ The lack of

¹¹ [2008] UKHL 21;

¹² [2006] UKPC 26.

¹³ 11 USC §§ 1501–1532 (Chapter 15, US Bankruptcy Code).

¹⁴ 11 USC § 1517.

¹⁵ 11 USC §§ 1525–1527.

¹⁶ Insolvency and Bankruptcy Code 2016, ss 234–235.

¹⁷ Insolvency Law Committee Report (2018) 15–20.

¹⁸ Admiralty (Jurisdiction and Settlement of Maritime Claims) Act 2017, ss 4, 5.

coordination between the two laws brings about uncertainty in cross-border maritime insolvency cases.

Challenges faced in Maritime Insolvency

Universalism vs Territorialism

Crucially to the insolvency law is the principle of universalism, whereby only one primary court within one country should deal with all the assets of a company in a case where the company declares itself bankrupt. All creditors, no matter where they may be, must submit their claims to that one court for the company's assets to be collected and distributed fairly. This plan enhances fairness, effectiveness, and improve coordination as it does not require multiple proceedings and minimizes expenses. Nonetheless, since not every nation is part of the international insolvency procedures, particularly in maritime cases, universalism faces practical challenges. In addition, the concept of centralised control also bears no relation to the maritime law, which enables the arrest of ships.

The opposite strategy is, however, territorialism. It implies that every country manages the resources it possesses on the territory and that there is no process listed everywhere. Creditors may do so as they are allowed to halt a ship in a specific country, regardless of the location of any assets. This guarantees local creditors and preserves national sovereignty but can frequently result in inconsistent judgments and retrial and disproportional outcomes. It is further aggravated by the fact that in the case of maritime insolvency, the creditors are more inclined towards territorialism as a way to recover their money faster since the ships are transportable and may be retained at any location they wish.

Multiple Jurisdictions and Parallel Proceedings

The existence of the shipping companies that globally perform their activities and possess their property in numerous countries is one of the largest obstacles of the cross-border maritime insolvency. In case of insolvency of such a company, courts in various countries might start legal procedures at the same time. This causes contradictory court rulings, overlapping cases, higher litigation expenses and delays. A case in point is a ship could be detained in one country and the bankruptcy proceedings be held in a different one. A lack of proper coordination of courts means that the whole process is ambiguous, unproductive, and uncertain.

Difficulty in Determining Centre of Main Interests (COMI)

Another key issue is the Finding of the Centre of Main Interests (COMI) that defines the centre of the main insolvency process. This is very difficult in maritime cases as shipping companies often have more than one country they operate. They may have operations in one country, they may register their vessels in another country and transact business in another country. Because of this scattered form, the true seat of the core interests of the company may be hard to locate, leading to conflict and forum shopping, or creditors choosing the most lucrative jurisdiction to themselves.

Lack of Uniform Legal Framework

There isn't a single international legislation that specifically addresses cross-border marine insolvency. Such frameworks like the UNCITRAL Model Law on Cross-Border Insolvency do not adequately cover such issues of the marine industry as ship arrest and maritime liens. As a result, legal regulations vary from country to country. All the countries treat maritime claims in various ways, and some of them accept the international insolvency processes, whereas others do not. This inconsistency generates confusion, inconsistency and uncertain laws.

Recognition of Foreign Insolvency Proceedings

The issue of courts in a particular country recognising bankruptcy proceedings initiated in a different country is just one of the significant obstacles. Not all the time is it automatic. Courts can either give importance to their local debtors or can be politically and economically inclined. This would imply that although the processes of bankruptcy would be carried out properly in a particular country, they would not be accepted in a different country, which would reduce the overall effectiveness of the process.

Ship Arrest and Maritime Liens

The rights of maritime creditors are very powerful as they enable them to seize ships and recoup their funds promptly by arresting ships and placing liens on them. This safeguards creditors though when insolvency strikes, it causes severe issues. Ships can be held by several countries, and this would not allow the company to operate. This leads to depreciation of the assets of the company. This is against the primary objective of the insolvency laws, which is to protect and maximise the asset value.

Inequality Among Creditors

All the creditors must be treated equally according to insolvency laws. In maritime insolvency, however, speedy creditors have the ability to seize the ships and get their money back first. Other creditors might get minimal or no assistance at all, particularly unsecured ones. The injustice and unfairness that is brought about by this contravenes the main principles of insolvency law.

Disruption of Global Trade

Shipment plays a significant role in global commerce and therefore, the world can take a hit in case an international shipping corporation goes into bankruptcy. Some cargo can be held up or held at locations, vessels can be blocked at ports and supply routes can be disrupted. A famous case of this was the death of Hanjin Shipping that saw cargo dumped on both sides of the globe due to the arrest of their ship and the grey legal status of it. This demonstrates the way the economy of the world can be affected by the bankruptcy of the sea industry.

High Costs and Delays

The cross-border marine insolvency is costly and time-consuming. In a variety of countries, lawsuits are widespread, and lawyers and judicial procedures are necessary within a specific region. Delays are sometimes caused by a lack of coordination by the courts. These elements add a strain on the creditors in terms of finances and diminish the overall net worth of assets to be distributed.

Lack of Coordination Between Courts

Good communication amongst courts in other countries is often lacking. This results in conflicting rulings, unneeded trip to courts thus postponing a resolution of an issue. Despite the promotion of international norms towards cooperation, there is still an inequality in the coordination of the courts.

Legal Uncertainty

All these challenges have a high level of legal uncertainty of cross-border marine insolvency. Frequently, companies and creditors are unaware of what law will be applied, which court has jurisdiction, or whether their claims will be accepted. This uncertainty discourages investment and increases the risk in the maritime industry.

Case Law Analysis

Hanjin Shipping Bankruptcy (2017)

Hanjin Shipping collapse in 2017 is one of the most significant real-life cases to examine the cross-border insolvency in the maritime. Hanjin used to be the seventh-largest shipping company in the world, and it had a significant impact on the global trade process, transporting goods across the continents. But with the debts, declining shipping rates, and mismanagement of finances, the company could not meet its creditors hence went into bankruptcy in South Korea.

It was now the actual problem since Hanjin was not only operating in a single country- it had ships passing all over the world, cargo belonging to other companies, and was owed money by creditors in numerous countries. It was this that enabled it to be classified as a cross-border insolvency situation.

Other countries ought to have realised that this process was under way when the company was put into insolvency in South Korea and then collaborated. However, in practice, it did not go that way. Various nations behaved differently and this brought havoc.

One of the biggest issues was the ship arrest. Because of the maritime law, which enables creditors to reclaim their monies through seizure of ships, many creditors flocked the courts in various countries to have Hanjin vessels apprehended. This led to the detention of ships in ports throughout the globe such as the United States, China and Singapore. Such arrests made ships unable to go on their routes, impacting world supply chains.

Still another grave issue was connected with stranded cargo shipped. Thousands of containers that transported goods such as electronics, clothes, and raw materials were either at sea or were grounded at ports. Ships were not willing to dock at the ports since the authorities were not certain whether they would be rewarded for their services. Even when ships were permitted to dock, the owners of the goods did not have access to their goods, without paying extra fees. This made businesses to lose enormously and further delayed deliveries globally.

This was further complicated due to the absence of legal uniformity. As an illustration, South Korea started insolvency procedures against Hanjin, but the procedures were not unanimously recognised by all countries. In China, courts were reluctant to give full acknowledgment to the Korean insolvency process, but rather emphasised on safeguarding the local creditors. This allowed Chinese creditors to independently enforce their claim even though this would interfere with the overall insolvency process.

On the same note, in the United States, Hanjin pursued the protection of Chapter 15 of the US Bankruptcy Code¹⁹ which is based on the UNCITRAL Model Law.²⁰ This in turn assisted in halting temporarily some of the enforcement actions and permitted some of the ships to operate. Nonetheless, such protection did not suffice to completely regulate the situation in the world as other nations had different approaches to law.

The case is a clear indication of the tension between the maritime law and the insolvency law. The Insolvency law attempts to make all creditors unite and evenly share out goods using a single centralised process. Nonetheless, maritime law permits individual creditors to do so by arresting vessels on their own. There is no doubt that in the case of Hanjin most of the creditors took up quick and individual actions instead of waiting to have a group heavy handed insolvency procedure. This undermined the concept of equal treatment of all creditors.²¹

The issue of multiple jurisdictions is also brought to the fore by the Hanjin bankruptcy. Given that the ships travel across countries, individual countries can assert their laws. This results in several lawsuits running simultaneously and more frequently with conflicting ruling. This leads to confusion, delay and inefficiency.

Another lesson that can be learnt out of this case is the significance of global collaboration.²² Had common legal framework followed and the Korean insolvency proceedings recognised by all countries, it could have been handled in an easier manner. Instead, the lack of coordination made the crisis worse and increased losses for creditors and cargo owners.

Hanjin Shipping case, in its simplest terms demonstrate how hard it is to deal with insolvency in the shipping business with involvement of more than one country. It shows that these nations will act in their respective interests, without a common system or effective collaboration, and will cause confusion and lack of fair results.

Future Developments

¹⁹ 11 USC §§ 1501–1532;

²⁰ UNCITRAL, *Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation* (1997, updated 2013).

²¹ Look Chan Ho, *Cross-Border Insolvency: Principles and Practice* (Sweet & Maxwell 2016) 45–48;

²² UNCITRAL, *Legislative Guide on Insolvency Law* (2005) pt 1.

The broader use of the UNCITRAL Model Law on Cross-Border Insolvency is one of the most important reforms.²³ It should be ratified into domestic law in countries such as India, to make foreign proceedings easier to recognize and cooperation between jurisdictions²⁴. But, as the Model Law does not pay particular attention to maritime issues, it is necessary to have it supplemented by maritime-specific provisions.

There is an urgent necessity to create a specialisation of maritime insolvency framework at the international level.²⁵ Such a system must reconcile the admiralty law with the principles of insolvency, particularly in the context of deciding upon any dispute between an individual right in enforcement such as ship arrest and insolvency proceedings on a group basis. This would promote the achievement of consistency among jurisdictions and reduce discontinuity.

Another positive change is harmonisation of ship arrest laws and maritime lien priorities. The current situation is the confusion and forum shopping because various countries have different approaches to ranking maritime claims. A more predictable and fair approach would be to have standard world-wide rules by creditors, perhaps by seeking amendments to existing maritime agreements.

It is also important to improve the relationship and coordination among courts. To enable real-time communication, exchange of information and mutual acknowledgment of court rulings, courts ought to have organised insolvency protocols. This would lessen the likelihood of conflicting rulings and parallel proceedings.

Lastly, there could be a digitised international registry of oceanic claims and ship position that would greatly amplify transparency. This would minimize fraud and duplication as claims, arrests, and insolvency processes across jurisdictions would be monitored.

Conclusion

The special features of the maritime law and the idea of the insolvency regimes make cross-border maritime insolvency one of the most multi-faceted intersections of international commercial law. As stated above, a synchronized and fair insolvency process is crippled greatly by the global nature of maritime activities, the assets, creditors, and legal requirements of which

²³ UNCITRAL, *Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation* (1997, updated 2013).

²⁴ Insolvency Law Committee, *Report on Cross-Border Insolvency* (Ministry of Corporate Affairs 2018) 15–20.

²⁵ UNCITRAL, *Legislative Guide on Insolvency Law* (2005) pt 1;

are spread out in a great number of countries. Regional instruments and frameworks such as the UNCITRAL Model Law though provide a framework and basis to collaborate and be recognised, however when it comes to addressing marine specific issues, such as ship arrest and maritime liens, they are also insufficient.

The confrontation between universalism and territorialism continues to hinder the process of developing a unified framework. Localist strategies prevail in practice since states prioritize local interests and allow creditors to affirm their claims unilaterally. This leads to inequality amid the creditors and weakens the aspect of collective in insolvency proceedings. Hanjin Shipping case provides a good example of how international trade can be derailed and how much money can be lost due to the lack of coordination, multiple processes and different understanding of foreign insolvency regimes”.

Consequently, there is an urgent need to have a global set up to deal with maritime insolvency. Important moves forward include assuring consistent recognition of proceedings, bolstering court collaboration, and harmonising marine and insolvency legislation. Legal ambiguity and inefficiency will continue in the absence of such measures. Ultimately, stability and confidence in the global maritime industry relies on a balanced approach that guarantees the creditor rights and promotes common solutions.

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