

Shipping & Transport - South Africa

Cross-border insolvency and ship arrests

Contributed by **Bowman Gilfillan**

July 17 2013

A recent flurry of major international shipping companies initiating proceedings for protection from creditors (eg, US Chapter 11 proceedings and South Korean rehabilitation orders) has highlighted the rights of creditors to arrest maritime property in South Africa as a mechanism to sidestep these proceedings.

South Africa is well known for having a liberal arrest regime, and the insolvency provisions are no exception. The legislation states that any property arrested or security put up in South Africa for a maritime claim will not vest in a trustee in insolvency and will not form part of the assets to be administered by a trustee or liquidator. It goes on to state that no proceedings in respect of the arrested property may be stayed by reason of any sequestration or winding-up of the owner. The effect of this provision is that arrested property falls outside the hands of the person appointed to deal with the property, which would otherwise be subject to winding-up or a similar procedure.

Two important questions arise in this context:

- Under what circumstances will insolvency proceedings trump the arrest, if at all?
- What effect does a cross-border bankruptcy order or similar declaration from a foreign court have on the rights of a maritime creditor to arrest property in South Africa?

In answer to the first question, the High Court has held that only "pre-winding-up arrests" will fall outside the insolvency proceedings. This means that in the case of liquidation of a South African company, an arrest of property which takes place before the application for winding-up is filed with the court will fall outside the assets to be administered by the liquidator. Maritime creditors will then be free to assert claims directly against the arrested property, and ultimately to apply to bring about a judicial sale in order to recover against the proceeds. Therefore, the timing of the arrest is paramount.

The position regarding cross-border insolvency is more complex. Although South Africa has passed legislation which incorporates the Model Law on Cross-Border Insolvency, this is still to take full effect. Until that happens, a party seeking recognition of a foreign order must fall back on the common law. In practice, recognition requires an application to the High Court. Before such an order is granted, the foreign administrator is not entitled to deal with any property of a company in South Africa and, without recognition, any action that he or she may decide to bring in respect of the company's assets will not be entertained by a South African court.

The pertinent issue, therefore, is the legal position as regards an arrest in South Africa after the foreign order is granted, but before the recognition order is granted by the South African High Court. While at present there is no authority as to whether such an arrest would qualify as a 'pre-winding-up arrest', general principles of South African law lean strongly towards the view that the recognition order will not ordinarily apply retrospectively and should not affect a pre-recognition arrest unless expressly stated as doing so. This approach is consistent with the principle that the terms of the recognition order are the source of the foreign administrator's powers entirely.

A caveat to mention is that, depending on the facts of the case, directives or prohibitions contained in the foreign order may influence a creditor's decision to bring or maintain an arrest, regardless of whether recognition is sought in South Africa.

One can conclude that, in principle, maritime assets remain fair game for arrest in South Africa until the foreign order receives local recognition, and even then prior arrests ought not to be affected.

For further information on this topic please contact [Jeremy Prain](#) at [Bowman Gilfillan Inc](#)

Author

Jeremy Prain



by telephone (+27 21 480 7800), fax (+27 21 424 1688) or email (j.prain@bowman.co.za).

The materials contained on this website are for general information purposes only and are subject to the [disclaimer](#).

ILO is a premium online legal update service for major companies and law firms worldwide. In-house corporate counsel and other users of legal services, as well as law firm partners, qualify for a free subscription. Register at www.iloinfo.com.

Online Media Partners



© Copyright 1997-2013 Globe Business Publishing Ltd