

Bankruptcy Court Bars Shipping Act Claims From Being Brought Before Federal Maritime Commission

A U.S. bankruptcy court denied motions by several shipping companies barring them from bringing Shipping Act claims against an insolvent Danish carrier before the Federal Maritime Commission. The court concluded that the Commission did not have exclusive or primary jurisdiction. As a result, the Shipping Act claims must be heard by the bankruptcy court as part of the carrier's cross-border bankruptcy case.

The carrier, The Containership Company (TCC) A/S ("Containership"), is a Danish company that commenced a "reconstruction" proceeding in Denmark under the Danish Insolvency Act in April 2011. The following month, the "reconstructor" appointed by the Danish bankruptcy court commenced an ancillary case in New York under chapter 15 of the U.S. Bankruptcy Code.¹

In July 2011, the bankruptcy court entered an order recognizing the Danish insolvency proceeding as a "foreign main proceeding" giving rise to certain protections in favor of Containership in the chapter 15 case including the imposition of the automatic stay prohibiting, among other things, the commencement or continuation of litigation against the company. Upon obtaining recognition of the Danish proceeding, the reconstructor, acting on behalf of Containership in the chapter 15 case, filed approximately 77 adversary proceedings against numerous shipping companies alleging that they breached their service contracts with Containership by failing to meet minimum quantity commitments specified in their contracts.² In response to the adversary proceedings, many of the shipping company defendants alleged that they were unable to meet the minimums in their contracts due to conduct by Containership in violation of the Shipping Act of 1984 and that such violations, together with Containership's adversary claims, should be brought to the attention of the Federal Maritime Commission (the "Commission") and not adjudicated by the bankruptcy court. The defendants argued that the Commission has exclusive jurisdiction to hear Shipping Act cases or, alternatively, if the Commission does not have exclusive jurisdiction, that the bankruptcy court should defer to the "primary jurisdiction" of the Commission to hear such cases.

Contacts

Rick Antonoff

Partner

T: +1 212 878 8513

E: rick.antonoff

@cliffordchance.com

Margaret Welsh

Associate

T: +1 212 878 8058

E: margaret.welsh

@cliffordchance.com

Exclusive vs. Primary Jurisdiction

Because the defendant shipping companies raised their arguments in motions for relief from the automatic stay, the court framed the issues in terms of whether the presence of exclusive or primary jurisdiction would constitute "cause" sufficient to modify the stay and permit the defendants to bring their Shipping Act claims to the Commission.³ The shipping defendants argued that cause existed to modify the stay because the Commission had exclusive or primary jurisdiction over the Shipping Act claims. However, as the court ultimately ruled that the Commission had neither exclusive nor primary jurisdiction, it found that the shipping defendants failed to carry their burden of proving that cause existed.

Exclusive Jurisdiction

After reviewing the statutory mandate of the Commission and the legislative history of the Shipping Act, the court found that the Commission has exclusive jurisdiction over such matters as regulating service contracts, determining whether a contract qualifies as a service contract, whether a particular entity is a "common carrier," whether rates charged by carriers are reasonable, and whether certain actions by parties in the shipping industry are unlawful. However, the court noted that the Shipping Act itself provides that the remedy for breach of a service contract is "an action in *an appropriate court*" (quoting § 40502(f) of the Shipping Act) (emphasis added) and that the claims of Containership and the shipping defendants were merely breach of contract claims.

As such, the claims were "well within the conventional expertise of a court and not the [Commissions'] traditional area of expertise." Therefore, the Commission did not have exclusive jurisdiction to hear the claims.

Primary Jurisdiction

In contrast to exclusive jurisdiction, primary jurisdiction is a doctrine in which a court with jurisdiction over a matter nevertheless defers to an agency to adjudicate the matter "when the issue involves technical questions of fact uniquely within the expertise and experience of an agency."

The court suggested that the types of claims that would require the Commission's expertise might include the actual minimum quantities at issue, the amount of cargo actually shipped or Containership's past practices in connection with the use of minimum quantities, none of which were implicated by the shipping defendants' allegations against Containership. Instead, the court characterized the shipping defendants' allegations as revolving around a central theme: whether Containership prevented the shippers from meeting their contractual minimums. Noting that these are "matters commonly addressed by the federal courts," the bankruptcy court concluded that they did not involve technical issues or policy considerations that might otherwise justify deferring to the Commission on the basis of primary jurisdiction.

Although the shipping defendants in *Containership* might have thought the bankruptcy court would let the dispute be heard by the Commission, the decision shows that demonstrating exclusive or primary jurisdiction to move a dispute to a tribunal other than bankruptcy court is a heavy burden.

¹ *In re The Containership Company (TCC) A/S*, Case No. 11-12622 (Bankr. S.D.N.Y. Feb. 10, 2012). Chapter 15 of the Bankruptcy Code permits representatives of foreign companies that are the subject of insolvency proceedings outside the United States to seek assistance from a United States bankruptcy court to protect the company's assets within the United States and to facilitate cooperation between U.S. and foreign courts in cross-border insolvency cases. See 11 U.S.C. §§1501 – 1532.

² Adversary proceedings are "separate lawsuits within the context of a particular bankruptcy case and have all the attributes of a lawsuit including the filing and service of a formal complaint" and the application of procedural rules. 10 Collier on Bankruptcy ¶7001.01, at 7001-3. Adversary proceedings are presided over by the same judge assigned to the bankruptcy case. Fed. R. Bankr. P. 7003 and 9002(4).

³ Section 362(d)(1) of the Bankruptcy Code permits a court to modify the automatic stay for "cause." The burden to show that "cause" exists is initially on the party seeking stay relief.

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

Clifford Chance, 31 West 52nd Street, New York, NY 10019-6131, USA
© Clifford Chance US LLP 2012
Clifford Chance US LLP

www.cliffordchance.com

Abu Dhabi ■ Amsterdam ■ Bangkok ■ Barcelona ■ Beijing ■ Brussels ■ Bucharest ■ Casablanca ■ Doha ■ Dubai ■ Düsseldorf ■ Frankfurt ■ Hong Kong ■ Istanbul ■ Kyiv ■ London ■ Luxembourg ■ Madrid ■ Milan ■ Moscow ■ Munich ■ New York ■ Paris ■ Perth ■ Prague ■ Riyadh* ■ Rome ■ São Paulo ■ Shanghai ■ Singapore ■ Sydney ■ Tokyo ■ Warsaw ■ Washington, D.C

*Clifford Chance has a co-operation agreement with Al-Jadaan & Partners Law Firm in Riyadh.