

HANJIN INSOLVENCY

WHAT TO EXPECT FROM THE FALLOUT



South Korea's biggest shipping company, Hanjin Shipping Co Ltd filed for court receivership in South Korea on Wednesday 31 August 2016 after losing the support of its banks, setting the stage for what has now become a motley situation. Some jurisdictions are refusing to allow Hanjin's vessels to berth at their ports (on concerns that Hanjin cannot pay the port fees) while some of Hanjin's vessels have instructions not to berth (for fear of ship arrest).

The risk of ship arrest is a real one. *Hanjin Rome* was arrested in the port of Singapore last week. This arrest is likely to be the first of many more, unless Hanjin can move swiftly to obtain injunctions against arrest or recognition of insolvency proceedings once these are confirmed in South Korea (and elsewhere). Otherwise, companies seeking to take delivery of shipments transported by Hanjin Shipping should expect delay in the order of weeks or even months if vessels are arrested or unwilling to berth. This will of course lead to downstream contractual issues of breach and/or late delivery.

What's the source of this?

We understand that certain ports are holding on to cargo which has been discharged from Hanjin vessels as collateral for previously unpaid fees. Even if the vessels are allowed to enter port limits, press reports suggest that it is unlikely that Hanjin will order them to do so before the South Korean courts grant the order for receivership; for fear that these vessels would be arrested by its many creditors.

Vessels which are ordered to stay outside port limits may be in breach of due despatch obligations (whether expressly or impliedly) under charterparties and bills of lading. Further, if these vessels are chartered out, such orders from Hanjin would most likely be in breach of the charterers' voyage orders.

Even if the South Korean courts grant the order and corresponding protection from institution of legal proceedings, creditors could be minded to take action against vessels in jurisdictions with liberal ship arrest laws. There are some which may allow for the arrest of vessels despite the commencement of insolvency proceedings in South Korea and/or the United States. The inevitable result is uncertainty and delay. In a world of "just-in-time" deliveries, such delays could result in problems throughout the entire supply chain.

In cases of late deliveries, cargo owners may be able to claim for damages if the market value of the cargo on the date it ought to have been delivered under the relevant contract is more than the market value on the date it is actually delivered. There may be additional losses for perishable goods. However, with Hanjin's dismal debt to equity ratio, cargo owners may well find it difficult to enforce such claims even in the unlikely event the courts do not grant Hanjin protection from legal proceedings.

There may also be issues with cargo insurance coverage. Even the "all risks" cover afforded under ICC(A) cargo insurance is unlikely to protect cargo owners suffering loss due to the Hanjin insolvency. Clause 4.6 of the ICC(A) stipulates that in no case shall the insurance cover "loss damage or expense arising from insolvency or financial default of the owners managers, charterers or operators of the vessel". Cargo owners may find themselves in a situation where they are unable to make insurance claims on their marine cargo policies should the cargo on board Hanjin vessels be damaged or lost as a result of what could potentially be a protracted delay. This will leave them with claims against Hanjin, in relation to which they will likely rank as ordinary unsecured creditors, since the bankruptcy protection will likely stop these cargo claimants from arresting the ships.

There will also be knock on effects for other areas of the industry. Banks holding bills of lading as security for trade finance arrangements may find that security to be worth less than the original value of the cargo (if a long delay impacts adversely on the price); or if the goods are perishable they may be left with a claim as an ordinary unsecured creditor against

Hanjin, if they are unable to arrest a ship and the borrower under the trade finance arrangement also defaults.

The word in the industry is that Hyundai Merchant Marine Co Ltd, South Korea's second-largest shipping line, is in talks with state-run Korea Development Bank, with a view to acquiring Hanjin's healthy assets, including profit-making vessels, overseas business networks and key personnel. But it must not be forgotten that Hyundai Merchant Marine is also in the process of a voluntary debt restructuring.

In this climate, it is important to know whether Korean companies such as Hanjin, that apply for (and/or are granted) court receivership or some form of court sanctioned rehabilitative arrangement, will receive protection from legal proceedings commenced in other jurisdictions.

For instance, Hong Kong does not have a bilateral treaty with South Korea and does not recognise rehabilitation proceedings taking place in South Korea. This means creditors may be able to file for arrest and recovery against Hanjin's assets in Hong Kong.

As for Singapore, presently, the legislative regime is silent on the automatic recognition of foreign insolvency proceedings but recent case law has sent a strong signal of support. In a novel decision in June this year, the Singapore High Court recognised insolvency proceedings commenced and concluded in Japan by a BVI-incorporated company whose business was primarily in Japan. The Court commented on a move towards a universalist approach, where one court takes the lead while other courts assist in administering the liquidation.

We would expect that Hanjin's proceedings in South Korea would receive a degree of support from the Singapore courts, though the extent of that support may depend very much on the terms of the South Korean court order.

For more information, you may wish to contact your usual Ince contact or any of the team below:

Felicia Tan
Incisive Law, Singapore
felicia.tan@incisivelaw.com

Max Cross
Ince & Co, Hong Kong
max.cross@incelaw.com

Ince & Co is a network of affiliated commercial law firms with offices in Beijing, Dubai, Hamburg, Hong Kong, Le Havre, London, Monaco, Paris, Piraeus, Shanghai and Singapore.

**E: firstname.lastname@incelaw.com
incelaw.com**

24 Hour International Emergency Response Tel: + 44 (0)20 7283 6999

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