

The Hanjin Insolvency

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8 February 2017

2016

Hanjin experienced increasing commercial / cash flow difficulties.

Total debts are said to have amounted by the end of August 2016 to US\$4.2 billion.

Reportedly, at this time vessels owned or chartered by Hanjin were carrying over 500,000 TEUs with cargo valued at more than US\$14 billion.

Reports vary but at the time of the collapse up to 100 vessels were owned or time chartered by Hanjin.

Hanjin continued to function by managing to negotiate various arrangements with its creditors. Eventually this became impossible.

2016

Hanjin experiencing increasing commercial / cash flow difficulties.

30 August 2016

Hanjin's creditors finally withdrew financial support.

31 August 2016

Hanjin applied to the Seoul District Court for rehabilitation protection.

1 September 2016

Seoul District Court granted rehabilitation protection.

2 February 2017

Seoul District Court ordered that the rehabilitation protection be discontinued.

The end of the rehabilitation protection

- The discontinuance of the rehabilitation protection will take effect on 17 February 2017
- Assuming that no interested party brings an appeal against the decision of 2 February 2017, the result will be that the rehabilitation proceedings (designed to save the company) will come to an end and be replaced by bankruptcy proceedings (designed to liquidate the company)
- Claims filed in the rehabilitation proceedings will automatically be transferred to the bankruptcy proceedings
- As at 25 October 2016, the claims submitted exceeded US\$800 million involving over 3,000 claimants

The parties affected by the insolvency

Hanjin's collapse inevitably affected a great many parties.

The classes of parties affected included:

- The owners of cargo shipped on board Hanjin vessels
- The owners of ships chartered to Hanjin
- The suppliers of bunkers to Hanjin
- The container lessors who had leased containers to Hanjin
- The crew serving on board vessels operated by Hanjin

The *in rem* claimant v The unsecured creditor

- A claimant who is able to assert a right to proceed *in rem* is in a vastly superior position compared to an ordinary unsecured creditor
- An *in rem* claimant is treated as a secured creditor who is bringing a claim to his own property
- The result is that the *in rem* claimant ranks in priority ahead of the unsecured creditors
- In an insolvent liquidation, the vessel against which the *in rem* claims are asserted will generally be sold *pendente lite* and the proceeds divided amongst the *in rem* claimants with the surplus (if any) paid to the liquidator

The right to proceed *in rem*

- In countries which have enacted legislation to implement the 1952 Arrest Convention, in order to bring a claim *in rem* it is necessary to establish that the claim falls within the list of maritime claims set out in the statute
- *and* that the claim arises in connection with an identifiable ship
- *and* that the person who would be liable on the claim in an action *in personam* was, when the cause of action arose, the owner or charterer of, or the person in possession or control, of that identifiable ship

The cargo owners

The cargo on board vessels operated by Hanjin was clearly not Hanjin's property. The cargo will therefore not be property available for distribution to Hanjin's creditors.

The initial recognition of the Korean rehabilitation proceedings allowed some vessels to call at ports and discharge cargoes – e.g. Hanjin Greece called at Long Beach on 9 September; Hanjin Rome called at Singapore later in September.

Ultimately, the cargo owners were obliged to make commercial arrangements to discharge their cargo.

Will any losses be covered by insurance?

Hanjin's financial difficulties were well-known before 1 September 2016.

The 2009 Institute Cargo Clauses (A) ("2009 ICC (A)") provide in clause 4.6 a more restricted exclusion than was provided in the 1982 Clauses (ie wider cover):

Exclusions

4. In no case shall this insurance cover:

4.6. Loss damage or expense caused by insolvency or financial default of the owners managers charterers or operators of the vessel where, at the time of loading of the subject-matter insured on board the vessel, the Assured are aware, or in the ordinary course of business should be aware, that such insolvency or financial default could prevent the normal prosecution of the voyage...

Issues will also arise in relation to the insurance cover for perishable cargoes.

Delay generally is not within the ordinary course of transit. However, Clause 8.3 of the 2009 ICC (A) provides as follows:

"This insurance shall remain in force (subject to termination as provided for in Clauses 8.1.1 to 8.1.4 above and to the provisions of Clause 9 below) during delay beyond the control of the Assured, any deviation, forced discharge, reshipment or transshipment ...".

Extra Forwarding Charges

A similar issue arises in relation to the recovering of any extra forwarding charges that cargo owners feel compelled to pay in order to secure deliver of cargo.

It is doubtful whether such extra charges would be recoverable under the 2009 ICC (A).

(Clause 12 only applies where an insured peril has indeed operated, Clause 16 (duty of assured) relates to recoverable loss having been caused, and Clause 4.5 generally excludes loss and damage or expense caused by delay.)

In common with other operators, Hanjin adopted the practice of leasing the containers required for its operations.

A lessor of containers will often not be able to assert an in rem claim since the containers are treated as supplied to the carrier and *not* to an identifiable ship for her operation or maintenance.

Therefore, the claim does not fall within legislation equivalent to s. 20(1)(m) of the SCA 1982 which requires the claim to be a “claim in respect of goods or materials supplied to a ship for her operation or maintenance”.

- In *The River Rima* [1987] 2 Ll. Rep. 106, the CA stated
 - ‘... this leasing agreement between the plaintiffs and NNSL, whilst no doubt designed to enable NNSL to provide a service for cargo-owners, to encourage the routing of cargo via NNSL and to enable NNSL to handle cargo more easily in cases in which they were themselves the carriers, is not sufficiently directly connected with the operation of ships to enable me to say that the containers were supplied by the plaintiffs to NNSL “for the operation of a ship or ships”.’

- It may, however, be possible to link individual containers with the particular vessels on which they were carried.
- By so doing, the lessor of the containers may be able to apportion a claim for outstanding hire.
- By linking the containers to particular vessels, it can be established that the containers are supplied to particular ships and not just to the operator of the ships.
- In *The Kuzma Gnidash* the Hong Kong High Court accepted that identified containers had been supplied to identified vessels for their “operation or maintenance” and therefore the claimants were entitled to proceed in rem.

In ***PST Energy 7 Shipping LLC v OW Bunker Malta Ltd*** [2016] UKSC 23, the Supreme Court held that a contract for the supply of bunkers is not a contract to which the Sale of Goods Act 1979 applies.

A contract for the supply of bunkers is not a contract for the sale of goods because consumption has to be permitted without payment or passing of property and unconsumed bunkers have to be returned at even though paid for.

Thus, potentially shipowners may be liable to pay twice – to a charterer (Hanjin) and to the physical supplier if not paid.

Hanjin both owned vessels and chartered in vessels as required.

There will be complex issues about exercise by owners of liens on sub-hires and sub-freights, and where any interpleader type issue should be resolved.

In ***Cosco Bulk Carrier Co Ltd v Armada Shipping SA*** [2011] EWHC 216 (Ch) the Court decided that it would be appropriate for this type of issue to be decided in London arbitration with the insolvent charterer joined to the arbitration.

In ***Spar Shipping AS v Grand China Logistics Holding (Group) Co Ltd*** [2016] EWCA Civ 982, the CA restored orthodox understanding that punctual payment of hire is not a condition of the contract but an intermediate term.

The consequence is that a failure to pay hire punctually will not by itself entitle the owners to terminate the charterparty.

Owners may be more concerned to recover and re-charter their vessels, but care will be needed as the failure punctually to pay hire is not of itself repudiatory.

Some owners might be tempted, if their charters provide for some form of right to terminate upon an event such as entry into rehabilitation proceedings, to go ahead and terminate on that basis alone, without reference to unpaid hire.

Such an approach warrants caution – there is an open question as to whether such provisions are in fact not enforceable because they breach the insolvency provision known as the “anti-deprivation” rule (see for example ***Seawolf Tankers v Pan Ocean*** [2015] EWHC 1500 (Ch)).

Following Hanjin's collapse, a number of vessels were stranded leaving the crew without adequate supplies.

Members of the crew are protected under the leading Admiralty jurisdictions and also under the insolvency law.

A crew member has a clear right to proceed in rem. A claim "by the master or member of the crew of any ship for wages" clearly gives rise to a right to proceed in rem in jurisdictions which have adopted the 1952 Arrest Convention - provided that the claim is linked to an identified ship.

- When the court determines the priority of the in rem claims, the crew claims are given a high priority: ***The Ruta*** [2000] 1 Ll. Rep. 359.
- A party which advances the unpaid crew their wages will be ordinarily be subrogated to their rights.
- Therefore the party which pays off the crew, can expect to be reimbursed from the proceeds of sale of the vessel.
- Further, under most insolvency regimes, claims by employees for unpaid wages are treated as preferential claims.

- Hanjin's insolvency is the most significant shipping collapse in living memory.
- There will be no phoenix rising from the ashes.
- The insolvency revealed shortcomings in standard cargo insurance terms.
- The insolvency illustrated the advantages enjoyed by claimants able to bring in rem claims over unsecured creditors.

THE END

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