

# Hanjin Bankruptcy:

Legal perspectives on Commercial Issues

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# Hanjin: A sinking Ship

- Hanjin Shipping was Korea's largest container carrier and global #7
  - A subsidiary of Hanjin Group, which also owns Korean Air
  - Operating approximately sixty liner / tramper services
  - Container fleet of 104 vessels totalling 3.7 million TEU capacity
  - Also operates LNG and VLCC vessels and 14 terminal operations
- Overcapacity and price pressures resulted in four years of losses near or exceeding 0.5 trillion won (~USD\$420 M) and total debt peaked at nearly 10 trillion won (~USD\$8.5 Bn) in 2013.
- In April 2016 Hanjin Shipping applied to creditors (chiefly, state-run Korea Development Bank) to avoid insolvency.
- On 31 August 2016 Hanjin filed for bankruptcy protection at the Seoul Central District Court .



# 'Receivers' take control; actions are 'stayed'

- Bankruptcy offers protection to a business that becomes insolvent.
- A "Receiver" or "Trustee" takes control of all the affairs of the business in accordance with a Court Order
  - The Receiver's duties and authorities are set out by the Court
- All existing 'causes of action' are 'stayed'.
  - Creditors may not sue on debts but must await the outcome of proceedings
- The Receiver will wind up the business and dispose of assets in the best interests of creditors
  - It is an unlawful preference to treat one creditor differently from another
- Secured creditors recover first, then unsecured creditors, *pro rata*
  - Because the largest creditors are secured, unsecured creditors may get nothing.

***This will take quite some time!***



# Hanjin Vessels have been arrested anyway!

Bankruptcy law is national in nature, and therefore any jurisdiction where Hanjin has debts or assets may be the forum for some kind of claim or action.

The domestic courts of any particular nation are not bound to respect the jurisdiction of the Seoul District Court or its stay

- Hanjin Rome was almost immediately detained at Singapore
- Hanjin California arrested in Australia about 6 September
- Sooho, Duesseldorf, Kingston, Rotterdam, and Turkey arrested at Chinese ports
- Scarlet and Vienna detained near British Columbia, Canada

Nonetheless, as at the time of writing, virtually 100% of cargo (with total values estimated at USD\$14 billion) has been offloaded.



# Actions in Domestic Law (I): Canada

- **Hanjin Scarlet and Hanjin Vienna arrested** in Federal Court
- Both vessels are currently moored off Vancouver Island
  - Multiple claims made by Port Authorities (DP World, GCT, Prince Rupert, Vancouver Port) and suppliers (Singamas Petroleum, Textainer)
  - Claims against each vessel joined in Case Management
  - Order made for unloading of cargo
  - Vienna is German owned, Hanjin chartered; owners are keeping operational
  - Scarlet has had a replacement skeleton crew brought in by Hanjin



# Actions in Domestic Law (II): USA

**Hanjin representatives bring action in New Jersey for recognition of Seoul proceedings as primary proceedings under US Bankruptcy Law (*In re: Hanjin Shipping...*)**

- September orders recognized foreign proceedings and prevented arrest of Hanjin vessels
- 20 October motion by Schenker confirms “specific” maritime lien
- 31 October motion by Ashley Furniture denying set-off trust
- 22 November declaration by Hanjin of “no substantial assets in USA to satisfy creditors...”



# Actions in Domestic Law (III): Singapore

Following the prompt arrest of one vessel, the Singapore High Court suspended enforcement or execution against Hanjin assets “to prevent piecemeal and haphazard resolution of the company's difficulties” – a **safe haven**

- Increased throughput of containers and related services
- An excellent point for transshipment
  - *But* still an unexpected and expensive delay for cargo!
- Some problems with unclaimed containers and empties
  - 28 November deadline issued by SPA for removal...



# Actions in Domestic Law (IV): Korea

- Some commentators believe principal assets will be dealt with before the end of the year!
  - About 80% of fleet was chartered/leased, and return to owners on expiry
  - Assets incl. business operations, five large containerships, port interests
- Court approved sale to **Korea Line** of business operations (including employees) of five subsidiaries in four countries
  - Includes right of refusal but not purchase of vessels!
  - Query – entry into container market?
- Court approved sale of Port assets to Hyundai Merchant Marine
  - Includes assets in Spain and California





# Claims are Inevitable!

- Claims against Hanjin for breach are legally straightforward but with little prospect of any payout, therefore cargo interests will have an incentive to bring claims against Forwarders or NVOCs.
- Some possible bases for claims include:
  - Claims to recover additional charges not agreed
  - Claims for loss of cargoes that are time sensitive, spoilable, or abandoned
  - Claims for delay in delivery of cargoes
  - As NVOC, for breach of contract in failing to deliver cargoes.
- Notify insurers promptly even where claims have limited merit!



# Service providers seek cash or credit terms

- Because claims against the bankrupt are “stayed”, trade creditors like terminals, rail carriers, and truckers have no reasonable expectation of payment from Hanjin for services agreed prior to the bankruptcy.
- These providers will look to cargo interests to pay or make direct credit arrangements for release and oncarriage of Hanjin containers.
  - As there are significant commercial pressures and few options for shippers/consignees, the prices charged may be unusually high.
  - In Rotterdam, forwarders were successful in challenging a 1000 euro fee imposed by ECT, with the court ruling it unlawful.
  - In USA, the Court permits NVOCs and BCOs to ‘offset’ those payments against monies owed to Hanjin, but denies request to order disclosure of Hanjin rates

**Such payments could result in claims of an improper preference by Hanjin receivers against those service providers!**



# Delay of goods / Time sensitive goods

## Delay

Claims in delay are highly circumscribed by BL terms... and hopefully also by your own STCs!

- *Hague-Visby* – no carrier liability for delay; no liability for damages arising from arrest
- Hanjin BL...?
- *CIFFA*: 2x gross margin

## Time sensitive or Perishable

- Goods that are time sensitive to market will probably need to be re-ordered at purchaser's cost.
- Goods that are perishable are likely to be abandoned after significant delay
- 'Consequential damages' are generally unrecoverable

# Liability of Forwarder as NVOCC

- Where a contractual carrier issued a BL or otherwise accepted responsibility for the carriage, they may be held directly liable by their Customers for failure to deliver cargo in good order and condition.
  - The NVOCC will have a similar but valueless claim against Hanjin.
- Carefully check specific bill of lading terms!
  - Right to impose additional charges not agreed in original affreightment?
  - Liability for Delay?
  - Liability in the event of arrest or legal process?
  - Unforeseen circumstances or other exceptions?
- Review STCs or overarching service agreement
  - Where the terms do not conflict with BL terms, they may apply



# Liability for Selection of Carrier?

A forwarder is expected to exercise its professional judgment in selecting carriers and other contractors without negligence.

- Was the bankruptcy of Hanjin foreseeable?
  - Debt problems and restructuring were well-known to the shipping public in April 2016, *but* there was no insolvency event and the market almost universally believed operations would continue.
- What obligation does a shipper or forwarder have to consider financial viability of a carrier?
  - Reuters has reported that some major shippers are now asking
- What about subcontracting of carriage?
  - Some shippers + forwarders provide for exclusivity of service, non-brokering.



# What about the empty containers?

These containers belong to Hanjin or a Hanjin supplier and ultimately must be returned, however, in the absence of particular arrangements with the Receivers many ports/terminals will not accept Hanjin empties. In some cases the empties remain stranded on chassis, a double problem.

Some possible outcomes are already developing:

- **Direct arrangement:** on 27 Sept the Container Owners Ass'n announced direct contact information for returning Hanjin-leased containers to the largest owners/lessors.
- **Receiver arrangements:** At NY/NJ Hanjin itself has set up facilities for accepting empties.
- **Third party arrangements:** in California one logistics company is accepting Hanjin Containers for indefinite storage.



# Bankruptcy unlikely to relieve commercial pressures; Regulatory response possible

## Commercial

- Downward price pressures including reduced Chinese supply and high US inventories remain unchanged
- Hanjin vessels will be purchased by other lines, no long term supply reduction
- Reported merger discussions

## Regulatory

- FMC regulates US shipping industries; alliances are specially permitted for the benefit of the shipping public although they might otherwise be anti-competitive.
- JOC reports the Chairman has suggested alliance failsafes / emergency procedures



# Thank you!

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