

Service

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Hanjin Bankruptcy Filings Impact Importers, Exporters and Intermediaries

On August 31, 2016, Hanjin Shipping Co. filed for bankruptcy protection in South Korea. Creditors “gave up the ship,” so to speak, and stopped the bleeding. Two days later, Hanjin filed in U.S. Bankruptcy Court for the District of New Jersey for Chapter 15, which provides a mechanism in the U.S. for resolving problems that arise in cross-border bankruptcies. Three out of four U.S. shippers reportedly have cargo on Hanjin vessels, so the repercussions of the bankruptcy filings are widespread.

The South Korean bankruptcy court will determine whether Hanjin should be liquidated or given a chance to restructure. Chapter 15, meanwhile, allows U.S. courts to issue subpoenas, orders to turn over assets, stays on pending actions, and orders of other situations involving American creditors or Hanjin’s assets in the U.S. A hearing was scheduled for September 6 in New Jersey to address Hanjin’s request to stay its creditors’ collection efforts and their efforts to terminate its creditors’ contracts.

One expected result of the Chapter 15 filing beneficial to shippers will be that Hanjin vessels can, without fear of arrest or other actions, discharge cargo in the U.S. and set the conditions of that process, including the delivery of cargo to U.S. importers. Currently, Hanjin vessels are laying to offshore awaiting a welcome to discharge at U.S. ports. Practical questions abound -- for example, how to return Hanjin containers after they are released to importers and unloaded without incurring demurrage or detention charges.

The following junctures in the supply chain may be problematic:

Cargo on Hanjin Vessels Arriving in the U.S.

The Chapter 15 process should quickly provide protection to these vessels and authorize expenditure of funds for the discharge of the cargo on those vessels, which should calm the concerns of ports/terminals. This could entail protection for certain ports and not others, which might result in dislocation of cargo in the U.S. That may cost importers and/or intermediaries additional funds to move the cargo to the desired locations, as well as other costs to retrieve and position cargo. Additional costs could be incurred surcharges to cargo for recoupment of container discharge costs.

Comment: Many issues for American importers and exporters should be resolved this week in the Chapter 15 case. The South Korean bankruptcy court may also provide relief by authorizing Hanjin to pay ordinary course-of-business expenses such as terminal fees necessary to complete the transportation process. Additional charges by terminals should be scrutinized using the “reasonableness” standard of the shipping statutes and regulations of the U.S. Shipping Act of 1998, as amended.

Hanjin Cargo on Hanjin Partners’ Vessels Discharged in U.S.

This cargo may already be in terminals or may be discharged in the coming days. While this cargo may be discharged, terminals may assess discharging costs to importers.

Comment: The Chapter 15 court orders will make clear in the short term how these issues are to be handled. In any case, importers may be willing to pay additional costs to retrieve cargo; such charges should be viewed through the “reasonableness lens” as noted above. Intermediaries will likely pass on these additional costs through tariff and/or bill of lading terms.

Hanjin Vessels Overseas

Creditors have reportedly seized Hanjin vessels at various global locations. However, as in the U.S., several major foreign ports have blocked access to Hanjin ships due to concerns that Hanjin would not be able to pay stevedoring and other port fees. There are questions about the procedures that may be available in foreign countries to protect vessels in order to discharge and deliver cargo, and under what conditions, i.e., payment of what fees to whom. We understand that some Chinese ports are requesting payment of up to \$4,500 per container to have a box released. These issues may be addressed by the South Korean bankruptcy court.

Comment: Husch Blackwell has made arrangements with local counsel in South Korea and New Jersey for assistance in seeking needed relief in the appropriate forum.

Hanjin Cargo at U.S. Railyards

At least two major U.S. railroads are refusing to turn over Hanjin cargo in their rail container yards to importers since Hanjin has not paid them for these containers and presumably for many other previously delivered containers. Some importers are offering to pay the line haul charges that Hanjin owes on their containers, yet railroads are still refusing to release the cargo. In other words, they are asserting a general lien on that cargo for past Hanjin debt. Hanjin, or possibly the owner of the cargo, may seek relief in the Chapter 15 proceeding, but this relief will likely require a further hearing resulting in significant delay in delivery. Not only is the cargo not being delivered, it also poses potential steep rail demurrage charges on importers.

Comment: Importers with this issue are advised to create a written record to the railroad noting that they have attempted to pick up the cargo and have proffered the unpaid charges to the railroads, and demand release of the cargo again. The Surface Transportation Board's Office of Public Assistance, Governmental Affairs and Compliance has indicated that if it is copied on these communications, it will intervene with the railroads to get this cargo released. If you need assistance in these circumstances, please contact Husch Blackwell attorneys Carlos Rodriguez or Benjamin Mann.

Hanjin Equipment Issues in the U.S., Demurrage and Detention

If Hanjin containerized cargo is picked up at a U.S. facility in a Hanjin container, the question arises as to where the empty container should be returned. If the container is lifted from the chassis, the chassis itself cannot be returned to the chassis lessor. The results are costly demurrage, chassis lease costs and/or detention charges. Hanjin has unilaterally nullified whatever free times it may have had in service contracts. Standard demurrage free time at U.S. ports is four days. The standard demurrage free time at the railyards is between 24 and 48 hours. Additionally, importers usually have four days of free time to unload a container and return it to the carrier. As noted, the question remains as to who will receive the container on Hanjin's behalf.

Comment: Contractual terms and/or shipping statutes and implementing Federal Maritime Commission (FMC) regulations may be applicable when a carrier assesses charges arbitrarily and unilaterally. The "reasonableness" issue is relevant, and solutions from the FMC should also be reviewed in resisting unreasonable application of demurrage and/or detention charges. These may have to be alleged within the context of the Chapter 15 proceeding. Of course, timing of solutions might have to be considered, so relief would have to be sought on an emergency basis. If the dispute arises out of a Hanjin transaction but is exclusively between another carrier and the importer or exporter, the New Jersey bankruptcy court may determine it does not have jurisdiction to hear the matter and will require the parties to go to state or federal district court to resolve their dispute.

Hanjin Reneging on Credit Terms

Hanjin has unilaterally nullified credit terms contained in service contracts and refuses to release cargo unless all past due amounts are made current. In some cases, this seriously interrupts cash flow structures on which importers were depending. While this raises contractual issues, it might also raise issues on the legality of imposing general liens on cargo being currently held for debt due on cargo previously released.

Comment: American creditors can use the Chapter 15 case to seek emergency relief to prevent Hanjin from withholding delivery of goods upon tender of payment for the charges for the shipment in question.

What This Means to You

The Federal Maritime Commission has officially gone on record with a “hands off” policy. The only pertinent, but not necessarily helpful, action the FMC is considering is that it will be “vigilant in watching for, and quick to act on,” improper behavior by other carriers and regulated parties (such as marine terminal operators, non-vessel-operating common carriers and freight forwarders) that would constitute violations of the Shipping Act. The “reasonableness” issues discussed above might be an area where the FMC might intervene either formally or informally.

Supply chain issues regarding release of cargo and equipment issues (demurrage, detention) may require commercial/legal resolutions with third parties and, when necessary, resolutions in the U.S. and South Korean bankruptcy courts.

Ocean transportation intermediaries (OTIs) that issue house bills of lading should review their terms and conditions and tariff provisions for applicable provisions. In any case, OTIs should keep their customers informed on how their cargo is impacted by Hanjin’s bankruptcy. Additionally, some of the issues discussed above are relevant to both cargo owners and non-vessel operating common carriers.

Contact Us

For more information on how the Hanjin bankruptcy may affect your business, contact Carlos Rodriguez, Benjamin Mann, or another member of Husch Blackwell’s Technology, Manufacturing & Transportation team.