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# The Collapse of Hanjin Shipping: An English Lawyer's Perspective

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## Introduction

The Korean container shipper, Hanjin Shipping Co., Ltd. ('Hanjin') is one of the world's top ten container carriers in terms of capacity with a fleet that includes 61 container ships and 18 bulk carriers, with a presence in 60 countries and 6,000 employees. By way of example of its importance to world trade, it reportedly accounts for about 8% of trans-Pacific trade volume for the United States. On 31 August 2016 Hanjin filed for bankruptcy in South Korea. It is one of the largest, if not the largest, container shipping insolvencies in history. It follows on from a series of shipping bankruptcies in recent years including Korean Line Corporation, STX Pan Ocean, Samsun Logix and Sanko Steamship. As Hanjin's bankruptcy, and possible rehabilitation, in South Korea proceeds, the international effects of the bankruptcy continue to be felt. Stories in the international press abound about significant container build up at port facilities, Hanjin vessels not putting into port so as to avoid arrest attempts and freight forwarders desperately seeking to access cargo in Hanjin containers.

The bankruptcy has been recognised in multiple jurisdictions under the UNCITRAL Model Law. In Great Britain, Hanjin's bankruptcy was recognised by an order of Nugee J dated 6 September 2016 ('the Recognition Order') pursuant to the UNCITRAL Model Law as implemented by the GB Cross-Border Insolvency Regulations 2006 ('CBIR'). The Recognition Order was in the usual 'extended form'. That is to say that not only is Hanjin treated in Great Britain as if it has been wound up by a creditor's petition but also enjoys the moratorium afforded to companies that have entered into administration in England pursuant to paragraph 43, Schedule B1 to the Insolvency Act 1986.

Hanjin's bankruptcy has thrown up a plethora of complex issues concerning the interaction of insolvency law, maritime law, property law and conflicts of law (among other things). In this article we address just some of the very many issues arising and outline the potential approaches that the English courts may take going forward, regarding: (a) the bases on which English courts are likely to modify the Recognition Order to allow a claim to be commenced or continued against Hanjin; (b) the enforceability of sub-freight liens and claims for freight under a bill of lading in light of the moratorium in England pursuant to the Recognition Order; (c) detention of cargo at ports; and (d) potential submission of Hanjin's creditors' claims to the jurisdiction of the Korean insolvency.

Our aim is to identify the English courts' likely approaches rather than attempt to give definitive answers to the issues arising. This is partly because the interaction and interplay between these diverse areas of law is still developing; and partly because the practical issues arising are typically intensely fact-sensitive.

## Modification of recognition orders under CBIR

The basic provisions of CBIR are well known but merit a brief summary here. Article 20(1) of CBIR provides that upon recognition of a foreign proceeding that is a foreign main proceeding, subject to Article 20(2), (a) commencement or continuation of individual actions, or individual proceedings concerning the debtor's assets, rights, obligations or liabilities is stayed; (b) execution against the debtor's assets is stayed; and (c) the right to transfer, encumber or otherwise dispose of any assets of the debtor is suspended. Article 20(2) provides relevantly that the stay and suspension referred to in Article 20(1) shall be the same in scope and effect as if the debtor had been made subject to a winding up order under the Insolvency Act 1986; and subject to the same powers of the court and the same prohibitions, limitations and exceptions and conditions as would apply under the law of Great Britain. Article 20(3) expressly excludes from the scope of Article 20(2) the right to take steps to enforce security over the debtor's property or to take steps to repossess goods in the debtor's possession under a hire-purchase agreement. It is common, at least in maritime insolvency cases, for the English courts to grant additional relief to the debtor under Article 21 so as to prevent the steps referred to in Article 20(3) without the written consent of the court or the consent of the foreign representative where the purpose of the foreign main proceedings is in the nature of a restructuring rather than a liquidation:

*Transfield ER Cape Limited*.[1] As noted above, the Recognition Order in the Hanjin bankruptcy contained such additional relief.

Articles 20(6) and 22 in short provide that a person affected by the stay or suspension under Article 20(1) or the additional relief under Article 21 may apply to modify or terminate the recognition order. It is to the application of these two provisions that we now turn.

The English court has recently considered the correct approach in considering such applications in *Ronelph Marine Ltd et. al. v STX Offshore & Shipbuilding Co Ltd and Jang*.[2] The case sets out conveniently some of the principles that the English court is likely to apply in applications to modify recognition orders.

In *Ronelph Marine*, each of the applicants (referred to herein for convenience as 'Ronelph Marine') entered into shipbuilding contracts with Dalian, a wholly owned subsidiary of STX. STX entered into performance bonds with Ronelph Marine, which bonds were governed by English law and contained non-exclusive 'English court' jurisdiction clauses. Dalian entered into a Chinese insolvency process in which it was made clear that the ship building contracts would not proceed. Ronelph Marine said that such notice was a renunciation and/or anticipatory breach of the shipbuilding contracts and sought to claim damages in the Chinese insolvency proceeding against Dalian.

The Dalian administrator rejected Ronelph Marine's claim. Consequently, Ronelph Marine then sought to sue STX in the English Commercial Court under the performance bonds. Those proceedings reached the stage of disclosure of documents after which STX entered into rehabilitation proceedings in South Korea, which proceedings were subsequently recognised in Great Britain under CBIR. Ronelph Marine then sought to claim under the performance bonds in the Korean rehabilitation proceedings. The Korean administrator rejected those claims. In Korean rehabilitation proceedings, the administrator prepares a list of all claims by creditors. If the creditor does not agree with that list, then it must submit a proof of claim within a limited period, which will either be accepted or rejected by the administrator (in this case the administrator rejected Ronelph Marine's claims). If rejected, then the creditor may commence 'confirmatory proceedings' in the Korean Rehabilitation Court within a limited time period. If not satisfied with the outcome of the confirmatory proceedings, the creditor may file an objection and the case is transferred to the Korean civil courts as an 'objection proceeding'. It was accepted by the Judge (Norris J) that if he modified the recognition order so as to allow the English court proceedings to continue it was likely that the Korean Courts would suspend the Korean confirmatory proceedings pending the outcome of the English court proceedings. Moreover, Norris J appeared to accept that the decision of the English court proceedings would likely be accepted in the Korean insolvency proceedings. So, Ronelph Marine had in effect two options: (a) to seek to continue its claim in Korean confirmatory proceedings; or (b) to seek to have its claims adjudicated in the on-going English court proceedings. Ronelph Marine chose the latter of the two options, namely to seek to have its claims adjudicated in the on-going English court proceedings. Consequently, Ronelph Marine applied to modify the recognition order so that it could continue the English court proceedings for the purposes of obtaining an adjudication of its claim with a view to presenting the outcome in the Korean confirmatory proceedings. Ronelph Marine accepted that it could not enforce any English judgment against STX, but it argued it could rely on the judgment for its unsecured claim in the Korean Rehabilitation Court, which could either adopt or reject such claim.

Norris J acceded to the application to modify the recognition order and in so doing conveniently re-stated some of the guiding principles that the English courts apply in determining applications to modify 'extended' recognition orders. Firstly, the applicant bears the burden of making out his case to modify the recognition order. Secondly, the applicant must identify the nature of the interests that he wishes to promote by obtaining that relief. Thirdly, the court will consider the question of whether the grant of such relief is likely to impede the achievement of the purpose of the insolvency proceeding. Fourthly, the applicant must enable the Court to balance his legitimate interests against the interests of other creditors, having regard to the nature and the probability of prejudice to the other side. In the context of money claims Norris J considered the well-known rule in England that the court will only exceptionally give a creditor the right to override and pre-empt the statutory machinery (in this case the Korean confirmatory proceedings). However, he considered that the 'exceptional' test was '*protean*' and stated that the true test was whether 'the applicant creditor [can] demonstrate a circumstance or combination of circumstances of sufficient weight to overcome the strong imperative to have all the claims dealt with in the same way'.[3] Norris J found that Ronelph Marine had discharged that burden since (a) the case gave rise to complex matters of English law; (b) the English Commercial Court proceedings were reasonably well advanced; (c) the English Commercial Court would adjudicate and

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1 [2010] EWHC 2851.
2 [2016] EWHC 2228 (Ch).
3 Paragraph 31 of the judgment.

quantify the claim under the performance bonds more speedily; (d) the English Court adjudication would assist rather than hinder rehabilitation proceedings in Korea; and (e) the interest of the other creditors in the Korean rehabilitation were not said to be prejudiced on STX foreign representative's evidence in the event the English Commercial Court proceedings were allowed to continue.

Although Norris J emphasised that the factors he had indicated were not exhaustive, advisors should consider each of the factors identified by Norris J when preparing any application to modify the Recognition Order in the Hanjin insolvency.

### *The enforceability of sub-freight/sub-hire liens and claims for freight under a bill of lading in light of the moratorium in England pursuant to the Hanjin's Recognition Order*

Hanjin not only owns its own vessels but is understood to have chartered (ie hired) a significant part of its fleet from other owners. Many (if not all) of those charters are likely to be on standard form time charterparties and, as a result, many will be subject to English law and jurisdiction (most probably arbitration). The owners of such chartered vessels will, therefore, be looking on nervously and considering the implications of the Hanjin insolvency from an English law perspective.

There will, of course, be substantial claims against Hanjin for early termination/repudiation of the charters (although the recent Court of Appeal decision in *Spar Shipping*[4] may arguably complicate matters). There will also probably be claims arising from the arrest/detention of those vessels which are unlucky enough to be arrested but, given the size of the insolvency, it seems perhaps unlikely that proving in the insolvency will not yield much return and certainly not for a considerable period of time. Owners will, therefore, be looking at other ways to secure payment which are not subject to the Recognition Order and the stay imposed by it.

Arguably the most straightforward situation is where the Owners have issued bills of lading to shippers to which they (i.e. the Owners, as opposed to Hanjin as charterers) are a party. How widely this is the case with vessels chartered by Hanjin is presently unclear but where it is, then the Owners have a contract directly with the shipper (or bill of lading holder). The writers do not see why such a contractual claim between Owners and shippers/bill of lading holders should be subject to or affected by the Recognition Order.

If this is right then the following observations can be offered. It is generally accepted that where the bill of lading contract is with the Owners, the right to freight is vested in those Owners and that the shipper/bill of lading holder will not obtain a good discharge by paying Charterers unless the bill provides by express terms or by incorporation that payment may be so made. The consequences of this are twofold. First, it means that to the extent that the Charterers (ie Hanjin) have not paid freight or hire due to the Owners, then the Owners may maintain their claim against shippers/bill of lading holders (although they may have to account for any sums recovered above that owing to them under the relevant Charterparty with Hanjin). The second consequence is that the shipper/bill of lading holder may be exposed to paying twice. To that extent, there is the risk (as with the recent collapse of OW Bunkers) that entirely innocent parties will end up in an invidious position, facing claims from two parties and in the end having to satisfy both.

The second question that calls for consideration is whether Owners can successfully avoid the consequences of the Recognition Order by relying upon what are commonly called liens on sub-freight (or sub-hire) against parties who may have chartered the vessel from Hanjin (or indeed sub- or even sub-sub-chartered her).

Plainly such liens are not possessory nor do they fit easily into any of the generally recognised types of liens. As a result and until recently (and arguably still) their nature has been the subject of debate.

In 2011, in *Cosco Bulk Carriers Co Ltd v Armada Shipping SA*,[5] the juridical nature of a lien on sub-freight/hire came before Briggs J sitting in the Chancery Division. Following the bankruptcy of Armada in Switzerland and a Recognition Order made in Great Britain under CBIR, Cosco sought to argue that a London arbitration that it had brought against Armada's sub-charterers by which it sought to enforce its lien over sub-hire, was not subject of the automatic stay because the lien operated as an equitable charge and that the Recognition Order did not prevent a secured creditor from enforcing his security. The Judge considered that the issue was 'ripe for consideration at least by the Court of Appeal' but declined to express his own views on the question, finding instead that he would permit the arbitration to proceed as a matter of discretion in any event.

Just a year later, the matter arose again in the Commercial Court in *The Western Moscow*.[6] This time the

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4 [2016] EWCA 982, in which, after several years of uncertainty, the Court of Appeal determined that a charterers' failure to pay an instalment of hire punctually in advance under the familiar form NYPE timecharter was not a breach of condition, entitling the shipowner to terminate and claim damages for that reason alone.

5 [2011] EWHC 216 (Ch).

6 [2012] 2 Ll Rep 163.

dispute was over jurisdiction. In a masterful analysis of the competing views, Christopher Clarke J (as he then was) reviewed the relevant authorities and concluded that the lien clause created an assignment by way of charge, rather than conferring a *sui generis* personal contractual right of interception. In so doing, he adopted the views expressed by a series of Judges at first instance in preference to views expressed by Lord Millett in *Agnew v Commissioners of Inland Revenue*[7] (and propounded by Professor Oditah[8]). As such, his judgment cannot as yet be regarded as the last word on the subject but it has been cited with approval by various leading textbook and was accepted as correct in *The Bulk Chile.*[9]

The judgment in *The Western Moscow* leaves a number of questions unresolved but assuming that it does indeed properly identify the nature of the lien, it leads to the conclusion that proceedings in relation to such a lien fall outside the scope of a standard Recognition Order, as foreshadowed in the judgment of Briggs J in *Cosco v Armada* and that they fall within the exception found in Article 20(3) of CBIR which expressly states that the automatic stay under Article 20 does not affect any right to take any steps to enforce security over the debtor's property.

Whilst this may be the cause for some optimism on the part of Owners, it is important to bear in mind that the Court has the discretion under Article 21 of CBIR to extend the scope of the stay to other proceedings or actions where it is necessary to protect the assets of the debtor or the interests of the creditors. In cases in the UK relating to maritime insolvencies, (as noted above) this has commonly been the case and Orders have been extended so as to prevent parties enforcing charges etc without the Court's permission or the foreign representative's consent. Consistent with this approach, the Order made in the Hanjin insolvency has been extended in several respects including a prohibition on any steps to enforce any mortgage, charge or lien or other security over the company's property and a blanket prohibition on any legal process (defined to include arbitrations) against the Company or its property without the permission of the Court. Whilst a brave lawyer might seek to argue that the right to freight or hire does not constitute property within the meaning of the Order, one suspects that this will receive short shrift.

As a result, the apparent security offered by the lien on sub-freight/hire may be less appealing than many might think and the prospects of Owners avoiding the clutches of the Recognition Order (at least in its present form) appear slim. That said, it is yet to be seen whether the Court may look favourably on a variation order permitting the underlying claims to be resolved in English arbitration (and according to English law) in much the same way as the Judge permitted in *Cosco v Armada*. And therein lies the rub. As Professor Baughen has noted,[10] the evidence given to the English Court in *The Bulk Chile* suggests that under South Korean insolvency law the lien on sub-freight/hire may not, in fact, be affected by the rehabilitation proceedings. It is fair to say that the evidence before the Judge was conflicting and, although the Judge expressed a clear preference for the evidence of one of the experts, this cannot, of course, preclude the possibility of the matter being resolved differently in South Korea in due course. Nevertheless, this part of the Judgment raises the possibility of arguing before the English Court that whatever stay is in place pursuant to the Recognition Order should be lifted or varied in the case of the liens on subfreight/hire in view of the generally favourably approach that English courts adopt to the enforcement of property/security rights in the context of English administrations provided such enforcement is unlikely to impede the achievement of the purpose for which the administration/rehabilitation was being pursued.

What this analysis also brings into sharp focus is the need carefully to consider the particular circumstances of any particular case. Various assumptions are made in what is said above and they may or may not apply in any individual case.

### *Detention of cargo at ports*

It is estimated that 90% of Hanjin vessels should finish offloading their cargoes by the end of October 2016.[11] However, the collapse has led to a significant delay in goods coming to market and a disruption to the supply chain. There are a number of potential causes for delay. They include some GB ports' assertion of a contractual lien or common law lien over the Hanjin shipped containers (and their contents) at port in respect of unpaid port fees.

Leaving aside the question of the effect of the Recognition Order, whether a port can assert a contractual lien over the containers (and their contents) is obviously a question of contract and as such intensely fact-sensitive. Common issues that arise are whether (a) the lien provisions in the port's terms and conditions are capable of covering both containers and their contents, and (b) the cargo owner has authorised Hanjin

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7 [2001] 2 AC 710.
8 The juridical nature of a lien on subfreight [1989] LMCLQ 191.
9 [2012] 2 Ll Rep 594.
10 See his short but insightful piece in the online publication on Maricom law dated 24 September 2016.
11 See the British International Freight Association's general information memorandum dated October 2016.

to contract on terms with the port operator so that the cargo can be said to fall subject to the port operators' contractual lien (applying the analysis in *Jarl Tra AB v Convoys Ltd*).[12] In addition it is possible that port operators may seek to assert (a) common law liens including a warehouseman lien and the ancient wharfingers liens (e.g. *R v Humphrey*)[13] over the containers and their contents, or (b) a statutory lien or right of distraint under the Harbours, Piers and Docks Clauses Act 1847 or related subsequent legislation.

Certain common law liens raise particularly complex issues since they *prima facie* give rise to a general (all-monies) lien such that the debt that must be discharged to terminate the lien includes not only the port charges in respect of the particular container in question but also *all* debts owing by Hanjin to the port.

One additional and particularly difficult area of the law is the effect of the Recognition Order on the potential perfection of a lien. In brief outline, in order to perfect a common law lien as a matter of English law the person asserting the lien must show that (a) the debt in question is due for immediate payment; and (b) the lienee is in lawful possession of the goods in question. As such, it might be said that the recognition order 'suspends' the right to perfect a lien pursuant to CBIR, Arts.20(1)(c) and 20(2)(a) so that if the lien is not perfected by the time of the recognition order the potential lien is lost.[14] However, in the context of the appointment of a receiver and 'the perfection' of a contractual lien, it would seem that it is possible to perfect a lien after the appointment of the receiver (see e.g. *George Barker (Transport) Ltd v Enyon,* where a contractual lien was not defeated by the later crystallisation of a floating charge in circumstances where the creditor (the lienor) came into possession of the goods only *after* the floating charge's crystallisation).[15] It has been doubted, however, whether this case would be followed in the case of a liquidation,[16] which doubt, it could be argued, may extend to the context of a recognition order in GB.

### *Submitting to the jurisdiction of the Korean insolvency proceedings*

As a matter of English law, there is a real risk that a creditor proving in a foreign insolvency proceeding will, by that action alone, subject his claim to the jurisdiction of the foreign insolvency proceedings. Where the creditor has a monetary claim arising from a contract with an English jurisdiction clause the risk may be of no consequence since it is likely that the English court will take the view that the claim *prima facie* should be determined by the foreign insolvency proceeding in any event (see *Ronelph Marine, supra*). However, if the creditor has a proprietary claim in England against Hanjin (e.g. a common law lien claim) the position may well be more nuanced. Moreover, submitting such proprietary claims presents something of a dilemma for a creditor. This is because failure to lodge a claim in the Korean insolvency proceedings in time potentially means that the claim cannot be advanced at all in the Korean insolvency proceedings. However, on other hand, submitting a proprietary claim arising in England in the Korean insolvency proceedings runs the risk of the creditor submitting his claim to the jurisdiction of the Korean insolvency proceedings. The Korean insolvency proceedings may or may not treat such claims as favourably as the English courts.

There have been a number of recent cases that touch upon the question of submission to the jurisdiction of the foreign insolvency proceedings including *Rubin v Eurofinance*;[17] *Stichting Shell Pensioenfunds v Krys*[18] and *Erste Group Bank v VMZ Red October*.[19] Reasons of space preclude a detailed factual analysis of these cases. However, the following principles set out in these cases may well impact on the issue as a matter of English law.

Firstly, a 'foreign' creditor submits to the jurisdiction of the court supervising a company's insolvency by proving in that insolvency. That by itself is sufficient without more (and irrespective of whether the proof has been accepted or a dividend has been received): *Erste Group* at [51].

Secondly, a submission may consist in any procedural step consistent only with the acceptance of the rule under which the court operates. These rules may expose the party submitting to consequences, which extend well beyond the matters with which the relevant procedural step is concerned: *Stichting Shell* at [31].

Thirdly, the characterisation of whether there has been a submission for the purpose of the enforcement of a foreign judgment in England depends on English law. The court will not simply consider whether the steps

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12 [2003] 2 CLC 1072
13 1 McClel & Y 173, 14
14 As a matter of domestic English insolvency law, a company subject to liquidation proceedings remains the legal owner of its property, so that a creditor may claim a lien, where applicable, over any property passed to it after the commencement of winding-up (generally the date of the presentation of the petition) but not once the actual winding up order is made: *Re Wiltshire Iron Co, ex parte Pearson* (1867-1868) LR 3 Ch App 443.
15 [1974] 1 WLR 462.
16 See e.g. Totty, Moss & Segal *Laws of Insolvency* (looseleaf) at D3-08.
17 [2013] 1 AC 236.
18 [2015] AC 616.
19 [2015] 1 CLC 706 (CA).

taken abroad would have amounted to a submission in English proceedings. The international context requires a much broader approach. Nor does it follow from the fact that the foreign court would have regarded steps taken in the foreign proceedings as a submission that the English court would so regard them. Conversely, it does not necessarily follow that because the foreign court would not regard the steps as a submission that they will not be so regarded by the English court as a submission for the purpose of the enforcement of a foreign judgment. The question of whether there has been a submission is to be inferred from all the facts: *Rubin* at [161].

Fourthly, as a general rule, however, there can be no objection in principle to a creditor invoking the purely adjudicatory jurisdiction of a foreign court, provided that it is an appropriate jurisdiction and that litigation is not vexatious or oppressive to the liquidator or other interested parties: *Stichting Shell* at [40].

While determining the position as a matter of English law in extreme cases (e.g. complete participation or total non participation in the foreign insolvency) is reasonably straightforward the position is less so where a party seeks to reserve its position regarding jurisdiction when filing its claim in the Korean insolvency proceedings. Sheldon *Cross-Border Insolvency* (4th ed.) at 13.25 suggests (we tentatively suggest correctly) that the position is as follows:

> '…
>
> It is suggested that, in each case, the answer will turn on a precise and careful analysis of whether the step that a creditor has taken in the insolvency process is consistent with ignoring the consequences of that process that are in issue, and the degree of any inconsistency in the creditors' approach.
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> …'

One possible solution to a creditor's dilemma is for it to apply to court to modify the English recognition order as appropriate or ask the foreign representative for an undertaking to similar effect. For example, in *D/S Norden v Samsun Logix Corporation*[20] D/S Norden sought permission to enforce its English security (a sub-freight lien) against Samsun's sub-charterer notwithstanding a stay on proceedings against Samsun imposed pursuant to CBIR. This on the basis that typically English courts would normally give leave to exercise a proprietary right provided it was unlikely to impede the achievement of the purpose for which the administration/rehabilitation was being pursued. It was common ground between the parties that the sub-freight lien would not be vulnerable to challenge as a matter of English domestic law. The Korean receiver had rejected in the Korean insolvency proceedings the sub-freight lien claim in part. D/S Norden subsequently submitted the part of the claim that had been rejected to confirmatory proceedings in Korea. D/S Norden argued that if it pursued its claim in the Korean insolvency proceedings then it would run the risk of the Korean receiver arguing that it (D/S Norden) would be bound by whatever the Korean court might decide. Conversely, if it did not participate in the Korean proceedings it would run the risk of the Korean court making an adverse decision against its sub-freight lien claim without having regard to arguments that it could have otherwise advanced in the Korean proceedings. The Judge rejected D/S Norden's application for permission to enforce the sub-freight lien. However, the Judge ordered that the recognition order be modified so that it was a condition of its continuation that the Korean receiver should not be permitted to argue in subsequent English proceedings that D/S Norden was estopped from denying that the decision of the Korean court should be given effect.

## Conclusion

Hanjin's bankruptcy has given rise to a number of complex and vexed English law issues involving the interaction of insolvency law, maritime law, property law and conflicts of law. The position as regards the Hanjin rehabilitation and the Recognition Order in GB remains fast moving and fluid. For legal advisors involved in the fall out interesting times no doubt lie ahead.

*Notes*

20 [2009] EWHC 2304 (Ch).