

**NEW YORK STATE BAR ASSOCIATION INTERNATIONAL SECTION  
2018 ASIA REGIONAL MEETING  
APRIL 23-24, 2018  
SEOUL, KOREA**

**Cross-Border Insolvency:  
Implications of the Hanjin Shipping Bankruptcy**

Submitted by

**Hon. Cecelia Morris**, Chief Judge, U.S. Bankruptcy Court, Southern District of New York, and

**Mark D. Bloom**, Greenberg Traurig, P.A.

Introduction.

This section of the program will examine various approaches to business restructurings under the recently revised Korean Debtor Rehabilitation and Bankruptcy Act (“DRBA”) and Chapters 11 and 15 of the United States Bankruptcy Code. Particular attention will be paid to the attempted restructuring of Hanjin Shipping, a Korea-based international shipping company that filed a Chapter 15 case in the District of New Jersey seeking recognition of a receivership proceeding filed in its home country of Korea. The Chapter 15 case was highly contentious from the outset, and while recognition ultimately was granted the restructuring in Korea wound up as a liquidation proceeding, with worldwide creditor recoveries estimated not to exceed 1% of claim value.

Background on the Company and Korean Receivership Filing.

- Hanjin was the seventh largest container carrier in the world
- Filed for receivership in Seoul court in late August 2016 (US\$5.5 billion in outstanding debt)
- More than 130 vessels in its fleet, operating all over the world

- With the Korean insolvency filing, Hanjin faced creditors attempting to seize vessels, other ships being turned away from ports and denied passage through canals, and terminal operators refusing to handle cargo
- As a result, Hanjin vessels were stranded at sea and global supply chains were disrupted at peak shipping season for holiday retail merchandise in U.S. and other countries
- Foreign representative appointed in Seoul proceeding sought recognition of that proceeding and cooperation from as many as 43 jurisdictions around the world, in effort to complete delivery of goods in transit, prevent local creditors from seizing ships, and preserve going concern value for rehabilitation of company
- One such proceeding was U.S. Chapter 15 filing in New Jersey in early September 2016, presenting largely different set of legal issues to U.S. court and different body of creditors than involved in Korean rehabilitation proceeding.

#### Brief Overview of Chapter 15.

- Special Chapter of U.S. Bankruptcy Code adopted to provide ancillary relief in respect of foreign insolvency proceeding, based upon UNCITRAL Model Law on Cross-Border Insolvency.
- Purpose not to administer estate assets or claims or develop restructuring plan with U.S. creditors for approval by bankruptcy court, but to obtain recognition of “foreign proceeding” upon request of “foreign representative,” so as to facilitate cooperation by US courts with foreign insolvency proceedings.

- Differentiation between “foreign main proceeding” and “foreign non-main proceeding” based on concept of debtor’s center of main interests, referenced worldwide as COMI.
- Different levels of relief available based upon recognition as “foreign main” or “foreign non-main”; e.g., automatic imposition of bankruptcy stay upon recognition of “foreign main”; discretionary upon recognition of “foreign non-main.”
- Requirement for recognition as foreign main proceeding that debtor’s COMI exist in foreign jurisdiction in which that proceeding is pending (presumption that COMI exists where debtor entity is incorporated or otherwise organized).
- Requirement for recognition as foreign non-main proceeding (outside debtor’s COMI) that debtor maintain an “establishment” in the jurisdiction – defined as “any place of operations where the debtor carries out a nontransitory economic activity.”
- COMI disputes can frustrate or delay U.S. recognition – e.g., *Bear Stearns Funds; O.A.S.; Oi Cooperatief Brasil, S.A.*
- Does not preclude separate commencement of Chapter 7 or 11 case for debtor (described below in respect of Chapter 11).
- Eligibility for relief and invocation of U.S. jurisdiction.
- Provisional and final relief available in advance of and upon recognition.
- Limited role for U.S. creditors, other than in connection with grant/denial of recognition and related COMI and eligibility issues.

- Use of cross-border protocols and court-to-court communication, incl. simultaneous hearings and even trials, e.g. *Nortel*.

#### Use of Chapter 11 by Non-U.S. Companies

- Low threshold for jurisdiction facilitates filing by non-U.S. companies – proverbial “umbrella in New York.”
- Independent from or in conjunction with Chapter 15 filing – after recognition, foreign representative can commence voluntary or involuntary case per section 1511, or upon recognition as foreign main proceeding a concurrent proceeding can be commenced under section 1528.
- Same legal process as for U.S.-based debtor.
- Administration of estate and development of reorganization plan for vote by creditors and confirmation by bankruptcy court in transparent and participatory process.
- Well-developed system with multiple tools available to achieve restructuring in proceedings before specialized courts and experienced judges:
  - Retention of authority by debtor in possession to manage and operate business
  - Automatic stay
  - Ability to obtain post-petition financing on secured, superpriority basis
  - Ability to use, sell and lease property in ordinary course of business
  - Ability to assume, reject or assume and assign executory contracts and unexpired leases
  - Exclusive right of debtor in possession to file Chapter 11 plan

- Broad notice to creditors
- Formation of Creditors Committee with authority to retain professionals at expense of estate, appear and be heard on all issues in case
- Extensive financial disclosure requirements.

### The Hanjin Restructuring

- Abrupt refusal of lenders and Korean Development Bank to fund additional advances caused lack of meaningful opportunity for advance planning, guidance or thoughtful coordination.
- Difficulty in implementing cross-border strategy to protect vessels or maintain continuity of operations.
- Lack of reliable or predictable source of third party financing (even though Korean law allows for post-petition financing).
- Minimal financial and operational information available to international creditors.
- U.S. Chapter 15 court has limited jurisdiction and authority in respect of operational issues, e.g. no authority to approve post-petition financing to maintain operations under section 364 of Bankruptcy Code.
- No insight into Korean proceedings in U.S.; no protocols, court-to-court communication did not occur until after critical period had passed.
- Contentious issues from very first day
  - Arrest of ships/protection of maritime lienholders – collision of bankruptcy and maritime law regarding recognition and enforcement of maritime liens and related rights
  - Entry of ships into U.S. ports to unload cargo

- Payment of port charges
- Intermodal delivery to beneficial cargo owners – resourcefulness of U.S. counsel in developing delivery protocols, and flexibility of U.S. court in approving and adopting.
- Rights and interests of port authorities.

### Lessons Learned

- How U.S. Chapter 11 case might have unfolded – greater transparency and flexibility, greater role for U.S. court and creditors, availability of additional relief??
- What additional relief might have been available – post-petition financing; rejection of burdensome contracts and leases; claims administration and objection; formulation and proposal of plan of reorganization or liquidation, incl. cramdown of dissenting creditors??
- Would outcome have been different??