

# Holiday Help for Hanjin Headaches: A Few Practical Pointers

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As most readers are aware, Hanjin Shipping Co. Ltd. (“Hanjin”) commenced insolvency proceedings in South Korea on August 31, 2016. Shippers, motor carriers, transportation intermediaries, and others are scrambling to react to fluid circumstances surrounding these unfolding developments. For instance, container terminals in Virginia, Los Angeles/Long Beach, and Seattle are reportedly no longer accepting delivery of Hanjin import, export, or empty containers. Concerned that port handling and stevedoring costs will not be paid, other port authorities and terminals, including those in Shanghai, Xiamen, Valencia, and Savannah have prevented Hanjin vessels from calling. Also reported is that Hanjin vessels are being arrested and voyages cut short due to unpaid charter fees. Containers are stuck onboard these vessels and going nowhere in a hurry. As you enter the holiday weekend evaluating your current situation vis-à-vis Hanjin, please keep the following in mind:

## **Shippers and Ocean Transportation Intermediaries**

Naturally, shippers and ocean transportation intermediaries (whether NVOCC’s or ocean freight forwarders) should withhold payment to Hanjin for transporting cargo until the goods have actually been delivered to destination.

In addition, shippers and intermediaries should begin evaluating, among other things, the *force majeure* provisions in their respective contracts in order to determine under what circumstances a given party may be forced to bear the additional costs required to move shipments to destination.

Shippers and intermediaries should also prepare to defend against possible double-payment freight charge liability exposure in the event that Hanjin has utilized other carriers to transport their cargo and has failed to pay those downstream carriers. Accordingly, be sure to retain all shipping paperwork, contracts, and communications relating in any way to services being provided by Hanjin.

Of course, shippers and intermediaries should also be attuned to the fact that Hanjin will likely itself invoke the *force majeure* provision in its bill of lading terms and conditions or service agreements. Shippers and intermediaries will wish to advise their own customers and consignees of the ripple effect that Hanjin’s service failures will have upon the arrival of anticipated cargo.

Finally, companies having ongoing volume commitments with Hanjin should proceed to invoke any available termination clauses in their service contracts that allow for termination under these circumstances (or at least begin to understand how broadly your termination rights may be). Similarly, companies should exercise any provisions that will excuse them from having to meet their MQC commitments.

## **Motor Carrier Considerations**

Motor carriers who find themselves unable to return Hanjin equipment to the ports should make sure that they create a factual record of their attempt to do so. This information and documentation will be important in the event that the motor carrier needs to demonstrate its inability to perform drayage services in conjunction with Hanjin equipment.

For instance, such motor carriers could argue that the circumstances constitute a “force majeure” under the Uniform Intermodal Interchange Agreement (“UIIA”), thereby relieving them of liability for any per diem charges. The Intermodal Association of North America (“IANA”), for whom Benesch serves as outside General Counsel, is notifying its motor carrier participants to the UIIA of some practical steps that motor carriers can take in order to protect themselves. Specifically, motor carriers should:

- Retain copies of any and all notices, bulletins, or other advisories identifying changes to a facility’s policy as it relates to Hanjin equipment;
- Maintain copies of any and all documentation (i.e., e-mail communications with facilities, turn-away tickets, rejection slips, etc.) that demonstrates their company’s unsuccessful attempts to return or pick-up specific Hanjin equipment; and
- Create a log of any verbal communications that a driver or dispatch office may have with a facility regarding the inability to return or pick-up Hanjin equipment. The log should include (1) the date and time of attempted return or pick-up; (2) the name and contact information of the person with whom the driver or dispatcher spoke at the facility; and (3) the response of the facility when the motor carrier attempted to return or pick-up Hanjin equipment.

Taking these steps now will maximize the likelihood that motor carriers can avoid being pursued for per diem charges in the future by Hanjin or a bankruptcy trustee.

### **Bankruptcy Considerations**

At this time, Hanjin has only commenced an insolvency proceeding in South Korea. While it may be difficult or cost-prohibitive for many creditors to become active in the South Korean proceedings, we anticipate that Hanjin will imminently file a Chapter 15 bankruptcy proceeding in the United States given that it is reported that it has several vessels docked just offshore.

A Chapter 15 bankruptcy proceeding is intended to protect and maximize the value of a foreign debtor’s assets located in the United States while the debtor is engaged in a foreign insolvency proceeding. Absent this cross-border mechanism, a foreign debtor’s United States-based assets would not be protected by the automatic stay and, therefore, would be within the reach of its creditors, notwithstanding the foreign insolvency proceeding. This is an important concern to debtors like Hanjin, as, at any given time, one or more of its vessels may be docked in a United States port, subject to seizure by one of its creditors. However, by filing a Chapter 15 petition and obtaining the legal recognition of its foreign insolvency proceeding by a United States Bankruptcy Court, a foreign debtor’s assets located in the United States are protected by the automatic stay provisions of the Bankruptcy Code.

If a Chapter 15 bankruptcy proceeding is commenced and the United States Bankruptcy Court enters an Order recognizing the South Korean insolvency proceeding, then Hanjin will be able to

avail itself of all of the protections under the Bankruptcy Code. In such case, creditors should discontinue any action which would violate the automatic stay and should closely follow the bankruptcy proceeding for information related to the filing of claims. While the procedures vary from case to case, oftentimes the foreign debtor will direct creditors to file claims in the foreign proceeding, not the Chapter 15 case. Thus, it is critical that trade creditors understand, among other things, where claims need to be sent and provide enough delivery time so that the claim arrives before the claim bar date, especially if the claim is being sent overseas. Creditors are therefore well-advised to seek legal counsel in these circumstances.

**Please contact an attorney in Benesch's Transportation & Logistics Practice Group if you need assistance in evaluating your particular facts and circumstances as they relate to Hanjin.**

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