The Chapter 15 Case of Hanjin Shipping

Ilana Volkov presents a case study in the universalist approach to cross-border insolvency administration

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Chapter 15 of the US Bankruptcy Code, which is based on UNCITRAL's Model Law on Cross-Border Insolvency, was enacted in 2005 to provide an "effective mechanism" for dealing with cross-border insolvency cases.[1]

Some of Chapter 15's express objectives are "*greater legal certainty for trade and investment*" and the "*fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested entities, including the debtor.*"[2]

Under Chapter 15, a foreign representative may file a petition in the US to obtain "*recognition*" of the debtor's foreign insolvency proceedings.[3] If the insolvency proceedings are recognised as "*foreign main proceedings,*" the debtor receives important substantial relief described hereafter.[4] Among other things, the foreign debtor is entitled to an immediate application of the automatic stay concerning his/her property located within the territorial jurisdiction of the US. The stay prohibits all entities (except for certain limited exemptions) from: commencing or continuing pre-petition judicial, administrative or other actions or proceedings against the debtor; recovering a pre-petition claim against the debtor; enforcing a pre-petition judgment against the debtor or the property of the estate; obtaining possession of property of the estate or exercising control over property of the estate; and creating, perfecting or enforcing any lien against property of the estate that secures a pre-petition claim.[5] Similar injunctive relief is also available on a provisional basis, that is, from the date of the filing of the Chapter 15 petition to the date of recognition, "*where the relief is urgently needed to protect the assets of the debtor or the interests of the creditors.*"[6]

Generally, there are two schools of thought regarding multinational insolvency proceedings:

1) universalism, where a bankruptcy progresses as a unified global procedure administered by one court, with the assistance of courts in other nations; and
2) territorialism, where a debtor is forced to file an insolvency action in every country where his/her property may be found.[7]

It is well accepted that Chapter 15 reflects a strong Congressional preference for a "universalist" rather than a "territorial" approach to transnational insolvency administration, an approach that recognises today's interconnected global economy. For example, Section 1508 of the Bankruptcy Code states: "*In interpreting this chapter, the court shall consider its international origin, and the need to promote an application of this chapter that is consistent with the application of similar statutes adopted by foreign jurisdictions.*"[8] This approach is further evidenced by Section 1507(b), which provides that upon granting recognition of the foreign main bankruptcy proceedings, a court may provide additional assistance, "*consistent with the principles of comity.*"[9]

Furthermore, Chapter 15 requires the US Bankruptcy Court to "*cooperate to the maximum extent possible with a foreign court or a foreign representative....*"[10]

What does all this mean, exactly? The Model Law's underlying philosophy was explained in an often cited decision, In *re ABC Learning Centres, Ltd.*, 728 F.3d 301 (3d Cir. 2013). There, the Court of Appeals for the Third Circuit stated:

> *"The Model Law reflects a universalism approach to transnational insolvency. It treats the multinational bankruptcy as a single process in the foreign main proceedings, with other courts assisting in that single proceeding. In contrast, under a territorialism approach a debtor must initiate insolvency actions in each country where his/her property is found. This approach is the so-called "grab" rule where each country seizes assets and distributes them according to each country's insolvency proceedings."*[11]

The Court further observed:

> *"Chapter 15 creates ancillary proceedings in the United States to provide support to the foreign insolvency administrator.* ***The goal is to direct creditors and assets to the foreign main proceedings for orderly and fair distribution of assets, avoiding the seizure of assets by creditors operating outside the jurisdiction of the foreign main proceedings.***"[12]

The US Bankruptcy Court for the District of New Jersey (the "Bankruptcy Court") which presided over the Chapter 15 case of *In re Hanjin Shipping Co., Ltd.* ("Hanjin") fully embraced this universalist approach on several key occasions throughout the case. This article will discuss the Bankruptcy Court's ruling and rationale for granting the foreign representative's motion for provisional relief.

CHAPTER 15 REFLECTS A STRONG CONGRESSIONAL PREFERENCE FOR A UNIVERSALIST RATHER THAN A TERRITORIAL APPROACH TO TRANSNATIONAL INSOLVENCY ADMINISTRATION

Hanjin's business and the insolvency proceedings

On August 31, 2016, Hanjin commenced insolvency proceedings in South Korea: its foreign representative filed a Chapter 15 petition in the US on September 2, 2016. At the time of the filing, Hanjin was the largest shipping company in South Korea and the seventh largest shipping company in the world, transporting over 100 million tons of cargo per year and reportedly carrying almost eight percent of the U.S. market's trans-Pacific trade volume. Hanjin's business as a global carrier involved an enormous amount of commercial relationships, including with suppliers of "*necessaries*," such as fuel.

Critically, at the time the Korean insolvency proceedings were initiated, Hanjin had more than a dozen US bound vessels carrying billions of dollars of cargo, four of which were anchored or drifting outside US territory for fear of being arrested by unpaid providers of the so-called "*necessaries*." Most of the cargo was ordered in anticipation of the holiday season. Hanjin needed emergent relief from the Bankruptcy Court:

i) to ensure the cargo could be delivered to its owners and to avoid enormous economic damage to them, and
ii) to get paid for its work and generate revenue for continued operations.

The provisional order and the maritime lienholders' objections

To obtain this essential provisional relief, Hanjin's foreign representative had to demonstrate, among other things, that creditors and other interested entities were "*sufficiently protected*."[13] The primary objectors to the request for provisional relief were the unpaid providers of "*necessaries*," who asserted statutory maritime liens on account of their pre-petition claims and wanted the ability to arrest Hanjin's inbound vessels in order to enforce those liens. The maritime lien-holders argued their interests were not "*sufficiently protected*" if they could not enforce their maritime liens through ship arrests. Alternatively, they contended that if the Bankruptcy Court were to impose the automatic stay on the maritime lien-holders, it should require, at a minimum, that Hanjin post security or file a bond in accordance with 11 U.S.C. § 1522(c).

The Bankruptcy Court overruled the maritime lien-holders' objections and entered a provisional order on September 9, 2016, thus permitting Hanjin ships to enter and leave US ports without fear of arrest. After discussing Chapter 15's universalist approach and the *ABC Learning* case at length, the Bankruptcy Court found that allowing Hanjin's vessels to enter US ports under protection of the automatic stay was necessary to "*protect the interests of [Hanjin's] global rehabilitation and creditors as a whole*." Indeed, according to the Bankruptcy Court, allowing the maritime lienholders to enforce their individual lien rights in the US would accede to a "*territorial view*" of international insolvency proceedings "*in contradiction to Chapter 15's clear directive*." Furthermore, the Bankruptcy Court rejected the lienholders' request for security, finding that Hanjin did not have the financial wherewithal to provide any letters of credit or bonds and, in any event, their claims could and should be administered in Hanjin's main insolvency proceedings in Korea. The Bankruptcy Court ultimately concluded that Hanjin's foreign main proceedings "*will be better off*," as a whole, if the vessels were able to deliver the cargo promptly.

The maritime lienholders were unhappy with the Bankruptcy Court's decision and filed a motion for reconsideration. The Bankruptcy Court denied that motion; the denial was affirmed on appeal by the District Court. The maritime lien-holders' further appeal to the Circuit Court was dismissed as moot.

Conclusion

It was critical for the Bankruptcy Court to grant the foreign representative emergent relief in order to avoid disruption of international commerce and irreparable harm not only to the beneficial cargo owners who were anxiously awaiting the receipt of their cargo, but also to Hanjin and its creditors. To accomplish that result, the Bankruptcy Court had to acknowledge its role in the overall insolvency proceedings as an adjunct court, in other words, a court whose role was to support and assist the court administering the Korean insolvency proceedings and not to indulge the parochial interests of individual creditors.

By directing adjudication and payment of the claims of all unpaid creditors to the foreign main proceedings in Korea, the Bankruptcy Court stayed true to the purpose and intent of Chapter 15. ■

THE BANKRUPTCY COURT HAD TO ACKNOWLEDGE ITS ROLE IN THE OVERALL INSOLVENCY PROCEEDINGS AS AN ADJUNCT COURT

Footnotes:

1 See 11 U.S.C. § 1501(a).
2 *Id.*
3 The term "foreign representative" is defined in Section 101(24) of the US Bankruptcy Code to mean "a person or body, including a person or body appointed on an interim basis, authorised in a foreign proceeding to administer the reorganisation or the liquidation of the debtor's assets or affairs or to act as a representative of such foreign proceeding."
4 See 11 U.S.C. § 1520.
5 *Id.* at § 362(a).
6 *Id.* at § 1519.
7 Jay Lawrence Westbrook, *Chapter 15 at Last*, 79 Am. Bankr. L.J. 713, 715 (2005).
8 11 U.S.C. § 1508.
9 *Id.* at § 1507(b).
10 *Id.* at § 1525.
11 *Id.* at 307 (internal citations omitted).
12 *Id.* at 306-307 (internal citations omitted) (emphasis supplied).
13 See 11 U.S.C. § 1522(a).

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