



Managing the Aftermath of Hanjin



Questions and Answers

Q: Our office in Spain put a hold on payment to Hanjin for the prepaid charges for all of our shipments until such time it could be determined how much it would cost us here in the U.S. to get the containers off the pier. We, therefore, had the funds available to pay the terminal handling charges (THCs) and get the containers picked up with minimal delay. Considering the number of containers we had, the demurrage paid out was very low. On the shipments that Hanjin was to move inland as they terminated at the port, Spain will be deducting the inland portion, demurrage and the THCs portion we paid to the terminals here. They will remit to Hanjin only the ocean freight less the inland and expenses. Will we have any problems with the court for not paying for the THCs and inland portion even though Hanjin did not fulfill that part of the contract?

A: No, unless it is determined that what you withheld or deducted should have been paid in all events and then made the subject of a claim against the Hanjin's bankrupt estate. You engaged in self-help that amounted to creating your own preference. Even though your unilateral adjustments may, on paper, be correct, the process was not. However, given the magnitude and complexity of the situation, it may very well go unnoticed.

Q: What about shipments on Hanjin vessels but on bills of lading (BLs) from other lines, such as Zim or Evergreen? Who is responsible for obtaining the release and/or paying terminal charges? Will there be THCs at the terminal if we have Zim or Evergreen BLs?

A: The slot carrier that issued bills of lading covering its shipments on Hanjin vessels, and ultimately the receiver, will be responsible for the THCs. If this results in charges in excess of what would have been due in the ordinary course a claim will have to be filed in the bankruptcy - in Korea.

Q: Who all can file a claim with Korean courts and how is the procedure done?

A: We are not knowledgeable on Korean bankruptcy claim filing procedures, but are in the process of obtaining that information and will make it available for circulation shortly. In all events, however, it would be best to consult one of the firms in Korea that are heavily involved in representing claimants. More so, because our understanding is that all claim filing is in Korean and, we assume, you would require not only competent advice on the process but someone that can speak and write Korean to prepare and file the claim.

Q: Can a shipper become a beneficial party? We actually have some of our own shipper owned containers on Hanjin.

A: Yes, a shipper can be the beneficial party, provided it is shipper on the Hanjin bill of lading. If, however, the shipper only appears as such on an NVOCC bill of lading, so that the NVO is the shipper on the Hanjin bill, the shipper may have to authorize the NVO, through a power of attorney or assignment of claim, to file the claim on the shipper's behalf. We are in the process of clarifying this latter point and will make the information available when received. Alternatively, you should consider consulting with Korean bankruptcy counsel for guidance.

Q: Regarding prepaid freight charges to a port, what happens if the cargo is discharged at a different foreign port than what it was booked for (not inland charges but additional ocean freight charges)?

A: Hanjin, per its BL terms, can terminate a shipment at any intermediate point and not be obligated to return freight nor are they responsible for additional freight costs for on-forwarding cargo to the intended destination.

Q&A, continued

Q: We have heard from some sources that Hanjin U.S. employees will no longer have pay after 9/30, has this information been heard by others and how will any of this impact the ability to further release cargo?

A: This has not been confirmed by Hanjin.

Q: What is Hanjin's plan for the empty containers scattered across the U.S.?

A: At the time of the webinar there was no plan formulated addressing this issue. We now understand something is under discussion but no details are available. In addition, since the webinar the New Jersey Chapter 15 bankruptcy court has issued an order, in response to a motion by an NVOCC, addressing this issue insofar as it relates to where Hanjin can designate containers to be returned and limiting what charges may be assessed by Hanjin. However, neither the Court nor Hanjin have set up any plan for returns. A copy of the Court's order will be provided upon request.

Q: What type of insurance should have worked best for an importer to protect it from Hanjin situation?

A: All-Risk Cargo insurance with Sue and Labor and/or Forwarding Charges clauses are the best options to potentially recover some of the costs of on-forwarding or other charges such as storage. Each claim needs to be assessed on its own merits, however, so it's impossible to say these clauses will cover some of all of the additional transportation costs. Unfortunately delay, loss of market and liquidated damages such as discounts are not recoverable by any type of insurance.

Q: What recourse do we have to collect fees paid to Hanjin prior to filing Chapter 15 where they terminated the container at the port instead of to the inland point? We paid to the inland point but it was terminated at port.

A: It is likely such a claim would be considered a pre-existing liability and therefore subject to resolution as part of the bankruptcy as a general creditor's claim. To be sure however, we again caution guidance be sought from a Korean bankruptcy counsel involving the application of Korean law.

Q: How and where do we send a claim to Hanjin?

A: We cannot speak to the process of Korean bankruptcy claim filing procedures. We are obtaining the information requested and will make it available upon request, or you may seek counsel from a Korean bankruptcy attorney.

Q: Our FMC lawyer advised that they can help us process the claims against Hanjin for some of the issues occurred. Of course there will be fees going through the lawyer so my question is if we should just have our insurance provider to submit these claims against Hanjin on our behalf?

A: There is no insurance that a transportation intermediary (such as a forwarder or NVO) could have purchased that will cover first party costs borne by an intermediary, however as answered in a previous question, there may be coverage available to the cargo owner. To that point any action against Hanjin should be via the bankruptcy proceedings in Korea and attention is brought to the looming deadline for filing such suits.

Q: For vessels being arrested, can customers file claim against non-delivery as loss cargoes?

A: For cargo that is indeed damaged, lost or missing during this protracted situation, cargo claims can be filed under a cargo insurance policy, but for cargo, unaffected by any physical loss or damage sitting at port or on-board a vessel, cargo insurance will not respond.

Q: What will happen to the cargo for the vessels that have been arrested or ceased?

A: The containers are property assets of Hanjin, or the companies it leased them from, and therefore subject to the jurisdiction of the stay imposed both the Korean & U.S. Chapter 15 courts. As such you have a duty to preserve the containers so that when and if they can be returned they will be in reasonably the same condition as when received. The good news is that Hanjin has announced it will not be demanding detention charges if the containers are returned when a procedure has been set up for return. We also recall to your attention the recent court order addressing in part container returns, a copy will be provided upon request.

Q&A, continued

Q: Is it a possibility that this cargo can go General Order?

A: Yes, cargo offloaded at a port that is not timely entered or transferred is subject to General Order time restrictions.

Q: Would it be prudent to file an estimated claim NOW?

A: Yes, for those shipments insured under an All-Risk Cargo policy, the insurer should be notified and a 'claims-watch' be set up.

Q: Is it legal for them to hold freight if the freight charges have not been paid?

A: Per the Hanjin BL terms, it is legal for the carrier to hold cargo for unpaid freight costs. For other parties such as terminal operators or drayage providers, they have a legal right to hold freight for non-payment as well.

Q: There is a lot of talk about putting a lien/seizing containers against non-payment of duplicate or demurrage charges. Can this hold up in court?

A: Yes, if the terminal operator or other entity is not releasing containers even though those charges should have been paid by Hanjin, the terminal operator or other entity in possession of the container is within its legal right to hold the container for payment even though that payment would have been made twice.

Q: Is there any instance of gross negligence that would lift any stated liabilities and allow for full recovery of damages as a result of willful negligence?

A: We read your question as asking if a claim of gross negligence could avoid any contractual or statutory limitation of liability. The overarching answer is that insofar as Hanjin is concerned, as matters stand Hanjin has been immunized by the bankruptcy court in Korea and the Chapter 15 court in the U.S. from any action against it or its assets. Therefore, any claim against Hanjin, regardless of the predicate, whether limited or not, will be subject to resolution by the bankruptcy court, most likely in Korea. If you are referring to a claim against an NVO, predicated on a claim of negligent selection or something of that sort, there is some very minor authority, which carries an extremely heavy burden of proof, for a claim of gross negligence, but we would not give such a claim much chance of success if prosecuted.

Q: Do you think Hanjin will declare general average?

A: General average does not apply to this situation.

Q: Is a class action lawsuit being considered?

A: There has been no intelligence of any class action law suits being contemplated or filed against Hanjin. Moreover, such actions would likely be precluded by the Chapter 15 Court's stay of all proceedings against Hanjin

Q: If Hanjin accepted, knowing with full intent of BK, why wouldn't the FMC regard this as a violation?

A: Violations of the Shipping Act can be highly fact-specific. The FMC has announced a protocol for the public's requests for assistance concerning Hanjin matters or possible Shipping Act violations. (<http://www.fmc.gov/NR16-18/>)

Q: If it goes on exam (no ISF) could we get the container from customs instead of the line?

A: An exam requested by CBP, for a lack of an ISF, would occur prior to CBP authorizing the release or transfer of the merchandise. The container remains under the control of the carrier, terminal operator or exam facility and is not allowed to be released without CBP's approval. CBP's approval to transfer or release cargo does not erase any unpaid charges on the cargo.

Q&A, continued

Q: Is an export NVO liable for \$500/container to get cargo delivered to final destination?

A: No, because the \$500 limitation of liability, which is presumably what you are referring to, is only applicable to cargo loss or damage, not other claims in connection with performance of the carriage subject to the NVO's house BL. In the context of your question, the NVO is responsible for completing carriage in keeping with its OTI tariff or service agreement. If charges are incurred in excess of those agreed to with the shipper, it is advisable to negotiate them with the shipper, and when the dust settles determine to what extent there is recourse against Hanjin's bankrupt estate, an intermediary carrier, MTO or other third party that may have been responsible for the excess charges.

Q: Should the NVO file force majeure with Hanjin?

A: Unfortunately not. Force Majeure is a defense, not a claim. It is something the NVO may be able to use in response to a claim from one of its shippers as a result of the NVO's inability to perform its house bill of lading contract of carriage due to the Hanjin bankruptcy. We recommend any NVOs review their Force Majeure clauses within their conditions of carriage and their tariffs with counsel.

Q: You might want to also point out that if a shipper/consignee is walking away from goods, there is a need to notify the VOCC promptly if the goods are abandoned.

A: As discussed in the presentation, OTIs are encouraged to closely monitor the status of all containers it manages or agrees to transport. When a shipper or consignee is going to abandon cargo, the OTI should promptly communicate with the appropriate parties to handle the disposition of the cargo and the return of the conveyance equipment. This minimizes the unnecessary accumulation of detention and demurrage charges.

Q: What about business interruption coverage?

A: Unfortunately, business interruption coverage will not apply here.

Q: What is the difference between Chapter 11 and Chapter 15 proceedings?

A: Chapter 11 is known as reorganization. It is filed with the intention of obtaining protection from creditors' claims with the goal of giving the bankrupt the opportunity to come back to life. Chapter 15 is merely a device to permit a U.S. court to act in cooperation with a foreign bankruptcy court and essentially to protect the bankrupt company and preserve its assets that are within the U.S. from any adverse action while the foreign court manages the bankruptcy abroad.

Q: In such proceedings, how the priority of creditors is set, agreed?

A: The issue of priorities and anything else regarding managing the bankrupt estate or its liquidation is subject to Korean bankruptcy law and is something about which we are not competent to provide well informed guidance.

Q: What is the role of Insurers? Was this potential risk included in a typical policy?

A: For cargo insured under All-Risk cargo insurance we have outlined in a previous answer some areas of potential coverage for the cargo owner. A transportation intermediary's Professional Liability/Errors & Omissions insurance will likely be there to defend the intermediary against allegations of negligence however as the Hanjin situation was not the faulty of the intermediary it's almost certain no liability can be assessed against the intermediary and therefore no damages will be paid.