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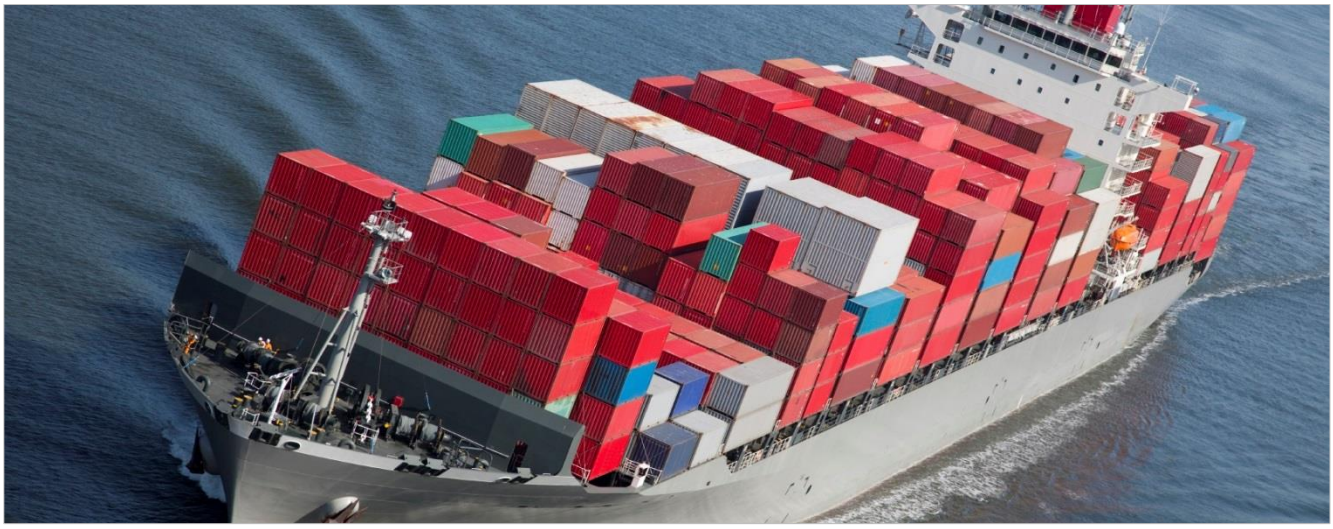

Cover Story

Aftermath of the Hanjin Saga – Can Terminal Operators Charge a "Ransom" Fee Before Allowing Shippers and Forwarders to Take Back Their Hanjin Cargoes?

Introduction

South Korea's Hanjin Shipping Co. ("**Hanjin**") was once the world's seventh-largest container carrier until its recent bankruptcy in late August 2016, which is expected to bring about numerous upcoming litigations and arbitrations between cargo owners, shippers, freight forwarders and suppliers who have contracted with Hanjin or were once in supply chains in which Hanjin was involved.

In the wake of the Hanjin crisis, terminal operators have been using various methods to protect their interests, in fear that they will not get paid by the insolvent Hanjin eventually. For instance, there are news reporting that Hanjin's major local port partner, the Hong Kong International Terminals ("**HIT**"), has been charging an additional "ransom" fee (as security deposit) from shippers and forwarders of Hanjin cargoes. As one can imagine, this may easily result in significant delivery delays and even disruptions to the supply chain in the event that shippers and forwarders are unwilling to pay. From a legal point of view, are terminals or port operators allowed to impose such additional payment obligation on shippers and freight forwarders? Or to put it in another way, can the affected shippers and freight forwarders commence legal proceedings against the terminal operators restraining them from doing so?

A recent Dutch decision

On 2 September 2016, a court in the Netherlands (Case no.: C/10/509258 / KG ZA 16-1005) has considered this issue and has ruled in favour of shippers and freight forwarders against the Europe Container Terminals ("**ECT**"), a Rotterdam container terminal operator which is owned by Hong Kong's Hutchison (the "**Dutch Decision**").

The proceedings were brought by various Dutch shipper organisations including EVO, TLN, Fenex and Fenedex (the "**Plaintiffs**") against ECT shortly

after Hanjin's receivership has commenced. In gist, the Plaintiffs applied for an injunction against the ECT in the Rotterdam Courts because ECT was charging for a release fee of €1,000 per dry container of Hanjin and a release fee of €1,500 per special unit of Hanjin (such as flat-racks and reefers) from their members. "That is almost three times the terminal handling charges...", said a supply chain director of a major German cargo owner, "what is the administrative charge, and how can they justify that?"

After hearing the parties' submissions, the judge ruled in favour of the Plaintiffs and pronounced that fixed release fees of approximately €1,000 to €1,500 per cargo, being charged by ECT on Hanjin cargoes held at the terminal, were unlawful. Accordingly, it ruled that ECT only allowed to charge the actual handling costs plus a surcharge of €25 per cargo (reported by Lloyd's Loading List). Nevertheless, it also held that ECT may still apply a "lien" (i.e. the right to keep possession of property belonging to another until a debt has been paid) against the Hanjin cargoes, if there a due but unpaid debt owed to the ECT.

The Plaintiffs are in general happy about the ruling of the Dutch Courts and are of the opinion that it is a step in the right direction. Having said that, it is unclear how wide the Dutch Decision will apply. EVO, one of the plaintiffs, indicated that only members of the four Plaintiff shipper associations could claim benefits of the award, and that the shippers or forwarders so affected must demonstrate, in addition to the usual conditions for exempting cargoes at ECT, that they are members of at least one of the Plaintiffs. Accordingly, it is likely that the Dutch Decision would only apply to members of the Plaintiffs' associations. That said, it is believed that more and more shipper groups will take out similar legal actions in their own jurisdictions to protect their interests.

The situation in Hong Kong

Recently, the Hong Kong Shippers' Council ("**HKSC**") has also expressed its "outrage" towards similar behaviours of HIT. As reported by Lloyd's List, the HKSC has received hundreds of complaints from its members and importers that HIT has forced them to pay an extra amount of HK$10,000 – HK$15,000 before they can take their Hanjin containers.

"This arrangement is not acceptable as cargoes belong to shippers, the beneficial cargo owners are not shipping lines," said Willy Lin of HKSC, "The terminal operators cannot have a lien over cargoes, they have no right to withhold containers and ask shippers to pay what are owed to them by the shipping lines". The HKSC has also indicated to the press that it has consulted its legal advisers and is considering legal action against such "unacceptable" moves.

Responding to the HKSC's allegations, HIT issued the following statement on 15 September 2016:

> *"HIT has offered special arrangements to minimise the impact to shippers and forwarders, and to assist the logistics industry to get through this difficult time. Representatives from the logistics industry, the Transport and Housing Bureau, and the member for the Legislative Council's Transport constituency held a meeting yesterday to follow up on the Hanjin incident. HIT's representative clearly stated in the meeting that HIT has put in place extra resources to provide emergency services to respond to the Hanjin incident."*

According to HIT, it has already released the handling details on the retrieval and return of Hanjin cargoes. So far, that has been no legal proceedings commenced against HIT in respect of the additional Hanjin cargoes handling charges.

Will the Dutch Decision be applicable in Hong Kong?

As mentioned above, the Dutch decision will only apply to members of the Plaintiff shippers associations. Therefore, parties who are aggrieved against HIT must commence legal proceedings in Hong Kong if they wish to obtain an order to prohibit HIT from charging additional fees for handling Hanjin cargoes. Similar to the Dutch Decision, it is unlikely that HIT would have legal basis to impose such additional charges on cargo owners and freight forwarders unless there is a contract between them, or the bill of ladings between the shippers and the cargo owners allowing HIT to apply such additional charges. This is because whether collection of an additional "release fee" is permissible should depend on the terms of the bill of ladings and/or commercial agreements made between the relevant parties on each occasion.

That said, before any judgment or injunction can be obtained from the Hong Kong court, there seems to be nothing which the shippers or forwarders could do to stop HIT from charging such additional fees for releasing Hanjin cargoes.

In the meantime, given that litigation may take time, the HKSC is of the view that the affected shippers and cargo owners in Hong Kong should still pay the "ransom" fee to HIT first to avoid delay in the collection of the cargoes and creation of further troubles such as cargo damage.

South Korea's Hanjin Shipping Files for U.S. Bankruptcy Protection

On 31 August 2016, South Korea's Hanjin Shipping Co. ("**Hanjin**"), the country's biggest shipping company, applied for receivership in the Seoul Central District Court. The application was filed one day after Hanjin's creditors had decided to cut off one of its lifelines, as financial assistance of more than 1 trillion won (i.e. approximately HK$7 billion) failed to keep it afloat. The Court will soon determine whether Hanjin should be liquidated or should remain as a going concern. Such process will usually take one or two months but is expected to be accelerated in Hanjin's case.

Meanwhile, Hanjin has filed for bankruptcy protection in the United States to protect its vessels from being seized by its creditors. South Korea's financial regulator said Hanjini is also planning to file for court protection in other countries such as Canada, Germany and the United Kingdom to protect its vessels. The collapse of Hanjin, the world's seventh-largest container carrier with a 2.9% market share, is expected to have a global impact on the shipping industry.

(Please refer to the Q&A section for further details.)

HKSC lashes out over Hanjin box deposit "highway ransom"

In the wake of Hanjin's collapse, the Hong Kong Shippers' Council ("**HKSC**") has received hundreds of complaints from its members and other importers, that a terminal operator in Hong Kong has forced them to pay a considerable amount of "deposit" before they can take their Hanjin Shipping containers. Although the HKSC refused to disclose the name of the operator, Lloyd's List has reported that the terminal operator in question is the Hong Kong International Terminals ("**HIT**"), a main receiver of Hanjin's containers in Hong Kong.

Mr Willy Lin, chairman of the HKSC criticized such behaviour of HIT as "too greedy". He further indicated to the press that the HKSC has already sought legal advice from its lawyers to consider the possibilities in commencing legal proceedings against HIT. Having said that, as litigation will take time, the HKSC is of the view that the affected cargo owners should still pay the deposit to HIT in the meantime to avoid the creation of further problems such as cargo damage.

Hong Kong mulls block exemption for some liner shipping agreements

Following the path of Singapore, the Hong Kong's Competition Commission has recently proposed a block exemption order ("**BSO**") in which vessel sharing agreements ("**VSAs**") will be exempted from the first conduct rule stated in the Competition Ordinance, provided that they can fulfil certain conditions. The conditions under the proposed BSO are:

(i) the parties to the VSA do not exceed the market share limit of 40% collectively;
(ii) the VSA does not require members to undertake cartel-related activities; and
(iii) members must be free to withdraw from a VSA without a penalty, upon serving reasonable notice.

The proposed effective period for the BSO is five years. There is also a proposed six-month grace period to allow parties time to make transition arrangements. All stakeholders and interested parties are now invited to present their opinions regarding the proposed BSO to the commission via email, fax or post by 6:00 pm on 14 December 2016.

Shanghai and Singapore see higher box throughput in August

Shanghai and Singapore are two of the fastest-growing marine hubs in Asia. As revealed by recent statistics published by the Shanghai International Port (Group), there was a remarkable increase of 5% in the container volumes handled in Shanghai in the month of August. In fact, August is the third consecutive month this year in which the number of containers handled in Shanghai has risen. As for Singapore, data published by the Maritime and Port Authority of Singapore also reported an increase of 6.2% in container throughput for August.

To enhance their respective competitiveness, Shanghai is looking for opportunities to cooperate with London to develop its fledging shipping services industry, while Singapore is seeking to perfect its shipping practices by starting a maritime community to improve and promote maritime safety as announced by its Maritime and Port Authority recently.

Bahamas Oil Refining Company International Limited v The Owners of the Cape Bari Tankschiffahrts GMBH & Co KG

[2016] UKPC 20, Privy Council, Lord Neuberger, Lord Mance, Lord Clarke, Lord Sumption and Lord Toulson, 19 July 2016

Cape Bari is a vessel owned by the Respondents (the "**Vessel**"). On 25 May 2012, the Vessel arrived at the Appellants' terminal to load a cargo of crude oil. Prior to entering the terminal, the master of the Vessel signed two agreements on behalf of the Respondents, in which one of them was a "Conditions of Use" to govern the Respondents' use of the berth (the "**Conditions**"). Shortly thereafter, the Vessel collided with the Appellants' sea berth while under a local pilot's navigation, causing serious damages alleged to be approximately US$22 million.

The Respondents argued that they should not be liable for the entire US$22 million as they were entitled to limit their liability to a certain amount under the Convention on Limitation of Liability for Maritime Claims 1976 (the "**Convention**"), which had been incorporated into the Bahaman law by the Merchant Shipping (Maritime Claims Limitation of Liability) Act 1989 (the "**Act**"). Nevertheless, the Appellants argued that the Respondents have effectively waived or contracted out the right to limit liability by its signing of the Conditions, as there was a clause therein providing that the Respondents would be liable for "all and any loss, damages, costs and expenses" incurred by the Appellants in connection with the Vessel's use of the terminal.

The Privy Council held that it was permissible for the owner of a vessel to contract out of or waive their statutory right of limitation under the Convention. Nevertheless, in order to do so, that provision relied upon must make it clear that that is what is intended. The more valuable the right abandoned by a party to a contract, the clearer the language needed to be. In the present case, on the true construction of the clause in question, the Respondents had not contracted out of the Convention and the Act as there was no mention of either instrument. The effect of such clause was just to impose a liability on the Respondents for them to hold the Appellants harmless and that liability was up to the statutory limit under the Convention.

Connect Shipping Inc and Another v Sveriges Anfgartygs Assurans Forening (The "Renos")

[2016] EWHC 1580 (Comm), Queen's Bench Division, Commercial Court, Mr Justice Knowles, 1 July 2016

The Renos (the "**Vessel**") was significantly damaged as a result of a fire that had broken out in its engine room. The owners of the Vessel (the "**Claimants**") issued a notice of abandonment and claimed that they should be indemnified by the Defendant insurers on a constructive total loss basis, which would be available where the cost of repairing the Vessel would be higher than its current value. However, the Defendant insurers disagreed and contended that the Claimants should only be indemnified on a partial loss basis.

In deciding whether the Claimants were entitled to be indemnified on a constructive total loss basis, the Court had to first determine whether the Claimant's notice of abandonment was filed too late. Under s. 52(3) of the Marine Insurance Act 1996 (the "**Act**"), a notice of abandonment must be given with reasonable diligence after the receipt of reliable information of the loss, but where the information is of a doubtful character, the assured is entitled to a reasonable time to make inquiry. Taking into account the fact that this case was complicated and the Claimants were in receipt of conflicting information from experienced sources on the estimated costs of repair, the Court was of the view that the Claimants had satisfied the requirements of giving a notice of abandonment with reasonable diligence.

The next issue was whether the Claimants should be entitled to recover costs of repair incurred before the notice of abandonment, and the Court rejected both of the Defendant insurer's arguments on this issue. Firstly, it held that the Defendants was wrong to argue that pre-notice of abandonment costs are not within the scope of constructive total losses for the reason that the assured could have given a "protective notice of abandonment" at an early stage where there seems a possibility that it may later call for an indemnification on a constructive total loss basis. The Court held that the filing of a "protective notice of notice of

Connect Shipping Inc and Another v Sveriges Anfgartygs Assurans Forening (The "Renos") *(con'd)*

[2016] EWHC 1580 (Comm), Queen's Bench Division, Commercial Court, Mr Justice Knowles, 1 July 2016

abandonment" carries with it the risk that the Claimants would be bound by their premature decision of abandonment as such notice is irrevocable once accepted by the insurers. Secondly, it held the Defendants have mistakenly assumed that the word "future" in section 60 of the Act refers only to the period after filing of the notice of abandonment.

Accordingly, the Court held that it has no basis to limit the costs of the Claimants to those incurred after the notice of abandonment and the Claimants were entitled to both their pre-notice of abandonment costs and certain post-notice of abandonment costs.

Saga Cruises Bdf Ltd and Another v Fincantieri Spa

[2016] EWHC 1875 (Comm), Queen's Bench Division, Commercial Court, Sara Cokerill QC, 29 July 2016

This case concerns two distinct claims, both of which arise out of a contract made between Saga Cruises (the "**Owners**") and Fincantieri SPA (the "**Yard**"), under which the latter contracted to carry out repair, refurbishment and fit-out works (the "**Works**") to one of the Owners' cruise ships, the Saga Sapphire (the "**Vessel**").

The First Claim: Concurrent Delay

The first claim is a claim by the Owners to recover liquidated damages for delay, as completion of the Works was delayed for about 14 days. The Yard argued, among other things, that they should not be liable to pay as the delay was caused by two events concurrently, one for which the Yard was responsible and the other one for which the Owners were responsible. However, the Court rejected the Yard's contentions in relation to the Owners' delays and found the Yard liable for the entire delay. It held that the Owners' delays had been subsumed by the Yard's own delays such that the Owners' existing delays made no difference to the completion date. In other words, the Owners' delays had not caused any additional delay to completion which was not already accounted for by the Yard's delays and hence the Yard is liable to pay liquidated damages to the Owners.

The Second Claim: the Yard's Breach of Duty

The second claim is for an alleged breach of duty of the Yard. This is because after redelivery of the Vessel, it was bareboat-chartered to a third party cruise operator and broke down shortly after being overhauled at a shipyard. The cause of the break down was found to be a failure of the luboil coolers. The third party cruise operator claimed that such loss was the Yard's responsibility as a result of their failure to perform their obligations under the contract with the Owners.

The Court held that the Yard owed a duty to the Owners to use reasonable skill and care in cleaning the luboil coolers and an obligation to inspect and advise the

***Saga Cruises Bdf Ltd and Another v Fincantieri Spa** (con'd)*

[2016] EWHC 1875 (Comm), Queen's Bench Division, Commercial Court, Sara Cokerill QC, 29 July 2016

Owners on any defects in the luboil coolers. The Yard breached both of those duties. On the facts of the case, there was no evidence of any compromise in relation to potential claims arising out of the Yard's work on the coolers. Further, all of the losses suffered by the Owners were losses occurring "naturally in the usual course of things" and are therefore direct losses instead of consequential losses which would be excluded under the Contract.

Nevertheless, despite the Court's finding on the Yard's breach of duty, it held that this second claim failed on causation grounds. The Court was of the view that even if the Yard had properly complied with that duty, it would not on the balance of probabilities have revealed the need for retubing. There is no evidence that the Yard should have been aware of and informed the Owners of anything which Owners did not themselves observe.

Accordingly, the Yard was only held liable to pay liquidated damages for a number of delays up till the date of redelivery, but not for the losses incurred by the Owners due to the breakdown of the Vessel.

In the Wake of the Hanjin Crisis, What Can Cargo Owners and/or Creditors of Hanjin Do in order to Better Protect Their Interests?

Background

The collapse of Hanjin Shipping Co., Ltd ("**Hanjin**"), one of the world's largest shipping companies, continues to have an impact on the shipping industry worldwide. About two weeks ago, a spokesperson of Hanjin said that 44 of its 98 container ships were not allowed access to ports such as Shanghai, Sydney and Hamburg. There were also news reporting that Hanjin's major local port partner, the Hong Kong International Terminals, is asking HK$10,000 in handling charge and an additional security deposit from carrier owners of Hanjin cargoes.

What is the latest development of Hanjin's bankruptcy?

31 Aug 2016	Hanjin filed for receivership in the Seoul Central District Court.
1 Sep 2016	An order was granted by the Seoul Central District Court for Hanjin to commence rehabilitation proceedings in Korea.
5 Sep 2016	Hanjin filed for bankruptcy protection in the United States preventing its vessels from being arrested and seized, and preventing creditors from bringing legal action against it in the United States.
6 Sep 2016	Hanjin gets a $90m lifeline as it seeks to unload its stranded vessels at the ports in Asia and Europe.
7 Sep 2016	Interim bankruptcy protection was granted to Hanjin in the United States.
10 Sep 2016	A bankruptcy judge in the United States granted a protection order that will allow Hanjin ships to dock at the ports in the United States without fear of arrest
16 Sep 2016	The Singapore High Court granted an interim stay order recognizing Hanjin's rehabilitation proceedings in Korea, preventing arrest of Hanjin ships in Singapore and allowing Hanjin vessels to unload at Singapore ports.

What are the implications for cargo owners and/or Hanjin's creditors?

As of August 2016, Maritime analyst Alphaliner reports that Hanjin operates a fleet of 98 cellular ships, some 44 bulk carriers and tankers and 11 dedicated container terminals around the world. Even though Hanjin's market share is relatively small, its bankruptcy may still potentially bring about disruption of more than 600,000 teu of shipping capacity, thereby having adverse impacts on the operations of cargo owners.

Although Hanjin has filed for bankruptcy protection in countries such as the United States and Singapore, its assets remain unprotected in most of the other jurisdictions in the world. In the fear of not getting paid, it is expected that ports and operators will continue to turn Hanjin's vessels away, leaving them stranded outside the ports and causing disruption to the delivery of merchandises. This can result in significant delivery delays and may even disrupt the entire supply chain. The risk of loss may be even greater for owners of perishable cargoes.

Can shippers, cargo owners or the parties affected sue for late delivery of cargoes?

In principle, cargo owners or shippers with cargo awaiting delivery may be able to recover damages from Hanjin and/or other parties for any loss incurred as a result of or in connection with the late delivery of the cargoes. Cargo owners or other parties so affected should therefore carefully review and scrutinise their existing agreements with Hanjin or other carriers who have vessel-sharing arrangements with Hanjin to assess whether they may claim against Hanjin or other carriers. Having said that, as Hanjin is sitting on debts worth over USD5.37 billion, it seems difficult for any judgment against Hanjin to be enforced even in jurisdictions where bankruptcy protection from legal proceedings was not granted to Hanjin. In the meantime, it is advisable for shippers and cargo owners to renegotiate the transport or redelivery of their cargoes with new carriers as soon as possible, to avoid incurring further losses.

Can cargo owners or the parties affected file for ship arrest and/or recovery against Hanjin's assets in Hong Kong?

Hong Kong has no bilateral treaty with South Korea which would recognise rehabilitation proceedings that take place in South Korea. Further, in the case *The Convenience Container & Others* [2006] 3 HKLRD 610, it was held that plaintiff is entitled to arrest the defendant's vessels in Hong Kong despite the defendant was voluntarily wound up in Singapore. Therefore, creditors, shippers and/or cargo owners affected may be able to file for arrest against Hanjin's vessels in Hong Kong to obtain security for their claims. Likewise, it is possible to enforce judgment against Hanjin's assets in Hong Kong. However, it is uncertain whether and when Hanjin's vessels will arrive in Hong Kong. Further, as Hanjin is severely indebted to creditors around the world, it is unlikely that Hanjin would have any asset which may enable the creditors, shippers and/or cargo owners to enforce against in Hong Kong. In any event, creditors, shippers and cargo owners are recommended to seek immediate guidance and legal advice to protect their positions and maximize their chances of recovery.

Can cargo owners make an insurance claim?

According to a recent report published by Marsh & McLennan, Hanjin's collapse will bring considerable concern as to whether all relevant parties can be adequately covered. This is because one particular exclusion clause commonly found in marine cargo insurance policies, namely the "Insolvency of Carrier Exclusion" (Clause 4.6 of the Institute Cargo Clauses A, B and C), expressly excludes insurance coverage for loss, damage or expense arising from insolvency or financial default of owners and operators of vessels. Therefore, depending on the terms of the marine cargo insurance policies, shippers and cargo

owners may have difficulty in making an insurance claim on their cargo insurance policies should their cargoes on Hanjin's vessels be damaged or lost due to delays resulting from Hanjin's insolvency. Nevertheless, these standard Institute Cargo Clauses are often just a starting point, as numerous amendments and alterations to the terms and conditions may apply on a case-by-case basis. Shippers and cargo owners who would like to bring insurance claims should therefore review their own marine insurance policies to ascertain if they are adequately covered.

The Hanjin Crisis – the Way Forward?

After the order for Hanjin to commence rehabilitation proceedings was made by the Seoul Central District Court on 1 September 2016, the South Korean government has formed a task force to monitor the matter so to enable it to take appropriate steps when necessary. At the same time, Seok Tae Soo, Hanjin's CEO, was requested to submit a revival plan to the Courts by 25 November 2016. Meanwhile, there have also been talks that Hyundai Merchant Marine Co. Ltd ("**Hyundai**"), Hanjin's biggest competitor, is considering to take over some of Hanjin's vessels and assets with the support of the state-owned Korea Development Bank. Nevertheless, like Hanjin, Hyundai itself is suffering from cash flow problems and the company has recently announced a restructuring plan to issue around HKD139 million worth of convertible bonds.

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