

Chapter 15 at 11: Chapter 15 provides provisional relief in *Hanjin Shipping*

January 06 2017 | Contributed by [Caplin & Drysdale, Chartered](#)

Background

[Chapter 15 overview](#)

[Hanjin decision](#)

[Amendments to bankruptcy rules](#)

[Comment](#)

This is the second instalment in a series on the US cross-border insolvency statute, Chapter 15 of the Bankruptcy Code, which took effect 11 years ago (for further details please see "[Chapter 15 at 11: Bankruptcy Code's cross-border insolvency law approaches 11th anniversary](#)").

Background

On August 31 2016 one of the world's largest shipping companies, Hanjin, filed for insolvency protection in South Korea because a liquidity crisis had rendered it unable to meet its debts, including those owed to creditors in the United States. On the same day that Hanjin commenced its insolvency proceeding, the Korean court granted an injunction staying all creditors from taking action against Hanjin and its assets. The stay was intended to have worldwide application. However, creditors holding US maritime liens threatened to arrest and seize Hanjin's vessels – along with containers, cargo, bunker fuel and other onboard assets – as soon as the vessels entered US territorial waters. Hanjin's vessels were stranded in international waters, unable to dock at US ports due partly to the threat of arrest and seizure. (1) Even if Hanjin's vessels were permitted to enter US ports without arrest and seizure, there was no assurance that their cargo would be unloaded or the vessels refuelled, as Hanjin's suppliers could take the position that the insolvency filing permitted them to terminate their contracts with Hanjin. (2) Companies reportedly scrambled to find alternative means to move their goods. Without the assurance of a reliable shipping service, Hanjin feared that "a mass of transport contracts might be cancelled and clients might leave, which necessarily would result in a rapid decrease of [Hanjin's] sales and decrease in the value of its assets". (3)

This is where Chapter 15 of the Bankruptcy Code entered the picture. Under Chapter 15, a representative of a foreign insolvency proceeding may petition a US bankruptcy court for recognition of that proceeding. Hanjin's foreign representative did just that and petitioned the US Bankruptcy Court for the District of New Jersey to recognise the Korean insolvency proceeding as a 'foreign main proceeding'. Once recognition of a foreign main proceeding is obtained, the automatic stay applies to halt actions by creditors with respect to the foreign debtor and its property located within the territorial jurisdiction of the United States. (4) Other protections of the Bankruptcy Code may also be available upon recognition, such as Section 365(e), which prohibits counterparties from modifying or terminating executory contracts. (5) However, a court cannot grant recognition immediately after a Chapter 15 petition is filed. The Federal Rules of Bankruptcy Procedure require that interested parties be given "at least 21 days' notice by mail of the hearing" on the petition for recognition of a foreign proceeding. (6) The 21-day period may be extended if necessary, to ensure that creditors with foreign addresses are afforded reasonable notice by mail. (7) The 21-day period may also be shortened by the bankruptcy court, as a result of amendments to the bankruptcy rules that took effect on December 1 2016. (These amendments are discussed below.) To protect the debtor's assets and the creditors' interests during the so-called 'gap period' – the period between

AUTHOR

[Jeffrey A Liesemer](#)



filing of the Chapter 15 petition and the bankruptcy court's ruling on recognition – Chapter 15 provides for the award of interim or provisional relief, such as "staying execution against the debtor's assets".(8)

In conjunction with the petition for recognition, Hanjin's foreign representative moved to apply the automatic stay under Section 362 of the code on a provisional basis to block creditor enforcement actions against the vessels and other assets. The foreign representative also sought, on a provisional basis, to invoke Section 365(e) of the code, which would preclude Hanjin's contracted counterparties from modifying or terminating their contracts. On September 9 2016 the bankruptcy court granted an order granting provisional relief, including application of the automatic stay to block the enforcement of maritime liens and the seizure of vessels.(9) Although the order did not resolve or alleviate all of the challenges facing Hanjin, it did enable the shipper's vessels "to continue operating in the ordinary course, to enter U.S. territory without the fear of arrest or seizure, and to bring containers and cargo to land that otherwise would be stuck at sea".(10)

Chapter 15 overview

Provisional relief

Under Chapter 15, a foreign representative may seek provisional relief if "relief is urgently needed to protect the assets of the debtor or the interests of the creditors".(11) The bankruptcy court may grant provisional relief only if "the interests of the creditors and other interested entities, including the debtor, are sufficiently protected".(12) Under this requirement, the court must consider the interests of all the debtor's creditors, not just US creditors. The court may refuse provisional relief if it "would interfere with the administration of a foreign main proceeding".(13) In addition, the court may refuse provisional relief if such relief "would be manifestly contrary to the public policy of the United States".(14)

Section 1519 of the code provides a non-exclusive list of provisional relief that may be granted.(15) In addition to staying execution against a debtor's assets, the bankruptcy court may:

- entrust the foreign representative with the administration of some or all of the debtor's US assets;(16)
- suspend the right to transfer, encumber or dispose of the debtor's assets;
- authorise the examination of witnesses or other discovery regarding the debtor's assets, rights, affairs, liabilities or obligations; and
- grant other remedies available to a trustee in a plenary bankruptcy case, except the power under the Bankruptcy Code to void certain transfers or obligations.(17)

Although Section 1519 of the code does not mention the automatic stay under Section 362, it is not uncommon for foreign representatives to seek application or imposition of the automatic stay on a provisional basis, rather than the issuance of a temporary injunction. A foreign representative's decision to pursue that route can alter the legal procedures and substantive requirements that the representative must follow or satisfy.

The court may make provisional relief subject to any condition that it considers appropriate, including the posting of a security or bond.(18) Any provisional relief granted by the court will terminate automatically upon recognition, unless the court orders the relief to remain in effect post-recognition.(19) Moreover, the court may modify or terminate provisional relief if the interests of creditors and other entities, including the debtor, are sufficiently protected.(20)

Any provisional injunctive relief granted under Section 1519 cannot block a police or regulatory action of a governmental unit, including a criminal action.(21) This limitation is not found in the United Nations Commission on International Trade Law Model Law on Cross-Border Insolvency, on which Chapter 15 is based. Presumably, the limitation is intended to ensure that injunctions or stays granted under Section 1519 are in line with, and do not exceed, the scope of the automatic stay under Section 362, which has similar carve-outs with respect to police and regulatory actions and criminal proceedings.(22) Nevertheless, the legislative history of Chapter 15 states that nothing in Section 1519 reduces or expands the scope of remedies available under Section 105(a) of the code, which is the 'all writs' statute that bankruptcy courts normally invoke when granting injunctive and other equitable relief. As a result, according to the legislative history, Section 105(a) is the "only avenue"

available under the code to enjoin police and regulatory actions.(23)

Injunctions: standards and procedures

Section 1519(e) provides that the "standards, procedures, and limitations applicable to an injunction shall apply to relief under this section".(24) The Supreme Court has outlined the standard for obtaining a preliminary injunction as follows:

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest."(25)

It is unclear why this injunctive relief standard should apply to other forms of provisional relief, such as discovery. Indeed, the case law is divided over whether this standard applies to all forms of provisional relief in Chapter 15 or only when an injunction is sought as a provisional remedy.(26) This issue has arisen in the context of requests to apply or impose the automatic stay provisionally. Courts siding with the view that the prerequisites for injunctive relief do not apply to such requests have emphasised the differences between injunctions (eg, which are directed to parties in litigation) and the automatic stay (eg, which is a statutory moratorium directed to the world at large).(27)

Some courts have grappled with another issue regarding the procedures to obtain provisional relief in light of Section 1519(e)'s reference to "procedures...applicable to an injunction". The Federal Rules of Bankruptcy Procedure require the filing of an adversary proceeding in order to obtain a preliminary injunction.(28) Adversary proceedings are equivalent to non-bankruptcy civil actions in the federal courts and involve more procedural hurdles than filing a motion in the main bankruptcy case.(29) As with the injunction standard, the courts are divided on whether foreign representatives must commence adversary proceedings to obtain provisional relief. One court has held that an adversary proceeding is not necessary unless a temporary injunction or stay of execution is being sought.(30) Another court has held that an adversary proceeding is not required at all because requests for provisional relief are "ancillary" to petitions for recognition, which are heard and determined in the main bankruptcy case, thus: "it does not make sense to require an adversary proceeding for provisional, or preliminary, relief where the underlying action for recognition does not require one".(31)

Hanjin decision

The bankruptcy court in *Hanjin* did not expressly address any of these standard and procedure issues in its written rulings. Citing an unpublished decision of the US Bankruptcy Court for the District of New Jersey – which states (without discussion) that provisional relief in Chapter 15 "requires satisfaction of the injunctive relief standard"(32) – the foreign representative in *Hanjin* argued that he was entitled to application of the automatic stay because the prerequisites for injunctive relief were satisfied. The court agreed, making the requisite findings with regard to irreparable harm and the likelihood of obtaining recognition.(33) In addition, the foreign representative sought provisional relief as part of an omnibus motion filed in the main bankruptcy case, which contained requests for other forms of relief, including recognition of the Korean insolvency proceeding. By including the request for provisional relief within this larger motion, the foreign representative might have been presenting provisional relief as something integral and ancillary to recognition, and therefore belonging in the main case. It is unclear whether the foreign representative made such a tactical decision. Nevertheless, the bankruptcy court did not expressly address or weigh in on the issue; it simply granted provisional relief without mentioning whether an adversary proceeding was required.

Amendments to bankruptcy rules

Recent amendments to the Federal Rules of Bankruptcy Procedure, which took effect on December 1 2016, could have bearing on the procedures issue discussed above. In particular, amended Rule 2002(q) now requires a bankruptcy court to "promptly schedule and hold a hearing on the petition [for recognition]" after it is filed.(34) The amended rule further provides that, if the court "consolidates the hearing on the petition [for recognition] with the hearing on a request for provisional relief, the court may set a shorter notice period" for the hearing, in lieu of the standard 21-day notice period.(35) These amendments are intended to respond to Section 1517(c) of the code,

which provides that petitions for recognition "shall be decided upon at the earliest possible time".

(36) In the wake of these amendments, it remains to be seen whether shortened notice periods for recognition and consolidated hearings will become normal practice. Since petitions for recognition are heard and determined in the main bankruptcy case, (37) it also remains to be seen whether the availability of consolidated hearings on provisional relief and recognition will support the view that foreign representatives need not file separate adversary proceedings to obtain provisional relief.

Comment

The *Hanjin* case is an example of how essential provisional relief can be for foreign debtors to preserve the status quo and maintain business operations before a ruling on recognition. However, provisional remedies are merely the opening phase of a Chapter 15 case. To obtain the full benefits of Chapter 15, recognition of the foreign insolvency proceeding must also be obtained – this will be discussed in the next instalment in this series.

For further information on this topic please contact [Jeffrey A Liesemer](#) at *Caplin & Drysdale*, Chartered by telephone (+1 202 862 5000) or email (jliesemer@capdale.com). The *Caplin & Drysdale* website can be accessed at www.capdale.com.

Endnotes

(1) Decision and order on maritime lienholders' motion for reconsideration ¶¶ 1 11(a), *In re Hanjin Shipping Co Ltd*, 16-27041 (Bankr DNJ September 20 2016) ECF 191. Hanjin's vessels were also barred from entering ports around the world "because of uncertainty about who would pay docking fees, container-storage and unloading bills". Costas Paris and Erica E Phillips, "*Hanjin Shipping's Troubles Leave \$14 Billion in Cargo Stranded at Sea*", *Wall St Journal*, September 7 2016, available at <http://www.wsj.com/articles/billions-in-cargo-remains-stranded-at-sea-1473285117>.

(2) Order granting provisional relief pursuant to Sections 362, 365(e), 1519, 1520 and 105(a) of the Bankruptcy Code pending hearing on petition for recognition as a foreign main proceeding ¶ G at 4, *In re Hanjin Shipping Co Ltd*, 16-27041 (Bankr DNJ September 9 2016), ECF 102.

(3) Declaration of Tai-Soo Suk in support of (I) verified Chapter 15 petition; (II) motion of foreign representative for entry of provisional relief in aid of foreign main proceeding; and (III) certain related relief ¶ 15, at 5, *In re Hanjin Shipping Co Ltd*, 16-27041 (Bankr DNJ September 2 2016), ECF 3.

(4) 11 USC § 1520(a)(1).

(5) *Id* §§ 365(e), 1521(a)(7).

(6) Fed R Bankr P 2002(q)(1).

(7) *Id* 2002(p)(1).

(8) 11 USC § 1519(a)(1).

(9) See provisional relief order, *supra* note 2, at 5 to 6. Three creditors appealed the provisional relief order to the US District Court for the District of New Jersey and requested a stay of the order pending the appeal, which the court denied. The creditors then appealed the denial of their requested stay to the US Court of Appeals for the Third Circuit, which dismissed the appeal on the ground that denial of the stay was not an appealable order.

(10) Appellee's objection to appellant's amended motion for emergency review 3, *In re Hanjin Shipping Co Ltd*, 16-3652 (3d Cir September 22 2016). See also Bonnie Eslinger, "Bankrupt Hanjin Shipping Unloading Cargo at California Port", *Law360* (September 12 2016), available at www.law360.com/articles/838737/bankrupt-hanjin-shipping-unloading-cargo-at-calif-port.

(11) 11 USC § 1519(a)(1).

(12) *Id* § 1522(a). The United Nations Commission on International Trade Law Model Law on Cross-Border Insolvency – which Chapter 15 is based on – uses the words 'adequately protected' rather than 'sufficiently protected', but Congress opted to use 'sufficiently protected' to avoid confusion with the specialised term 'adequate protection' under US bankruptcy law, which refers to the court-fashioned protection to prevent diminution in value of a secured creditor's collateral. See HR Rep 109-31(I), at 115 (2005), as reprinted in 2005 USCCAN 88, 178.

(13) 11 USC § 1519(c).

(14) *Id* § 1506.

(15) See *id* § 1519(a), providing that "the court may...grant relief of a provisional nature, *including...*" (emphasis added), and *Vitro SAB de CV v ACP Master Ltd*, 455 BR 571, 579 (Bankr ND Tex 2011) stating that "the relief enumerated in section 1519 is not all-inclusive".

(16) 11 USC § 1519(a)(2).

(17) *Id* § 1519(a)(3).

(18) *Id* § 1522(b).

(19) *Id* §§ 1519(b), 1521(a)(6).

(20) *Id* § 1522(a).

(21) *Id* § 1519(d).

(22) 11 USC § 362(b)(1) and (4). In addition, the court may not stay the exercise of certain rights under financial or security-related contracts in a Chapter 15 case, rights that are also exempted from reach of the automatic stay. See *id* § 1519(f).

(23) HR Rep 109-31(I), at 114 (2005), as reprinted in 2005 USCCAN 88, 176-77.

(24) 11 USC § 1519(e).

(25) *Winter v NRDC Inc*, 555 US 7, 20 (2008).

(26) Compare *In re Pro-Fit International Ltd*, 391 BR 850, 861 (Bankr CD Cal 2008) (holding that the prerequisites for injunctive relief apply "only where the relief sought under § 1519 is injunctive relief, such as the staying of execution pursuant to § 1519(a)" and not where "the foreign representative is seeking different relief", such as imposition of the automatic stay under Section 362) with *In re Worldwide Educational Services Inc*, 494 BR 494, 498-99 (Bankr CD Cal 2013) (holding that the prerequisites for injunctive relief apply to all forms of provisional relief in Chapter 15, including requests to impose the automatic stay). See also *In re Ace Track Co*, 556 BR 887, 894 note 6 (Bankr ND Ill 2016) agreeing in *dictum* with *Pro-Fit* that the standards and procedures applicable to injunctions do not apply to requests to impose the automatic stay provisionally in Chapter 15.

(27) See *Ace Track*, 556 BR at 894 6; *Pro-Fit International*, 391 BR at 864 to 865.

(28) Fed R Bankr P 7001(7), 7065.

(29) These requirements and hurdles include the preparation and filing of a complaint that satisfies applicable pleading standards, the payment of a filing fee, the issuance and service of a summons, and the preparation and filing of motion requesting injunctive relief. See Fed R Bankr P 7003, 7004, 7008, 7009 and 7065. In addition, any injunction or restraining order issued in an adversary proceeding must state the reasons why it was issued and describe in reasonable detail the acts enjoined or restrained. This is binding only on the parties and their representatives who receive actual notice of it by personal service or otherwise. See Fed R Civ P 65(d).

(30) See *Pro-Fit International*, 391 BR at 861 noting that a request for a stay of execution under

Section 1519(a)(1) "would require an adversary proceeding" while a request to impose the automatic stay would not.

(31) *Worldwide Educational Services*, 494 BR at 499 note 1. See also *Ace Track*, 556 BR at 894 note 6: "From a purely practical standpoint, requiring an adversary for interim relief would...make such relief difficult if not impossible to obtain prior to the hearing [on the petition for recognition] to which the relief is intended to act as a bridge." See also *In re Ho Seok Lee*, 348 BR 799, 801 (Bankr WD Wash 2006), holding that a request for a permanent injunction in Chapter 15 to protect a foreign debtor's assets did not require the filing of an adversary proceeding. But cf Fed R Bankr P 1018 advisory committee's note to 2010 amendment, stating that "proceedings governed by § 1519(e)...of the Code *must* comply with [Bankruptcy] Rules 7001(7) and 7065, which provide that actions for injunctive relief are adversary proceedings governed by Part VII of the rules" (emphasis added). The advisory committee notes accompanying the bankruptcy rules are "not determinative" of a legal issue, but are "of weight" in a court's interpretation of a rule. See *Torres v Oakland Scavenger Co*, 487 US 312, 316 (1988) (citations omitted); *In re Nat Football League Players Concussion Injury Litig*, 775 F 3d 570, 577 note 6 (3d Cir 2014).

(32) *In re Innua Canada Ltd*, 09-16362 (DHS), 2009 WL 1025088, at *3 (Bankr DNJ March 25 2009).

(33) Provisional relief order, *supra* note 2, at 4 to 5.

(34) Fed R Bankr P 2002(q)(1).

(35) *Id.*

(36) 11 USC § 1517(c). See also Fed R Bankr P 2002 advisory committee's note to 2016 amendment.

(37) See Fed R Bankr P 1018.

The materials contained on this website are for general information purposes only and are subject to the [disclaimer](#).