UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW JERSEY

In Re: **HANJIN SHIPPING CO., LTD.,** Debtor.	Case No.: 16-27041 (JKS) Judge: Hon. John K. Sherwood

DECISION AND ORDER
ON MARITIME LIENHOLDERS'
MOTION FOR RECONSIDERATION

The relief set forth on the following pages, numbered two (2) through sixteen (16), is hereby **ORDERED**.

9/20/16

INTRODUCTION

1. Early in this international bankruptcy case, Hanjin Shipping Co., Ltd. (the "Debtor") sought protection of its cargo vessels as they entered ports within the United States from the lien claims of suppliers of goods and services to the vessels. The suppliers sought to enforce their liens or, in the alternative, the posting of a bond or some other security by the Debtor as substitute protection for their liens. Since the Debtor is a company based in South Korea and has commenced insolvency proceedings in its home country, the Court's role is to direct creditors to the Korean court for an orderly and fair distribution of the Debtor's assets. Thus, to the extent the Debtor can obtain financing to bring its ships to United States ports, it can do so under protection of a stay. The Debtor's suppliers can seek to enforce their lien claims in the insolvency proceedings pending in Korea.

2. This matter is before the Court on the Motion of OceanConnect Marine, Inc., Glencore, McAllister Towing & Transportation, Inc. and Moran Towing Corporation (the "Maritime Lienholders") for reconsideration of the Court's Order dated September 9, 2016 which denied their rights of arrest or security. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(P). Venue is proper under 28 U.S.C. § 1410. The Motion for reconsideration is denied. The Court's findings of fact and conclusions of law are set forth below.

BACKGROUND AND PROCEDURAL HISTORY

3. On August 31, 2016, Hanjin Shipping Co., Ltd. filed an Application under South Korea's Debtor Rehabilitation and Bankruptcy Act. Tai-Soo Suk (the "Foreign Representative") was appointed as custodian by the South Korean District Court.[1]

4. The Debtor is headquartered in Seoul, South Korea. It transports over 100 million tons of cargo per year and is the largest shipping company in Korea.[2] After the global recession and financial crisis of 2008, the international shipping business experienced a drastic reduction in demand for transportation of goods. Additionally, the Debtor and competing companies were further harmed by an excess supply of vessels that exceeded the demand for transported goods. Combined, these factors contributed to the Debtor's dire financial situation.[3]

5. On September 2, 2016, the Debtor filed a Petition for Recognition under Chapter 15 of the Bankruptcy Code in this Court. On that date, the Debtor also filed an emergent Motion for a Provisional Order of Recognition.[4] The Court scheduled a hearing on the emergent Motion for September 6, 2016.

6. The emergent Motion sought, among other things, to impose the automatic stay provided under the Bankruptcy Code (11 U.S.C. § 362) and sought provisional recognition of the stay Order issued by the Korean Court.[5]

7. At the hearing on September 6, the Maritime Lienholders opposed the relief requested in part, essentially arguing that if they were going to be subject to the stay, their lien rights

[1] Debtor's South Korean petition is attached to the Chapter 15 Bankruptcy Petition (ECF 1).
[2] Declaration of Tai-Soo Suk in Support of the Verified Chapter 15 Petition (ECF 3, at 3).
[3] *Id.* at 4.
[4] (ECF 5).
[5] The stay Order is attached to the Declaration of Wan Shik Lee Nam (ECF 4, at Exhibit "B").

under United States maritime law deserved sufficient protection in the form of a bond, cash deposit or other security, and if such protection was not provided, the provisional stay should not apply. At the time of hearing, some thirteen (13) of the Debtor's cargo ships were outside of United States territorial waters and were loaded with containers of cargo to be delivered to customers in the United States and Canada. It was argued that these ships were unable and/or unwilling to enter United States ports due to fear of "arrest" by holders of maritime liens. Counsel for the Maritime Lienholders argued that his clients' lien rights under United States maritime law were far superior to those rights in other countries, including Korea.[6] Thus, if the ships were allowed to enter United States ports, unload their cargo and leave, the Maritime Lienholders' rights under United States law would be severely prejudiced.

8. Given the extremely short notice for the hearing and the fact that this issue was raised for the first time at oral argument on September 6, 2016 the Court entered an Interim Provisional Order Granting Recognition of Foreign Main Proceeding and Certain Related Relief Pursuant to §§ 362, 365, 1517, 1519, 1520, 1521, and 105(a) of the Bankruptcy Code on September 6, 2016.[7] Importantly, the Interim Order provided that the automatic stay would protect the vessels from arrest if they entered United States ports, but the vessels could not depart the United States until the issue was resolved. A subsequent hearing on the Provisional Order was scheduled for September 9, 2016.

[6] Transcript of Hearing Held 09/06/2016 at 123-133 (ECF 49).
[7] (ECF 22).

9. At the September 9 hearing, it was disclosed that despite entry of the Interim Provisional Order, none of the Debtor's cargo ships had entered United States ports and, in fact, one of the vessels bound for the West Coast had actually turned around.[8]

10. Multiple representatives of other constituents appeared at both the September 6 and September 9 hearings concerning the issuance of provisional relief. These parties included beneficial cargo owners ("BCOs"), whose products were stranded in cargo containers at sea, in warehouses and at port facilities. The BCOs expressed concern about negative financial impact on their businesses due to the non-delivery or delayed delivery of their goods.[9] In addition, operators of port facilities and warehouses, whose valuable space was or would soon be occupied by the Debtor's containers, stressed the negative financial ramifications of being unable to move the BCOs' cargo to its final destination.[10] In short, the impasse that existed due to the threatened arrest of the Debtor's vessels upon arrival at ports in the United States was causing imminent negative financial consequences for those parties.

11. Accordingly, during the September 9 hearing, the Court concluded that the restriction against the Debtor's ships being allowed to leave United States ports after unloading their cargo would be lifted and the Maritime Lienholders' recourse would be to file a claim in the Korean proceeding. The basis for this decision was set forth on the record, but the most compelling reasons were:

[8] Transcript of Hearing Held 09/09/2016 at 89 (ECF 104).
[9] *See, e.g.*, Memorandum of Law Regarding Continued Hearing on Provisional Relief for Samsung Electronics (ECF 43) *and* Objection to Motion for Provisional Relief for Ashley Furniture Industries, Inc. (ECF 63).
[10] *See, e.g.*, Objection to Interim Provisional Order for Maher Terminals, LLC (ECF 50) *and* Objection to Motion for Provisional Relief for World Fuel Services, Inc. (ECF 61).

a. The fact that the Debtor's ships were not entering United States ports, in part, because of the threat of arrest to satisfy maritime liens;

b. The stay imposed by the Korean Court was intended to apply to all of the Debtor's creditors – allowing arrest at a United States port would violate the stay;

c. The maritime liens were unripe and unenforceable under United States law unless and until the vessels entered a port within United States territorial waters; thus, the Maritime Lienholders were seeking permission to enforce United States maritime liens that would be enforceable only after the Korean insolvency proceeding was filed and in violation of the Korean stay Order;

d. The potentially severe negative impact that the immobilization of cargo would have on other United States constituents, especially the BCOs; and

e. The lack of liquidity available to the Debtor – as of the September 9 hearing date, it only had enough financing to pay the future (post-petition) expenses for docking, unloading and transporting four (4) vessels; to require the immediate posting of a bond or other liquid security for the pre-bankruptcy liabilities to maritime lienholders on as many as thirteen (13) ships seemed impossible. [11]

12. The Maritime Lienholders promptly filed the Motion for Reconsideration of the Court's decision and a hearing was held on September 15, 2016.

[11] Transcript of Hearing Held 09/09/2016 at 57-59 (ECF 104).

LEGAL ANALYSIS

13. In the Motion for Reconsideration, the Maritime Lienholders argue that the Court incorrectly held that they would be able to assert maritime liens against the Debtor's vessels (including chartered vessels) in Korea. They assert that under Korean law, a ship cannot be arrested unless the claimant has a claim against the owner of the ship.[12] Since the Debtor does not own, but charters, most of the ships bound for United States ports, the Maritime Lienholders have a unique opportunity to enforce their liens against chartered ships that enter United States ports that will be lost once the ships depart. Thus, they argue that they are entitled to "sufficient protection" under 11 U.S.C. § 1522 and propose that this Court amend its Order to: (1) require the Debtor to post bond or security; (2) allow creditors to proceed to arrest the vessels now in the United States; or (3) waive the stay provided to the vessels (and their third party owners) under 11 U.S.C. §§ 1520 and 362.

The Korean Bankruptcy Proceeding

14. On August 31, 2016, the Debtor applied for protection under Korea's Debtor Rehabilitation and Bankruptcy Act with the 6th Bankruptcy Division of the Seoul Central District Court.[13] The Korean court entered a provisional Order granting relief and on September 1, 2016 allowed commencement of the rehabilitation proceeding.[14]

[12] Maritime Lienholders' Motion for Reconsideration at 2 (ECF 85).
[13] The South Korean Petition is attached to the Declaration of Wan Shik Lee Nam (ECF 4, at Exhibit "A").
[14] *Id.* at Exhibits "B" and "C."

15. The provisional Order provided in part that "the exercise of security right on the basis of a rehabilitation claim or rehabilitation security right is hereby prohibited with respect to all rehabilitation creditors and rehabilitation secured creditors."[15]

Maritime Attachment Liens

16. Though the Court did not have a comprehensive understanding of how claims brought by maritime lienholders will be treated in Korea, it accepted for purposes of the hearing on September 9 the possibility that maritime lien rights are better in the United States for suppliers than they are elsewhere, including Korea. Within the United States, maritime liens often arise automatically, by operation of both state and federal law.[16] The Federal Maritime Lien Act creates maritime liens for "necessaries" ordered by authorized vessel agents.[17] The term "necessaries" "encompass[es] any item which is 'reasonably needed for the venture in which the ship is engaged."[18]

17. The ability to enforce a maritime lien is governed by Title XIII, Rule B (*in personam*) and Title XIII, Rule C (*in rem*) of the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions to the Federal Rules of Civil Procedure. An *in rem* arrest under Rule C can be brought by an entity providing supplies to a vessel even though the operator did not enter into a contract and has no personal liability for the "necessaries" that were provided.[19] Considering the unique leverage that a Rule C arrest

[15] *Id.* at Exhibit "B."
[16] *See generally* Robert Force, Admiralty and Maritime Law, Chapter 9, pp. 163-164 (Federal Judicial Center, 2004).
[17] 46 U.S.C. § 31301, *et seq.*
[18] *Foss Launch & Tug Co. v. Char Ching Shipping U.S.A., Ltd.*, 808 F.2d 697, 699 (9th Cir. 1987).
[19] *Belcher Co. of Alabama, Inc. v. M/V Maratha Mariner*, 724 F.2d 1161, 1163 (5th Cir. 1984).

gives to suppliers under United States law, the fact that the Maritime Lienholders wanted their liens recognized and protected by this Court does not come as a surprise.

Chapter 15's Universalist Approach

18. There are generally two schools of thought when it comes to multinational reorganizations: (1) universalism, where a bankruptcy progresses as a unified global proceeding that is 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 that its property may be found.[20]

19. Congress created Chapter 15 of the Bankruptcy Code in 2005[21] and embraced the universalist approach by directing United States Bankruptcy Courts to consider issues in a global context:

> "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."

U.S.C. § 1508.

20. This approach is further evidenced by § 1507(b), which provides that upon granting recognition of a foreign main bankruptcy proceeding, a court may provide additional assistance, "consistent with the principles of comity."

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[20] Jay Lawrence Westbrook, *Chapter 15 at Last*, 79 Am. Bankr. L.J. 713, 715 (2005); *see also In re ABC Learning Centres, Ltd.*, 728 F.3d 301, 306 (3d Cir. 2013) ("Chapter 15 embrace[d] the universalism approach [and] rejected the territorialism approach, the 'system of full bankruptcies,' in favor of aiding one main proceeding.") (citing H.R. Rep. No. 109-31, 100th Cong., 1st Sess., at 109 (2005)).

[21] Chapter 15 sought to incorporate the United Nations Commission on International Trade Law's Model Law on Cross-Border Insolvency. Both the United States and South Korea have been members of this Commission on a rotating basis. *See* United Nations Commission on International Trade Law, *A Guide to UNCITRAL: Basic Facts about the United Nations Commission on International Trade Law*, www.uncitral.org/uncitral/en/about_us.html (last visited Sep. 20, 2016).

21. Within the Third Circuit, courts are encouraged to follow this statutory directive. In *In re ABC Learning Centres Ltd.*, the Court embraced the universalist approach described above, discouraging the piecemeal seizure and distribution of assets by individual nations and noting that Chapter 15 "encourages communication and cooperation with foreign courts" with respect to transnational insolvency cases. 728 F.3d 301, 306 (3d Cir. 2013). "The goal is to direct creditors and assets to the foreign main proceeding for orderly and fair distribution of assets, avoiding the seizure of assets by creditors operating outside the jurisdiction of the foreign main proceeding." *Id.* at 306-307.

Limits on the Universalist Approach

22. Although comity is a principal objective of Chapter 15, deference to comity is not without limit. Courts have ruled that deference to a foreign tribunal in accordance with international norms cannot override the plain language of the Bankruptcy Code when the language leaves no room for deference or discretion by the bankruptcy courts.[22]

23. In addition to the plain language requirement, there is a limited public policy exception to Chapter 15's universalist approach. Under 11 U.S.C. § 1506, nothing in the Code "prevents the court from refusing to take an action…if the action would be manifestly contrary to the public policy of the United States." The Third Circuit has determined that this exception should be "narrowly construed" because the "word 'manifestly' in international usage restricts the public policy exception to the most fundamental policies of the United States." *In re ABC Learning Centres Ltd.*, 728 F.3d 301, 309 (3d Cir. 2013) (citing H.R. Rep. No. 109-31(1), 100th Cong., 1st Sess., at 109 (2005)). Further, this

[22] *In re Fairfield Sentry Ltd.*, 768 F.3d 239, 245-246 (2d Cir. 2014).

exception only applies "where the procedural fairness of the foreign proceeding is in doubt or cannot be cured by the adoption of additional protections" or where recognition "would impinge severely a United States constitutional or statutory right."[23]

Relief provided under 11 U.S.C. §§ 362 and 1519

24. It is well understood that the automatic stay imposed under 11 U.S.C. § 362 is applicable only to a debtor. Importantly, however, courts have applied the stay to non-debtors when it is ascertained that a claim against a third party "will have an immediate adverse economic consequence for the debtor's estate."[24]

25. In addition to § 362, § 1519 provides a court with the power to enter such provisional relief that is "urgently needed to protect assets of the debtor or the interests of creditors."[25] While courts have broad discretion in granting relief under § 1519, it is limited by 11 U.S.C. § 1522(a), which provides that the court may only grant relief if the interests of creditors and other interested parties, including the debtor, are "sufficiently protected."[26] 11 U.S.C. § 1522(b) acts in conjunction with §1522(a), by providing that the court may impose conditions on this discretionary relief, such as the posting of security or a bond. Because Congress did not provide a definition of "sufficiently protected" or an accompanying formula to determine how the interests of these creditors should be accounted for, courts have great leeway to determine what this is. Some have fashioned

[23] *In re ABC Learning Centres Ltd.*, 728 F.3d 301, 309 (3d Cir. 2013) (quoting *In re Qimonda AG Bankr. Litig.*, 433 B.R. 547, 570 (E.D. Va. 2010).
[24] *Queenie, Ltd. v. Nygard Intern.*, 321 F.3d 282, 287 (2d Cir. 2003) (citing *McCartney v. Integra National Bank North*, 106 F.3d 506, 510-511 (3d. Cir. 1997).
[25] 11 U.S.C. § 1519(a).
[26] Notably, § 1522(a) makes use of the phrase "sufficiently protected" rather than "adequately protected" to avoid confusion with 11 U.S.C. § 362 and its similarly court-fashioned protection for secured creditors. *See Collier on Bankruptcy*, ¶ 1522.01, p. 1522-2, n.2 (16th ed. 2016) (citing H.R. Rep. No. 109-31, 100th Cong., 1st Sess., 116 (2005)).

remedies on a case-by-case basis by analyzing the requirements of § 1522(a), which is "logically best done by balancing the respective interests based on the relative harms and benefits in light of the circumstances presented…."[27] Further, "Standards that inform the analysis of § 1522 protective measures in connection with discretionary relief emphasize the need to tailor relief granted to the foreign representative and the interests of those affected by such relief, without unduly favoring one group of creditors over another."[28]

DISCUSSION

26. The fundamental question is whether the maritime lien rights available under United States law should be enforceable despite the issuance of the stay Order in Korea.

27. The Debtor has made a prima facie case that the proceedings before the South Korean District Court will be recognized as the "Foreign Main Proceeding" and thus, the Debtor will qualify for protection of the automatic stay provided under § 362 of the Bankruptcy Code. Since the Court has not yet entered a formal recognition order, the Debtor sought provisional relief under § 1519, which provides a court the power to enter such provisional relief that is "urgently needed to protect assets of the debtor or the interests of creditors."[29] This is the relief granted in the Court's Order of September 9, 2016 which includes the imposition of a stay under § 362 of the Bankruptcy Code and provisional recognition of the Korean stay Order.

[27] *Jaffe v. Samsung Elecs. Co. Ltd.,,* 737 F.3d 14, 27-28 (4th Cir. 2013).
[28] *In re Tri-Continental Exchange Ltd.*, 349 B.R. 627, 637 (Bankr. E.D. Cal. 2006) (citing Guide to Enactment of Model Law, ¶ 161); *See also In re SIVEC SRL.*, 2011 WL 2445754 (Bankr. E.D. Okla. 2011).
[29] 11 U.S.C. § 1519(a).

28. The Korean stay Order was entered on August 31, 2016 and was intended to apply to all of the Debtor's creditors, including the Maritime Lienholders. It is widely recognized that the purpose of the automatic stay in insolvency proceedings is to preserve the status quo by providing a "breathing spell" to the besieged debtor.[30] The stay expressly provides that any attempt to obtain possession of property of the estate or act to create, perfect or enforce a lien against property of the estate is forbidden.[31] The status quo at the time of the South Korean filing was that all but one or two[32] of the Debtor's vessels were outside of United States territorial waters. Thus, these ships were not subject to the arrest provisions under United States maritime law that the Maritime Lienholders now seek to enforce. Allowing the enforcement of these inchoate lien rights after the issuance of the Korean stay Order is not consistent with the concept of a stay. In contrast, the Court understood that the Maritime Lienholders had arrested at least one vessel, the *MV/Hanjin Montevideo*, in a United States port prior to the filing of this Chapter 15 case and "carved out" this vessel from the protections provided under the Provisional Order.[33] This was because the lien claims against the *Montevideo* were mature and enforceable when the issue was before the Court.

29. In light of the universalist approach under Chapter 15, a court must provide aid to the foreign main proceeding (here, Korea) absent plain language to the contrary or a vital public policy concern. Nothing in the Bankruptcy Code or in this country's vital public

[30] *Mar. Elec. Co. v. United Jersey Bank*, 959 F.2d 1194, 1203 (3d Cir. 1991).
[31] 11 U.S.C. § 362(a).
[32] The Court was advised at the hearing on September 6 that an arrest writ had been issued on another vessel, the *Seaspan Efficiency*. (Transcript of Hearing Held 09/06/2016 at 62 (ECF 49)) The treatment of that vessel has not been specifically addressed.
[33] Transcript of Hearing Held 09/06/2016 at 143-144 (ECF 104).

policy concerns would mandate that the Maritime Lienholders be permitted to enforce lien rights that were not enforceable under United States law when the Korean stay went into effect. To allow such enforcement would be to apply a "territorialism approach" to international insolvency in contradiction of Chapter 15's clear directive. To protect the interests of the Debtor's global rehabilitation and creditors as a whole, the Debtor's vessels had to be allowed to enter United States ports under the protection of the stay.

30. While it is true that the chartered vessels are not owned by the Debtor, the claims against these vessels are based in part upon liabilities of the Debtor. And, so long as these vessels are under charter by the Debtor, its property rights are impacted. In order to achieve the practical objective of moving cargo from the Debtor's vessels to intended destinations in the United States (and limit the harm to BCOs), it was necessary to extend the stay to vessels chartered by the Debtor. Also, there is supporting precedent from other jurisdictions, when faced with similar circumstances, that the stay should apply to all of the Debtor's vessels, owned and chartered.[34] But, to be clear, once these vessels are no longer under charter by the Debtor, they will not be protected by the stay and the Maritime Lienholders would be able to enforce their liens against such vessels in the United States.

31. The language of §1522(a) makes clear that courts must weigh the interests of all parties, including other creditors and the debtor, in providing discretionary relief. The Court weighed these interests and considered the practicalities involved. If the Debtor's vessels

[34] *See In re: Daebo Int'l Shipping Co., Ltd.*, Case No. 15-10616 (Bankr. S.D.N.Y. Mar. 19, 2015) (DOC 21); *In re: STX Pan Ocean Co., Ltd.*, Case No. 13-12046, (Bankr. S.D.N.Y. July 1, 2013) (DOC 30); and *In re: Korea Line Corp.*, Case No. 11-10789 (Bankr. S.D.N.Y. Apr. 20, 2011) (DOC 56).

were not allowed to dock, unload their cargo, and depart under the protection of a stay, they would potentially avoid ports in the United States, leaving delivery of their cargo in limbo and causing BCOs, port operators and others harm. The relief granted by the Court was designed to minimize this harm by giving the Debtor assurances that its vessels would not be seized in the United States.

32. While it is true that § 1522(b) provides this Court with the ability to impose conditions related to discretionary relief, including the posting of security or some other form of protection, it does not mandate that it do so. At the time of hearing, thirteen (13) vessels were bound for United States ports and the Debtor had secured the financing necessary to dock and unload just four (4) of them. It was apparent that the Debtor did not have the financial wherewithal to tender any immediate form of security to the Maritime Lienholders and was unwilling to do so due to the entry of the stay Order in Korea. The Court was not inclined to allow the stalemate between the Debtor and the Maritime Lienholders to continue at the expense of the Debtor and its other creditors. As a whole, the Debtor's "foreign main proceeding" in Korea will be better off if the Debtor's vessels can promptly deliver their cargo. The Maritime Lienholders' claims against the vessels can be administered by the Court in Korea. There is nothing in the record that would indicate that the Korean Court will not provide due process to all parties.

CONCLUSION

33. For the foregoing reasons, the Maritime Lienholders' Motion for Reconsideration is denied.