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Soundings

In this issue: Korean Bankruptcy Procedures

Korean Bankruptcy Procedures

Many Members will have experienced the consequences of a counterparty entering into creditor protection schemes that are in place in the vast majority of jurisdictions. The difficulties faced by Korea Line are the most recent example of this. The following provides a short summary of some of the issues that arise from Korean bankruptcy procedures. If Members have any further queries please contact your account manager.

1. What does it mean that a company has entered in to rehabilitation proceedings?

Rehabilitation proceedings in Korea effectively mean that the company has the protection of the court until such time as an assessment has been made of its financial position. This assessment is undertaken by a receiver who is appointed on the court's behalf. Effectively the receiver reviews the financial position of the company concerned and forms a view as to whether it is a going concern and the extent to which contractual commitments can be maintained.

This process does of course take some time. Until such time as the receiver has reached a decision contractual partners are obliged to maintain the contracts, failing which they will themselves be in breach of contract, and the receiver could be entitled to claim.

2. Can a party approach the company to renegotiate some or all of the charterparties before the commencement of rehabilitation proceedings?

A party is free to renegotiate or open a dialogue with the company prior to the rehabilitation proceedings, however the execution of renegotiated terms or a settlement agreement must be done with the approval of the court, otherwise there is a risk that it may be nullified at a later date by the receiver or committee of the creditors.

3. What is the procedure to register a claim against a company in the rehabilitation proceedings?

A Member who has a claim against the company in rehabilitation must register its claims at the Court. To register a claim the following documents would be necessary:

- a) A copy of the charterparty;
- b) A final statement of account showing the outstanding hire or any other documents which can substantiate the Member's claims (including, as the case maybe, an English lawyer's opinion);

c) Power of Attorney ("POA"); and

d) Certificate of Corporate Nationality ("CCN").

The POA and the CCN must be signed by the representative director, the president, or the managing director of the claimant Member and must also be notarised before a notary public and legalised at a Korean consulate (if the POA and the CCN can be apostilled, legalisation is not necessary).

4. Will the receiver be interested in affirming (i.e. maintaining) any or all outstanding charterparties?

This will very much depend on the financial position of the company in rehabilitation and an assessment of the overall level of liabilities. It will also largely depend upon whether the receiver deems a charterparty to be profitable.

5. While in rehabilitation is a Member obliged to maintain a charterparty if hire is not paid? What are the consequences of not maintaining a charter?

Where a charterparty is affirmed by the receiver, a Member is obliged to maintain the charterparty

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and this is the case even if hire is not paid by the receiver. However, the Member's claim for unpaid hire is a common benefit claim (outside the rehabilitation proceedings) and the Member can therefore pursue this claim against the company and its assets regardless of any current rehabilitation proceedings.

Where a charterparty is not affirmed by the receiver but is not terminated either, a Member is still obliged to maintain the charterparty even if hire is not paid by the receiver. Whether a Member's claim for unpaid hire is a common benefit claim or a rehabilitation claim is unclear under Korean law because there are conflicting lower court judgments and no Korean Supreme Court judgment on the issue.

If a Member does not maintain a charterparty and decides to terminate it, such termination by the Member may be deemed to be a repudiatory breach.

6. If the receiver of the company in rehabilitation terminates a charterparty, is it possible to claim damages including consequential damages in the rehabilitation proceedings?

It is possible to claim damages in the rehabilitation proceedings if a charterparty is terminated. A Member would be able to claim damages by registering its claim within the deadline set by the court or if a claim crystallises after the deadline, to register its claim within one month from the crystallisation.

Where a charterparty has been formally terminated by the receiver a Member can lodge a claim for damages for the balance of the charter period.

A Member can also register a potential claim which will likely arise in the future on a conditional basis; in other words, it would be able to make a claim subject to an arbitration award.

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7. Assuming that the receiver affirms a charterparty, what happens to it in terms of the rehabilitation proceedings?

If the receiver affirms and continues performing a charterparty, any hires due from the receiver's affirmation of the charterparty should become payable in full as opposed to the "rehabilitation claims" which will need to be apportioned as between the various claimants depending on the financial position of the company in rehabilitation.

The receiver is not obliged to make a decision to affirm the contract until such time as it is in receipt of written notice from the claimant demanding that a decision is made. The receiver has 30 days from the date of receipt of the notice to make such a decision. This 30 day period however can be extended at the discretion of the court.

8. Can steps be taken to arrest assets of the company in rehabilitation proceedings in other jurisdictions?

A rehabilitation order from the Korean court does not have extraterritorial effect. In a number of cases a receiver has applied to foreign courts, such as the US and the UK, to obtain recognition of Korean rehabilitation proceedings.

9. What is the position concerning a purchase option in a charterparty?

If a charterparty contains a purchase option the receiver will still be able to terminate. If the charterparty is terminated the purchase option will be lost.

10. What is the timescale for a re-payment schedule under a rehabilitation plan?

Under normal circumstances, the repayment schedule in a rehabilitation plan grants a grace period of 2-3 years with instalment payments to be made over the following 5-7 years. The maximum payment schedule is 10 years.

11. What is the position if the receiver rejects the claim in the rehabilitation proceedings?

The receiver's rejection can be disputed by applying to the rehabilitation court for a decision confirming the registered claim within one (1) month from the expiration of the inspection period, that is the time given to the receiver to consider the claim. This procedure, known as summary proceedings, does not involve a full trial although the court generally holds 2-3 hearings (or more if necessary). A Member would be entitled to submit further evidence, if necessary, but such evidence would be restricted to written evidence only. Summary proceedings generally last for about 2-3 months, however, in complex cases such as charterparty disputes, and/or depending on the court schedule, they can last for more than 5-6 months.

If the rehabilitation court renders a decision denying the disputed claim, a Member would have a further month from the time it received a written decision from the rehabilitation court to file "objection litigation proceedings" objecting to the decision. These objection litigation proceedings follow the same course as other Korean civil litigation proceedings and may operate in parallel with the rehabilitation proceedings. In general, it takes 8-10 months for a Korean court of first instance to render a judgment on a civil lawsuit. An appeal to the appellate court could last a further 8-10 months and if there is a further appeal to the Supreme Court, the proceedings could take a further 1-2 years.

The final and conclusive judgment in the objection litigation proceedings binds the rehabilitation court and it should take into consideration rehabilitation claims pending in the objection litigation proceedings when reviewing and approving the rehabilitation plan in accordance with which the debtor is to reorganize his assets and liabilities.

If Members have any further queries relating to Korean bankruptcy procedures then please contact your account manager.