Korea Maritime Law Research Centre

Maritime Law News Update

Vol. 13February13, 2016

136-701 CJ Law building Room 402, Korea University (School of Law), Anam-dong, Seongbuk-gu, Seoul, Korea
- Head of Maritime Law Research Centre In-Hyeon Kim 02-3290-2885 (office), captainihkim@korea.ac.kr
- Researcher Eun-Jung Lee 02-3290-2912 (centre), sara_eun@naver.com
- Research AssistantSeul-Ki Moon, sseulkii@naver.com

O Korea University Maritime Law Research Centre aims to provide information regarding domestic and foreign maritime law trends regularly to practitioners, for the future development in Korean Maritime Law. We kindly ask for your support and interest.

O **This News Letter was published upon the Maritime Development Fund fromMr. Shin-hwan Park Spark, president of Spark International. We thank you deeply for your sponsorship.**

I. Introduction of Court Decisions

1. Whether parties are allowed to contract out the shipowner's global limitation right

(The KSC case 2015.11.17. Docket No. 2013da61343)

(1) Facts

Cargo owner (shipper) A entered into a contract for the carriage with the carrier B. The carrier, as the time charterer, borrowed the vessel X from the owner C. During the carriage, the cargo was destroyed due to fire on board. As a result, A suffered cargo damages. A raised cargo claims to B and C. C applied for the shipowner's limitation of liability proceedings and this was accepted by a Korean court. B successfully took part in the limitation proceeding as a relevant party.There was an agreement in the contract to the effect that whether B was liable for all the damages which A suffered. However, there was no mentioning about the fire exemption or shipowner's limitation of liability in the contract. B argued that he was allowed to invoke the fire exemption and shipowner's limitation of liability stipulated in the Korean Commercial Code ("KCC"). On the other hand, A rebutted such arguments.

The lower court decided that such provisions in the KCC were regarded as default rules and agreements to contract out the application of such provisions in a contract were valid. B appealed to the Korean Supreme Court (KSC).

(2)Decision of the Korean Supreme Court

Because Article 769 of KCC should be regarded as a default rule, taking into consideration the way of stipulation, contents and reason for the existence of the provision in the KCC, both

parties are allowed to contract out the application for the provision of shipowner's limitation of liability by agreement.

In addition, the agreement between the parties on the liability of the carrier is valid pursuant to Art. 799 (1), unless it exempts or lessens the obligation or the liability of the carrier against provisions from Art.794 to 798 of the KCC.

The interpretation of the agreement is to make certain the objective meaning which the parties intended to give through the act of expression. Even though it may not be limited to the wordings engaged in the agreement, it should be done not by the unexpressed internal intention of the parties but by interpreting the objective meaning reasonably.

According to the lower court's judgment, both parties agreed that the carrier would make full compensation for the shipper's damages resulted from external factors by the agreement in the contract, covering Pusan port to Jeju Port; the carrier promised to provide new cars inexchange for the damaged cars to the shipper when the shipper rejectedthe receiptof cars, the carrier also promised to pay repair costs when the damaged car can be repairable and pay the loss when accessories for the cars were lost.

Taking into consideration the fact and legal theory as well, it is appropriate to decide that the parties made an agreement to contract out the application for the provision of the fire exemption, ship owner's limitation of liability or the carrier's limitation of liability through the agreement in the contract. We support the lower court's judgment on this matter.

(3)Case Comments

The accident was involved in the domestic sea carriage between Pusan and Jeju Island. According to Korean practice, written contracts for the carriage are actually prepared by the parties and the bill of lading ("B/L") is not issued in the inland sea carriage. Since a written contract is not a kind of standard terms, as a result the act for regulating standard terms is not applicable to the case.

The carrier enjoys the benefits of fire exemption, package limitation and global limitation. In the international carriage of goods by sea, the bill of lading as the evidence of the contract for the carriage is issued. Because the bill of lading is issued by the carrier prior to the contract, the above exemptions or limitation provisions favorable for the carrier are included in it.

In the contract, there was an agreement to the effect that the carrier assumed full responsibility against the shipper's loss during the carriage. As soon as the accident occurred, the carrier invoked fire exemption, package limitation and global limitation. Both the lower court and KSC decided that all the above provisions in the KCC were a kind of default rule and thus the parties had freedom to contract them out by agreement. The relevant clauses in the contract does not have express wording to say that the carrier is not allowed to invoke the fire exemption, package limitation or global limitation. However, the courts interpreted the meaning of the clause in the contract broadly, resulting in such conclusion.

The author agrees with KSC's decision on fire exemption or package limitation but is reluctant to accept the judgment regarding to the global limitation. Fire exemption and package limitation is a matter between two parties involved in the carriage and thus contracting out the application of such provisions in the KCC by agreement is allowed. However, global limitation is not a matter of both parties involved in the contract, but rather a matter of several parties including third parties in the limitation proceedings. In addition, the claims which were subject to the global limitation are triggered not only by the breach of contract but also by tort. As a result, the validity of global limitation should not be depended on the party's agreement.

Both the shipper and carrier are small companies. There is a high possibility that they did not know about the legal regime such as fire exemption and global limitation. In this case, the carrier was placed in a detrimental position due to the agreement in the contract. If the carrier did know about the presence of such regimes in the KCC which are beneficial for it, they would not have agreed with such agreement in the contract against the KCC.

Preparing for the standard form of the contract for the carriage, reflecting legal regime to protect the carrier on one hand and the shipper on the other hand is essential.

The courts referred to the mandatory provision of Art. 799 for the carrier's package limitation when it interpreted the absence of the mandatory provision in the shipowner's global limitation. The KSC said that both package limitation and global limitation were very similar and thus the rational for Art. 799 could be borrowed for the interpretation of global limitation. The KSC reached a conclusion that the agreement by the parties to make the carrier detrimental in terms of the shipowner's limitation of liability was allowed, just like the case involved in the package limitation, because it is outside of the scope of protection of the mandatory provision in the KCC.

It is noteworthy that not only the agreement to make the shipper detrimental against the relevant provisions, but also the agreement to make the carrier unfavorable against the relevant provisions in the Rotterdam Rules are null and void. If the governing law was the Rotterdam Rules in this case, the agreement in this contract should have been interpreted as null and void because it makes the carrier less favorable as opposed to the relevant provision in the Rules.

2. The Legal Effect of the Bill of Lading issued after the cargo has been already delivered

(The KSC case 2015.12.10. Docket No. 2013da3170)

(1) Facts

Shipper A in Korea tried to export goods to an importer in Jordan. A entered into contract for the carriage with the carrier B in Korea.

A requested carrier B to issue the sea waybill and it was duly issued by carrier B. The importer received the cargo from the carrier.

In the meantime, shipper A who did not pay the loading expense to the carrier and requested carrier B to issue the B/L in order to utilize it as a security for receiving the cargo price from the consignee. A servant of carrier B who understood mistakenly that the cargo had not been released issued the B/L to shipper A.

Shipper A, who became aware of fact that the cargo had already been delivered, made claims for the loss of the cargo to carrier B.

Shipper A argued that carrier B was liable for his damages because B breached its duty to deliver the cargo after it receive loading expense from the shipper and because B breached its duty of exchanging the cargo with the B/L. The lower court rejected shipper A's argument because such practice was not found in Korea, and because the B/L is the document required a connection with the cargo, but in this case it was issued after the cargo was already discharged by the carrier without the possession of the cargo and thus it was null and void.

(2) The judgment of the Korean Supreme Court

The B/L is a negotiable instrument representing the title of the cargo. It is a kind of document requesting connection with the cargo and thus the B/L is valid only where it was issued by the carrier who actually received the cargo from the shipper and possesses it. Therefore, a B/L issued without receiving the cargo is null and void because it did not meet the requirement for a valid B/L. This theory is also applicable to the case where the B/L is issued after the cargo was duly delivered by the carrier to the consignee. (omitted)

In case of the sea carriage that the B/L is not issued, the shipper's right to claim the cargo prevails over that of the consignee before the cargo has not yet arrived at the destination(the KCC Art. 815, 139). However, the consignee's right prevails over that of the shipper's after the cargo has already arrived at the destination and the consignee requested the delivery of the cargo(the KCC Art. 815, 140(2)).

Taking the above legal theory into consideration, the B/L holder does not have any new rights to request the carrier to deliver the cargo, now that the B/L was issued in accordance with the contract after the cargo has already arrived at the destination and the consignee requested the carrier to deliver the cargo to it.

The B/L in the case was issued after the cargo had already been delivered to the due holder of the B/L at the destination and thus it was null and void. The plaintiff (A) as one of the parties in the contract is not the bona fide holder of the B/L under Art. 854(2) and thus, even if the plaintiff possess the B/L, defendant (B) does not have any obligations to deliver the cargo based on the B/L which is null and void.

Now that there is neither any practice nor implied agreement that the carrier should not hand over the cargo to the consignee before the shipper pay the loading expenses to the carrier, the fact that the carrier issued the B/L does not provide such reliance to the shipper. And thus the fact that the carrier delivered the cargo without receiving the loading expenses does not against the estoppel.

(3) Case Comments

The sea waybill is different from the B/L in that the former is not subject to the presentation rule. Therefore, in cases where a sea waybill is issued, the carrier is allowed to hand over the cargo to the consignee and he does not have duty to hand over the cargo with exchange of the sea waybill to the holder of the sea waybill. On the other hand, in case that the B/L is issued, the carrier should deliver the cargo to the due holder of the B/L. If not, the carrier should pay damages for the loss of the cargo to the holder of the B/L. In the meantime, because the B/L is a kind of the document requiring connections with the cargo, the B/L issued by the carrier without possession of the cargo is null and void.

In this case, after the carrier handed over the cargo to the consignee with the sea waybill, it once again issued the B/L to the shipper at the request of the shipper for the special purpose of the shipper to receive the cargo price from the consignee. The shipper held the B/L. However, the cargo had been delivered to the consignee and thus the B/L issued without connection to the cargo does not have effect as the B/L. Therefore, the carrier does not have any obligation in relation to the B/L.

There is an argument that the carrier may be liable for the damages to the holder of the B/L in accordance with the provision in the KCC even though the B/L is null and void in the above situation. According to Art. 854(2) of the KCC (equivalent to Art. 3(4) of the Hague-Visby Rule), the carrier is liable for damages pursuant to the wordings in the B/L. The written wordings are conclusive evidence between the carrier and the bona fide holder of the B/L. The majority view is that the carrier should hold liability according to Art. 854(2), even if the B/L is issued by the carrier without possession of the relevant cargo. The minority view is that there is no longer a valid contract for the carriage and the B/L issued by the carrier without possession of the cargo is null and void. As a result, the carrier is liable for the cargo damages based on tort. The KSC supports the minority view.

<Notice 1> Maritime Law Research Centre is open to anyone who wishes to learn more about Maritime Law at room 402 and 408, CJ Law Building, Korea University. Maritime law related professors on sabbatical, maritime lawyers, professionals in the maritime industry and doctoral students are welcome. Anyone who is interested may contact the Head of Centre InHyeon Kim at captainihkim@korea.ac.kr.

<Notice 2> The internet webpage for Korea University Maritime Law Centre (www.kumaritimelaw.com) has opened.