Korea Maritime Law Research Centre

Maritime Law News Update

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

o This News Letter has been published upon the Maritime Development Fund from Spark International (www.sparkinternational.com) president Sam Park (The President of the Korean Maritime Insurance Arbitrator's forum). We appreciate Mr. Park's contribution.

1. Requisite for Management of Affairs for the State

(Korean Supreme Court case 2014. 12. 11. Docket No. 2012da15062, Seoul High Court case 2012. 1. 13. Docket No. 2009na99916)

1.1 Facts

The plaintiff is a company that does marine pollution clean-up. The plaintiff conducted a cleaning operation under the command of maritime police when there was a massive leakage of oil at the west coast from the collision of M/T Hebei Spirit which occurred on 2007. After that, the plaintiff filed a lawsuit against the state (Republic of Korea) claiming for the cost of the operation. The Plaintiff argued that a contract for work was formed between the plaintiff and the defendant, but the court decided that a contract of work was not effective because there was no written contract for this agreement in which one party was the state. The plaintiff continued to argue that it managed the defendant's affairs without obligation and thus it was entitled to claim for reimbursement of expenses according to Korean Civil Code Art. 739. The defendant argued that the cleaning operation was M/T Hebei Spirit's affair and thus it is not a management of affairs of the state. Furthermore, the plaintiff argued that it was not allowed to claim for reimbursement separately from the procedures for limitation on liability which had already commenced.

1.2. Korean Supreme Court's Judgment

The Korean Supreme Court decided as follows.

(1) The Requisite for Management of Affairs for the State

For to be construed as the management of other person's affairs, first it shall be another person's affair and second, there shall be an intent to manage the affairs for the benefit of the person, in other words an intent to revert the benefits from the management to the person, and third, it shall not be against the intention of the person or would not be

detrimental to the person's interests. However, where the managed affairs were related to the state's affair, private person is not allowed to conduct the state's affairs without legal grounds. So it is recognized as Management of Affairs only if the nature of the affair allows it to be managed by a private person instead of the state and when the private person's intervention is justified for reasons such as urgency etc., and only then the private person is allowed to demand reimbursement of necessary or useful expenses.

In this case, (i) the plaintiff conducted cleaning operation, intending to manage the state's affair; (ii) emergency cleaning operation was needed because the operation by the ship owner was not sufficient to prevent pollution from the leakage; (iii) the cleaning operation was an affair of the state's duty which could be dealt by a private person such as the plaintiff and (iv) the plaintiff was under the command of maritime police while conducting the operation. Therefore, it falls within the definition of the management of other person's affair and thus the plaintiff is allowed to demand reimbursement of costs from the defendant.

(2) Whether the plaintiff is allowed to claim separately from the shipowner's limitation of liability procedure under the Oil Pollution Compensation Act

The purpose of the Procedural Act for Limiting Liability of Shipowners is merely to prohibit any creditor from exercising their right over any property of the debtor other than the limitation fund. But since obtaining the right for realizing claims and executing the right are two different matters, the plaintiff's lawsuit claiming for reimbursement shall not be banned even when the procedure for limiting the liability has already commenced.

1.3. Comments

(1) Whether a Management of Affairs has been established

The requisite for management of other person's affairs are (i) the affair shall be another person's, (ii) the intent to manage the affairs for the benefit of the person shall exist, (iii) and it shall not be evident that it would be against the intention of the person or it would be detrimental to the person's interests. Additionally, where it is related to the state's affair, (iv) the affair shall, in nature, allow a private person to conduct it instead of the state, (v) and there should be a justification for the private person to intervene such as urgency, etc.

1) When oil or waste is leaked at sea, the obligation to clean it is first placed on the shipowner. However, when the shipowner's operation is not sufficient or an emergency cleaning operation is required, the secondary obligation is imposed on the marine police, which makes the state an obligor.
2) As the plaintiff operated under the marine police's directions, the intent to manage the affairs for the state's interest can be admitted. If the plaintiff intended to manage it for its own purpose, it would not have followed the order of the marine police but it did by himself.
3) Plaintiff's operation of the affair instead of the state was beneficial to the state because the state had the obligation to execute the affair.
4) Marine pollution clean-up operation was an affair that could be allowed, by its nature, for a private person to conduct.
5) The private person's intervention is justified as the shipowner's operation was insufficient and the situation was urgent.

(2) Claiming separately from the procedure for limiting the liability

The legal procedures for private matters are divided into two parts; first, a part of confirming that there is a valid clai m and obtaining the right for realizing the claim, and a part that executes the right and actually realize it. The procedure f or limiting the liability is in the execution part and it is for letting the creditors 'execute' their rights over the funds and n ot over other properties. The right for realizing claims can be obtained by the court apart from the limitation of liability pr ocedure.

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2. The Scope of Application of the Limitation of Liabilty Clause in Air-Land Combined Transportation

[Korean Supreme Court case 2014. 11. 27. Docket No.2012da14562]

2.1 Facts

A (the consignee) planned to import 3,347 jewelry(11.5 Kg)(hereinafter the 'Cargo') at the price of 139,217.50 USD from B(the shipper) in China. A asked C, the defendant, to transport the Cargo from B's factory in China to A's office in Seoul by air transport and land transport.

'Conditions of Contract' regarding the limitation of liability were written on the reverse side of the air waybill which was given to B when A and C entered into the contract of carriage. It stated that 'For carriage to which neither any convention such as the Warsaw convention nor any law applies, Carrier's liability may be limited to the larger amount between the amount of 100 USD per package or 9.07 USD per pound(20 USD per kilogram) unless a higher value is declared and further a supplementary charge is paid'. On the air waybill, the information that the cargo was '1 package, weight 11.5kg, description jewelry 18K gold, 139,217.50 USD' was filled in. However, A did not pay the supplementary charge and only paid the ordinary charge to carrier C.

The Insurance company D, the plaintiff, and A, the consignee, entered into an insurance contract for the Cargo. The terms of the insurance included two conditions: 'Full value declared to Carrier and Valuation Charge Paid', and 'It is warranted that the subject matter insured be accompanied by Guard during whole course of transit within domestic area'. But A did not satisfy these conditions. While carrier C, the defendant, was transporting the Cargo from B's factory in China to A's Office in Seoul, part of the Cargo was stolen and later it was discovered that the theft occurred during carriage by land.

A claimed for insurance money against the insurance company D, the plaintiff, and D paid the claim. If the insurer had explained the meaning of the two conditions to the insured, it could have been exempted from liability. But the insurer was not allowed to invoke the exemption of liability because it did not explain the material fact to the insured according to Art. 3 (4), Act for regulating Terms and Conditions. As soon as D paid the insurance proceeds it obtained subrogation right against the carrier C which inflicted damages. The 1st and 2nd instance courts decided that the recourse

claims from the insurance company against the carrier C was allowed and further decided that the carrier was not allowed to rely on the limitation agreement in the airway bill because the damages occurred during the land carriage.

2.2 Court's Ruling

(1) Presumption of the occurrence of the event which resulted in damages

The contract that A and C entered into is a combined transportation contract. Thus the Montreal Convention takes precedence over defendant's general terms or the Civil Code and the Commercial Code. Article 18 (4) and Article 38 (1) of the Montreal Convention stipulates that if a carriage by land, by sea, or by river takes place in the performance of a contract for carriage by air, for the purpose of loading, delivery or transshipment, any damage is presumed, subject to the proof to the contrary, to have been the result of an event which took place during the carriage by air.

However, in this case it was determined that the theft occurred during the carriage by land and therefore it is no longer presumed that the damage occurred during carriage by air.

(2) The Limitation of Liability Clause

The limitation of liability clause written on the reverse side of the air waybill is terms and conditions(standardized contract) which is a part of the air-land combined carriage contract and the clause shall be applied to the whole carriage including the carriage by land unless it is expressly stipulated otherwise. In this case, the higher value of the Cargo was declared but since the supplementary charge was not paid, the liability of the defendant can be limited pursuant to the clause even if the damage occurred during carriage by land.

(3) The right of Insurance Subrogation

In order to be admitted to have the subrogation right of insurance, the insurer should have been obligated to pay the insurance money to the insured. Even if the insurer could not argue that the limitation of liability clause is effective as a part of the contract because it violated to exercise its obligation to explain the clause under Article 3(4) 4 of the Act for regulating Terms and Conditions, and thus had to pay the insurance money to the insurer, the case is still regarded as a case that the insurer is obligated to pay the insurance money to the insured and thus the insurer is entitled to make a subrogation claim against the third party which was liable for the claims. We support the 2nd instance court's judgment that D, the plaintiff, was obligated to pay the insured even if it did not fulfill its duty to explain material terms pursuant to the Act because the insurer had subrogation right by paying insurance money.

3. Comments

Two issues are involved in the case. The first issue was related to the scope of application of the clause written on the reverse side of the air waybill, and the second issues was whether or not the insurer still has a subrogation claim against the third party under Article 682, Commercial Code even though it could have not paid the insurance money if it had fulfilled its duty to explain material terms and conditions.

(1) Effect of limitation clause in the Air waybill

Regarding the first issue, the 2nd instance court stated that limitation of liability clause does not apply to this case because the damage occurred during the carriage by land on the premise that the clause written on the reverse side of the air waybill can be applied to the damages occurred only during carriage by air. But the Supreme Court stated that the contract between A and C was a contract for the combined transport and thus it could be applicable for whole legs of transport including air and land leg unless the scope of application is expressly limited to the air leg, and therefore it should be applied to the damage occurred during carriage by land.

(2) Subrogation Right

Regarding the second issue, the Supreme Court took the same stance with the 2nd instance court, saying that even if the insurer had to pay the insured because it did not fulfill its duty to explain the material terms and conditions to the insured where it could be exempted from liability against the insured if it had explained it, the insurer was obligated to pay the insured and thus it obtained subrogation right against the third party (here, the carrier C) pursuant to Article 682.

The purpose of the Act for regulating Terms and Conditions is to prevent enterprisers from taking unfair advantage of their bargaining power by banning the terms and conditions not sufficiently explained to the consumer from being a part of the contract. On the other hand, the purpose of subrogation in insurance is to prevent the insured from getting double imbursement and to impose burden upon the party in fault. Therefore, the fact that the insurer was not obliged to pay the insurance money if it fulfilled the duty to explain pursuant to the Act for regulating Terms and Conditions is not a justifiable reason not to allow the insurer to exercise the subrogation right.

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3. The Ocean Victory Case Regarding the Safe Port Issue

[Gard Marine & Energy Ltd v China National Chartering Co Ltd (The "Ocean Victory") EWCA Civ 16. 2015.1.22.]

3.1 Facts

The Ocean Victory, a Cape-size bulk carrier, tried to leave the port of Kashima, Japan under heavy weather on October 24, 2006. While she was leaving the berth, she was confronted with strong northerly winds and long waves and subsequently went aground at the end of the breakwater. The vessel had been bareboat chartered and thereafter time chartered. Gard P&I, the hull underwriters paid the insurance proceeds to the shipowner. Thereafter, it made recourse claims against the time charter as the assignee of the bareboat charterer and time charterer, on the ground that charterers breached the safe port warranty. The English Court of Appeals had to decide on two legal issues; (i) whether the port of Kashima was a safe port or not: (ii) whether the insurer can bring an indemnity claim against the bareboat charterer which was the co-insured and also paid for the insurance premium.

3.2 The English Court of Appeal's Decision

A port will not be safe if the vessel was exposed to danger in the absence of abnormal occurrence. In order to determine what constituted an abnormal occurrence it is necessary to have regard to whether the event had occurred with sufficient frequency so as to become a characteristic of the port. This incident was an isolated, unusual and abnormal event occurred by the combination of the strong wind and long waves which was unprecedent in the history of the port and therefore the port of Kashima shall not be counted as an unsafe port.

According to the terms in the bareboat charter party, bareboat charterer was co-insured. Also it paid the insurance premium. It seems that the parties in the contract had the intention that the damages should be completed by the insurance and no claims should be invoked to the parties. Therefore, the insurer cannot claim for recovery against the bareboat charterer.

3.3 Comments

(1) Safe Port

The bareboat charterers and time charterers undertake an obligation to nominate a safe port against shipowners or the bareboat charterers. They are strictly liable for damage resulted from vessel's entering into an unsafe port. What are the characteristics of a 'safe port' has been disputed in the case.

The obligation to nominate a safe port has been established by the English case law rather than the statute law. Absence of abnormal occurrence is one of the requirements (The Eastern City case, 1958). A port is unsafe only when vessels have been frequently exposed to danger during their entry, departure or anchoring and such danger has been acknowledged. Thus, the accident does not fall within the concept of unsafe port warranty if a vessel stranded due to abnormal and unexpected strong wind or long wave in a port. The court relied on the fact that there was no any other accident of 1,254 VLCC and 5,316 Cape-size vessels for 35 years between 1971 and 2006 in port of Kashima. Taking the combination of the strong wind and long wave together into consideration, the court said that the accident history could not be found in the port of Kashima. Accordingly, the English Court of Appeal found that the port of Kashima in the case was not unsafe pursuant to the definition of the unsafe port in the Eastern City case.

Is the obligation of nominating safe port imposed upon the charterers under the Korean law? We cannot find any provision imposing such obligation upon the charterer. Would the obligation to nominate a safe port be admitted under the Koran law unless the parties expressly agreed upon it in the contract? It might be admitted as such because almost all of charter parties circulated are Barecon and NYPE which include safe port warranty clause. It is noteworthy that the charterer's obligation to nominate a safe port will be expressly stipulated in the revised draft of Japanese Maritime Law.

(2) Subrogation Right

Is the insurer who paid the insurance proceeds to the shipowner, the insured, allowed to claim for recovery against the bareboat charterer which breached the safe port warranty? The Court of Appeal expounded that the insurer could not claim against the bareboat charterer because it was a co-insured under the insurance contract pursuant to the bareboat charter agreement., which meant that both the shipowner and charterer had intention that damages should be

compensated by insurance without any further recourse against each other, and also because the bareboat charterer paid the insurance premium.

In Korean Supreme Court case 1989.4.25. docket No.87daka1669, the Court stated that where it is 'an insurance for the party to the insurance' (the party is the person to pay insurance premium and the insured as well), the insurer cannot claim for recovery against the insured, on the other hand, where it is 'an insurance for the benefit of third party'(the party to the contract who pay the insurance premium is not the insured, but the third party is the insured), the insurer is allowed to claim for recovery. However, the majority of academics argue that the insurer should also not be allowed to claim for recovery against the party to the contract even under the 'insurance for benefits of third party' cases. Under the bareboat charter, the bareboat charterer pays the insurance premium for the benefit of the shipowner. It becomes party to the insurance contract while the shipowner becomes the insured. According to the Korean Supreme Court, the hull underwriter can raise a subrogation claim against the bareboat charterer, even if it paid insurance premium, based on the shipowners damage claim due to the breach of the bareboat charterer's obligation to nominate a safe port. But in this case, the bareboat charterer was co-insured. Therefore, it seems that the insurer is not allowed to claim for recovery against the bareboat charterer, because it was a co-insured, not because it paid for the insurance premium.

The owner of M/V Ocean suffered from total loss at the port of Kashima, and thus the insurer who paid insurance money to the shipowner and then claimed for recovery against the time charterer who was at fault. The English Court of Appeal found that the insurer could not claim recovery against the bareboat charterer, resulting in freeing the time charterer from liability because the bareboat charterer suffers no damages and thus it could not bring about law suit against the time charterer who inflicted damages against the vessel by breaching safe port warranty. If there was no insurance involved, the shipowner would have claimed damages against the bareboat charterer for the breach of safe port warranty, and, in turn, it would have claimed damages/recovery against the time charterer for its breach of safety port warranty. But in this case, This is why many anticipate for the English Supreme Court's final judgment on this matter.

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4. Developments in the Research Centre

(1) Prof. In-Hyeon Kim (Director)

- o On May 11th, delivered a speech on "The Law Protecting the Shippers in Korea" at the 19th International Congress of Maritime Arbitrators.
- o On June 1st, submitted an expert opinion to the Seoul Central District Court as a Professional Examiner.
- o On June 2nd, visited the division of International transaction of Seoul High Court and discussed about the establishment of the Admiralty Court.
- o On Jun 19th, attended the Decision Assessment Meeting of the Korean Maritime Safety Tribunal.

(2) The 3rd Meeting of the Committee on Vitalizing the Korean Arbitration and Maritime Court

- o On Jun 8th, Prof. In-Hyeon Kim attended the 3rd meeting of the Committee on Vitalizing the Korean Maritime Arbitration and Court System and was appointed as the Secretary General.

o The International Seminar for the establishment of the Maritime Court which had been originally scheduled to be held at the end of June was rescheduled to be held in early September.

(3) The 13th Ship Building & Finance Law Study Group Seminar

o On June 25th, the KU Maritime Law Research Centre hosted the 13th Shipbuilding & Finance Law Seminar.

o Mark Davis, Attorney at law from U.K. presented about RG(Refund Guarantee). More than 30 lawyers, in cluding Na-Rae Kim, Attorney at law(KIM & CHANG), attended.

(4) Exchange of MOU with the Korean Maritime Safety Tribunal

o On June 29th, Young-Ho Shin(Dean of KU Law school), and Mr. Hee-Jin Ji(Chairman of Central K MST) exchanged MOU for education between umpires, investigators of KMST and law school students.

(5) Project for Establishing Apportionment of Liability in the Fishing Vessel Collision

o On June 10th, the KU Maritime Law Research Centre and the National Federation of Fisheries Cooperative entered into a contract for carrying out study on establishing apportionment of liability in collision cases involved in the fishing vessel collision.

(6) Expansion of the Maritime Law Research Centre

o On June 20th, the Maritime Law Research Centre rented the room No. 408 in the CJ La w Hall in addition to the Room No. 402. It will be used as a Maritime Law reference book center.

(7) Korea University Graduate School

o On June, 2 experts who graduated from Korea Maritime University and working at a shipping company passed the entering examination for KU Graduate School commercial law department.

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5. Events

(1) Special Lecture from Mark Davis

o Mr. Mark Davis is a well-known author of "Bareboat Charter". He delivered a special lecture last year at the KU law school. He was invited once again by the KU law school and delivered a speech on the Refund Guara nty on June 25.

o He explained as followings;

- Refund Guaranty can be divided into two sorts. First, the traditional guaranty and second, the demand gua ranty. The traditional guaranty (the secondary liability guaranty) is affected by the main contract and thus when the main (underlying) contract is invalid, the guaranty also becomes invalid. On the other hand, the demand guaranty is completely independent from the main (underlying) contract and even when the main (underlying) contract is invalid, it has no effect on the validity of the guaranty. Naturally, the buyer prefe rs the demand guaranty to traditional guaranty.

- In case of a demand guaranty, once an event which was listed as a triggering event in the RG has occurred, regardless the causal relationship with the underlying contract, the buyer can claim for refund of the advance money against the guarantor.
- Paget's Presumption is used as the distinction between the traditional guaranty and the demand guaranty. Where RG is related to such as (i) guaranty between foreigners, (ii) published by a financial institution such as a bank, or (iii) there is wording such as 'on demand', it is construed as a demand guaranty.
- The Court decides whether it is a traditional guaranty or a demand guaranty, taking various factors into consideration. In the Wuhan Guoyo case, it was decided as a traditional guaranty at the first trial but at the second trial, the court decided it was demand guaranty.

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6. Books and Thesis

(1) Maritime Law the 4th Edition, by In-Hyeon Kim

o On Jul 7th, the 4th edition of Maritime Law(Bub-moonsa), written by Prof. In-Hyeon Kim was released.

o New legal issues such as the liability of the maritime related persons including the port authority, stevedoring company and ship builders, the effect of real right of the B/L, the scope of the obligors regarding maritime lien, etc. are added.

(2) Insurance Law the 3rd Edition, by Se-Min Park

o Prof. Se-Min Park, Insurance specialist, published Insurance Law the 3rd edition.

o Prof. Se-Min Park, has published Insurance Law in South Korea by Klwer on March 1, 2015.

(3) Hai-Xiang Lu's Master's Thesis

o A thesis on comparison of Korean and Chinese Maritime Transportation Law has been passed as a master's thesis at Korea University Graduate School Law Department.

<Notice>

Korea University Maritime Law Research Centre invites visiting scholars. Please send an inquiry on details to Prof. In-Hyeon Kim (captainihkim@korea.ac.kr). Home page (www.kumaritimelaw.com)for the centre was opened.