



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 trends regularly to practitioners, for the future development in Korean Maritime Law. We kindly ask for your support and interest.

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I. Introduction of Court Decisions

1. The Legal Nature of Refund Guarantee Bonds and Abuse of Rights (Supreme Court Case 2015.7.9. Docket No. 2014Da64442)

(1) Facts

Ship owner A entered into a ship-building contract with B (Korean law as the governing law). For the construction of the ship A was to make several advance payments to B, and B guaranteed the advance payment for A in case the construction was not done properly. Bank C issued an advance payment bond to A as the beneficiary (Korean law as the governing law). After the second advance payment to B, A no longer made any payments. Accordingly, B terminated the ship-building contract. Subsequently A also terminated the contract. Based on the advance payment bond, A requested the refund of advance payments to C. However C argued that since A did not pay the advance payments and thus provided cause for the contract to be terminated, A's claim was an abuse of rights. Regarding such, the original court decided that A's claim was an abuse of rights and therefore C did not have to refund the advance payments to A.

(2) Court's Decision

Regarding guarantees by the bank, when the bank promises to pay the guarantee to the beneficiary upon the presentation of documents, which are explicitly required by the bill and warrant that meet the payment conditions of the guarantee, and regardless of the underlying contract or conditions of performance, such contract constitutes an "Independent bank guarantee" and not a general guarantee with appendant nature. In an independent bank guarantee the main obligor cannot argue to the beneficiary, reasons based on the original

contract between the main obligor and beneficiary. Also the bank has an unconditional obligation to pay upon the request of the beneficiary [...] the original contract between the beneficiary and the main obligor under an independent bank guarantee has abstractness and is independent from its cause.

However, even under independent bank guarantees the principal of good faith and abuse of rights are not entirely excluded. If it is clear that the beneficiary (A) does not actually hold any rights against the main obligor (B), and nonetheless makes claims to the guarantor (C) by abusing the abstract and independent nature of the independent bank guarantee, this constitutes an abuse of rights and thus cannot be allowed. In such cases, the guarantor may refuse to pay the guarantee upon the request of the beneficiary. However, taking into consideration the fundamental nature of abstractness and independence of independent bank guarantees, the abuse of rights may only be accepted when it is objectively clear that the beneficiary did not have any rights against the main obligor at the time of request for guarantee, and the claim was a mere abuse of its formal legal position as the beneficiary.

[...] under the aforementioned legal reasoning, in order for the plaintiffs' claim based on the advance payment bonds under the independent bank guarantee to constitute an abuse of rights, it must be objectively clear to the defendant that, at the time the plaintiffs requested for guarantee by filing the lawsuit, the plaintiffs did not have any right to request a refund for the advance payments against B and the plaintiffs merely abused their legal positions as the beneficiary of an independent bank guarantee. According to both parties' arguments and the records of this case, the circumstance of when the guarantee was requested was that, in the final investigation of revival debenture trail between the plaintiff and shipyard B, the legality of shipyard B terminating the contract was an issue and after nearly 1 year of hearings the trail was closed without a conclusion. Taking into account such facts, it is difficult to say that at the time the lawsuit was filed, it was objectively clear that the plaintiffs had no right to claim refunds of the advance payment against shipyard B and nevertheless request for payment of such guarantee.

Nonetheless, the original court decided the plaintiffs' claims constituted an abuse of rights based on the results of the hearing, that it was objectively clear shipyard B had lawfully terminate the contract and the plaintiffs had no right to claim refund of the advance payments. There are mistakes in the legal reasoning regarding independent bank guarantees and abuse of rights, and such misunderstanding have led to illegalities in the judgement. Therefore, we reverse the original court's decision and remand to the original court for it to be re-judged.

(3) Comments

Under a ship-building contract, the contractor pays the constructor advance payment over several occasions, and in order to guarantee its refund the constructor hands over the letter of guarantee issues by the bank to the ordering body. This letter of guarantee is called the 'Refund Guarantee ("RG"). The RG is issued as a simple guarantee or an independent guarantee. An independent guarantee does not have a supplementary or appendant nature and therefore is separated from the cause. Thus the ordering body may easily receive a refund from the guarantor. The distinction is made from the writing on the RG. In this case, there was a "non-revocable" clause in the RG, making it an independent RG.

The Supreme Court stated that in the case of an independent RG, since it was separated from the cause, when the conditions written on the RG were met the guarantor had to pay the refund. However, if the cause constituted an abuse of rights, there was no need to pay the refund. It also saw that the standard time for determining the abuse of rights was at the time the application for refund was made. Furthermore, the court emphasized that abuse of rights were to be accepted in a limited manner, in order to meet the intentions of issuing the independent guarantee.

In this case the ordering body did not pay the advance payment and accordingly the contractor terminated the contract. Subsequently, the ordering body also terminated the contract since the construction was not done according to the contract and requested for a refund of the advance payments. The contractor argues that it was a case of abuse of rights since the ordering body provided the reason for termination. The Supreme Court decided that in relation to the interpretation of the RG, the principle of abuse of rights must only be accepted exceptionally, and the time for determination should be the time the request was made. The court saw that it was unclear on whether or not there was an abuse of rights and therefore sided with the ordering body, saying that the principle could not be applied in this case.

2. The Law Governing Direct Claims based on Cargo Insurance (Seoul High Court 2015. 6. 9. Docket No. 2012Na29269)

(1) Facts

Carrier A entered into a carriage contract with B to transport construction equipment from Thailand to Saudi Arabia. A issued a bill of lading to B stating C from Saudi Arabia as the receiver of cargo. A also entered into an insurance contract with D, which covered A's liability during the transportation. Machinery, which was to be transported under deck, was damaged while being carried on-deck. D (the Plaintiff) made a direct claim to C (the Defendant) for insurance payment. The law governing the insurance contract between A and C was English Law. However the agreement stated that English Law was only to apply on liability and payment issues of the insurance contract. The plaintiff argued that "Whether or not a direct claim arises is not a matter of liability or payment regarding the insurance contract. Therefore the Korean Law should apply instead of the English Law, and according to Article 7 of the Korean Private International Law, since a 3rd party's direct claim (stipulated under Article 724 Paragraph 2 of the Korean Commercial Code) is a mandatory provision that must be applied regardless of the governing law, Article 724 Paragraph 2 of the Korean Commercial Code shall apply regardless of the governing law. Furthermore, even if the English Law applies, the claims of this case meet all the prerequisites of direct claim under the English Law as well".

(2) Decision of the Seoul High Court

As seen above, there is an existing agreement between Bright Shipping and the defendant. However, since the agreement on governing law between the parties does not affect 3rd parties, the agreement between the plaintiff and defendant also does not affect other parties. On the other hand, under our private international law (“KPIL”), there is no provision on direct claims from the victim against the insurer.

Taking into account the following points: (i) the victim’s direct claim is based on the insurance contract entered into by the insurer, (ii) in the case a direct claim is accepted, its conditions (the scope of compensation, time of payment) may only be decided according to the contract, (iii) the acceptance of the insured’s right to insurance is decided by the law governing the insurance contract, and if the direct claim of the victim follows another law, the governing law of each legal effects coming from a single contract will split. This goes against the intentions of the contracting parties and there is also a possibility of conflict when interpreting the law, (iv) KPIL stipulates that [...] when determining the governing law, the parties intentions are the most important factors to consider. However, if a governing law other than the one agreed by the insurer and the insured is applied to the victim’s direct claim, considering the fact that the victim’s direct claim is in direct connection with the insurer’s scope of obligations [...] when the victims makes a direct claim towards the insurer the ‘governing law according to the agreement’ i.e. English law should apply.

Under Article 1 of the British Third Parties Rights against Insurers Act, regarding cases where a direct claim is accepted [...] ‘if the insured is a corporate body, only when there is a dissolution order or an arbitrary approval of dissolution and/or when an insolvency procedure is commenced by appointing an administrator in bankruptcy’ can a direct claim be accepted. However, Bright Shipping has currently closed its business and is in mere a state of *de facto* bankruptcy. In England [...] such provisions are interpreted as ‘limited’, ‘enumerative’ provisions. Thus, the insured Bright Shipping cannot be seen as meeting the requirements stated in Article 1 of the Third Parties Rights against Insurers Act, and therefore the plaintiff may not make direct claim to the defendant.

(3) Comments

In general, carriers join a P&I Club Insurance. However, in this case a liability insurance was concluded between a domestic insurance company and carrier. The Saudi Arabian importer who acquired the bill of lading regarding the damaged on-deck cargo, made a direct claim to the liability insurer. In Korea, the direct claim is accepted without limits and therefore is favorable to the plaintiff. However, if the English law applies the direct claim can only be made under limited conditions. Therefore it is highly unfavorable to the plaintiff.

Cases with foreign factors in Korea are determined under the KPIL and KPIL does not provide any regulations on direct claims. The plaintiff claimed that Korean domestic law was to apply to the case. However, the Seoul High Court considered the overall circumstances, including the point that a victim's direct claim against an insurer is based on the fact that the insurer entered into the insurance contract. Thus, the Seoul High Court saw that when the victim makes a direct claim against the insurer, the 'law governing the insurance contract' should apply. Therefore the English Law becomes the governing law and accordingly, the Third Parties Rights against Insurers Act 1930 applies. In addition, there is a high court decision stating that under the Third Parties Act a state of *de facto* bankruptcy is not grounds for when a direct claim may be made (Seoul High Court Case 2014. 5. 12. Docket No. 2013Na73560, see Maritime Law News Update Vol.8).

Since the laws on direct claims differ between England and Korea, there is much controversy when a lawsuit is filed in Korea. A solution is needed.

II. Research Centre Activities

1. 2015.9.17. Jointly hosted international seminar for the establishment of a Korean Maritime Court
2. 2015.8.26. 14th Ship building & financing research committee (Attorney Hee Sun Yoon, Kim&Chang)
3. 2015.10.1. 15th Ship building & financing research committee (Professor Chang Hee Lee, Korea Institute of Maritime and Fisheries Technology)
4. 2015.10.19-23 Conducted adjudicator, inspector education from Korea Maritime Safety Tribunal
5. 2015.10.16. Attended 8th East-Asian Maritime law forum (Dalian University, China)
6. 2015.12.10. Scheduled for the 5th Maritime Law Course for 2015

III. International Seminars

1. International Seminar on the Establishment of a Korean Maritime Court

- o 2015.9.17. An international seminar on the establishment of a Korean maritime court was held at the Korea Chamber of Commerce and Industry (KCCI) Building.
- o Professor James Hu (China), Professor Anselmo Reyes (HKU), Attorney Lawrence Teh (Singapore) was invited to introduce opinions on the maritime court.
- o Professor In Hyeon Kim presented a roadmap saying that "if immediate establishment is difficult, placement of maritime expert judges → establishment of a maritime division → establishment of a maritime court in 2017" can be viable plan

2. 8th East-Asian Maritime Law Forum

- o 2015.10. 16. East-Asian Maritime Law Forum was held at Dalian University in China
 - o Public damage claims regarding sea-rescue work and oil pollution in Korea, China, Japan was discussed
 - o Professor Lee Sik Chai, In Hyeon Kim and Attorney Hae Yeon Song, Soo Ho Son attended and spoke from Korea
 - o The 9th East-Asian Maritime Law Forum is to be held at Korea University in 2016
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IV. News on the Maritime Research Centre

1. Honorary Professor Lee Sik Chai

- o 2015. 10. 16. Delivered a key-note speech at the 8th East-Asian Maritime Forum held in Dalian University
- o Delivered a special lector at the law department of Yanbian University in China

2. Professor In Hyeon Kim

- o 2015.9.17. Presented at the ‘International seminar for the establishment of a Korean Maritime Court’
- o 2015.9.25. Presented on ‘the changes in the Korean legal training system’ at Far Eastern University in Russia
- o 2015.10.14. Spoke of the ‘safe port’ at 2015 first Maritime Arbitration Forum
- o 2015.10.16. Presented on “Korean maritime law trends of year 2014-2015” at the 8th East-Asian Maritime Law Forum held at Dalian Maritime University in China
- o 2015.10.20. Held special lecture on the ‘Ship Safety Act’ at the special investigation committee for Sewol
- o 2015.11.5. Achieved 1st rank as the most cited publisher amongst the entire law department of 2500 staffs and researchers from year 2004 – 2013 by the Korean Academic Promotion Foundation.

3. Adjunct Professor Felix Chan (Law Professor at Hong Kong University)

- o Appointed as adjunct professor of Korea University Law School
- o Published “Shipping & Logistics law, 2nd edition”

4. Adjunct Professor Lianjun Li (Attorney at Hong Kong Reeds Smith Butler)

- o Appointed as adjunct professor of Korea University Law School
- o Attended and discussed at the International seminar for the establishment of a Korean Maritime Court

5. Adjunct Professor Byung Suk Jung (Kim&Chang)

- o 2015. 10. 31. As the President of the Korea Private International Law Association (“KPILA”), held the 5th Korea-China Private International Law Association Joint Academic Forum (“the Korean International Jurisdiction Legislation from the Chinese perspective”)
- o Held fall academic symposium for KPILA
- o 2015.10.22. Delivered special lecture on maritime law at the adjudicator, inspector education for the Korea Maritime Safety Tribunal

6. Adjunct Professor Woo Young Chung (Lee&Ko)

- o Opened a ‘Ship Finance Lecture’ in the fall semester of 2015 for the Korea University Master of Law Course

7. Former Secretary of Ministry of Oceans and Fisheries Nak-Jung Choi

- o Opened a ‘Lecture on International Maritime Treaties’ in the fall semester of 2015 for the Korea University Master’s Course

V. Newly Arrived Books

1. <Maritime Law Research III> published

- o <Maritime Law Research III> By professor In Hyeon Kim was published on November 10
- o 44 theses presented from 2008 to 2014 were published by Bupmoon
- o A follow-up publication of Maritime Law Research (Samwoo, 2003), Maritime Law Research II (Samwoo, 2008)

2. Hong Kong Maritime Law

- o An introductory by adjunct professor Felix Chan from Hong-Kong University

3. Japan Maritime Law Research Committee Articles

- o Japan Maritime Law Research Committee Articles from 2012 to August 2015 have arrived and are placed in the data room of the Maritime Law Research Centre

VI. Maritime Law Academic Diploma Course at Korea University

- o In the first semester of 2016, 5 people applied for the doctorate program (including 1 person in the combined master’s and doctorate program) and 2 people applied for the master’s program. There has been room for more applicants recently.
- o Since all applicants are to take an interview, people who are interested in the program should contact professor In Hyeon Kim in advance.

<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 In Hyeon Kim at captainihkim@korea.ac.kr.

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