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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. **BBCHP's legal nature under Rehabilitation Proceeding (Changwon District Court decision 2016.10.17. Docket No. 2016taki227)**

(1) **Fact**

The Hanjin Shipping (Hanjin) applied for rehabilitation and a Korean court allowed to start the rehabilitation proceeding on September 1, 2016. According to Article 58 of the Rehabilitation Act, the property of the applicant as the debtor is no longer allowed to be arrested. In the meantime, Hanjin owns 54 vessels under BBCHP(Bareboat Charter Hire Purchase) agreement among its 61 operating vessels.

A claimant who supplied bunker to Hanjin applied for the auction sale against M/V Hanjin Xiaman which was registered in Panama and owned by a SPC registered in Panama. The Panamanian law is applicable for the case because the KPIL states that the law of the flag of the vessel shall govern the maritime lien. According to the Panamanian law the claimant who supplied bunker has maritime lien. The local court allowed the arrest of the vessel. Hanjin appealed the decision saying that the vessel was owned by Hanjin even though the registered owner was still the SPC.

(2) **Court's Judgment**

As soon as the court decided to start rehabilitation proceeding, the claimants with rehabilitation claim and rehabilitation security claim are not allowed to apply for compulsory execution against the debtor's property.

The M/V Hanjin Xiaman is a BBCHP vessel. The title of the vessel is within the hand of the Panamanian owner until the charter period ends and Hanjin has only the expectation right to obtain the title on the condition that it pays the charter hire completely without fail. The charter period ends on March 12, 2019 in the BBCHP contract. Therefore, the title of the vessel still exists in the Panamanian owner.

Even though there is strong need to gather rehabilitation property together as much as possible including vessels used in the operation for the purpose of facilitating rehabilitation proceeding, inclusion of the BBCHP vessels into the property of the debtor may inflict the foreseeability and legal stability of the claimant. Therefore, the argument of the applicant that the vessel should be regarded as Hanjin's property is rejected.

(3) Comment

The legal nature of the BBCHP has long been discussed in Korea. There is tendency in Korea that the BBCHP vessel is regarded as being owned actually by the charterer. We can enumerate lots of rules and laws admitting the BBCHP vessels as a Korean Flagged vessel including Ship Safety Act, Seaman's Act, Pilot Act and Shipping Act.

Under the BBCHP agreement, the charterer has a kind of expectation right on the vessel that it will become a Korean flagged vessel soon. However, the SCP in foreign countries is still registered as the title holder of the vessel in the registration book and ship's registry. Therefore, the legal owner of the vessel is still the SCP. If the above is the case M/V Hanjin Xiaman may not be regarded as the debtor Hanjin's property which is prohibited to be arrested under the Rehabilitation Act.

However, if the court maintains such decision continuously, the rehabilitation of debtor will be heavily hampered because almost all of vessels are subject to be arrested, as the result of which the continuous operation of Hanjin and rehabilitation cannot be expected.¹

In order to solve the problem, the speaker suggest the BBCHP vessel is inserted as one of the property of the debtor in case of shipping company's case in Article 58 of the Rehabilitation Act. In the meantime, the maritime lien holders such as the bunker supplier under the Panamanian law can be protected as the claimant with security under the Rehabilitation Act.

2. Effect of surrendered B/L (The KSC case 2016.9.28. Docket No. 2015na2036769)

(1) Fact

C-1 as the carrier entered into the contract for the carriage with the shipper. C-1 borrowed the vessel from C-2. As soon as a B/L is issued by the C-2, it was returned to the C-2 by the shipper. The C-1 entered into the stevedoring contract to discharge cargo with a stevedoring company X. The X made separate contract for discharging cargo with another stevedoring company Y. During the discharging, the cargo of the shipper was heavily damaged. The shipper made claims against Y based on the tort. Y argued that it is allowed to invoke the package limitation according to the Himalaya clause in the B/L issued by C-2. The shipper argued that the B/L was surrendered and thus the clause had no longer any effect.

(2) KSC's Judgment

Article 5 of the B/L issued by C-2 states that where the action is raised against the servant, agent or independent contractor, they are allowed to invoke the defence and limitation of liability which the carrier is available. Article 1 states that independent contractor includes ship owner, charterers, space charterer, stevedores, terminal operator, their servant or agent and anyone who assist the execution of the carriage.

¹ According to Singapore court's interim stay order dated on September 14, 2016, not only the owned vessels by Hanjin but also beneficially owned vessels and chartered vessels were ordered not to be arrested.

The stevedoring contract was made between C-1 and X. Therefore, there was no direct contractual relation between Y and C-2. However, C-2 assumed obligation of discharging cargo for the benefit of the shipper and Y carried out the discharging work on behalf of C-2 as the carrier. Y was in the status of the sub-contractor of the carrier.

Even though the issued B/L had been surrendered to the carrier, unless there was special circumstances otherwise agreed, the agreement stated in the rear side of the B/L on the liability of the carrier back is still valid just when it was issued. Therefore, Y as the stevedoring company is allowed to invoke the package limitation against the shipper based on the Himalaya clause.

(3) Comment

In a charter party situation, it is very difficult to find out who is the carrier between the charterer and the ship owner when the B/L is issued and signed by the ship's Master because there are two possible defendants. In the case, the shipper entered into the contract for the carriage with C-1. C-1 became charterer by borrowing the vessel from C-2 and C-2 actually carried out the carriage of the cargo. In this sense, C-1 can be regarded as the contractual carrier and C-2 as the actual carrier. If that is the case, C-1 should issue the House B/L which governs the legal relation between the carrier, and the shipper including the holder of the B/L. However, in the case, the B/L was issued by C-2 as the actual carrier. Only one type of B/L was issued and Master B/L was not issued. C-1 did not issue any B/L. However, C-1 also acted as the carrier by entering contract for discharging cargo with a stevedoring company.

When Y as the stevedoring company incurred cargo damages and was required to pay compensation for the shipper, it tried to rely on the Himalaya clause. Only if it falls within the definition of the independent contractor, it is eligible for invoking the package limitation. One requirement to become the eligible person for invoking the package limitation under the Himalaya clause is that the person should carry out one of the carrier's duty. If the stevedores had contract for the carriage with the shipper, they are not allowed to invoke the package limitation for which the carrier is available. It was obvious that Y did not have direct contractual delegation of the power from the carrier C-2 who issued B/L which Y tried to rely on. However, it was also obvious that Y did carry out one of the duty of discharging cargo imposed upon the carrier C-2. Reflecting these circumstances, the KSC decided that Y was regarded as the independent contractor who is eligible for package limitation.

The surrendered B/L has been engaged since 1990 in Korea. In order for the cargo interest to overcome the late arrival of the B/L in the discharging port, the originally issued B/L is returned to the carrier and then only the front side of the B/L is handed over the shipper with remake of "SURRENDERED". There is no dispute on the legal effect of the surrendered B/L in respect of the presentation rule.² The carrier is not required to hand over the cargo with the exchange of the B/L in case that the B/L is issued in the type of the surrendered B/L. The consignee (or importer) is free from obtaining its cargo without presenting B/L. Only if it verifies its identity as the rightful consignee, it can obtain delivery of the cargo from the carrier. However, there are dispute on whether the clause in the back side the originally issued B/L is still valid and has effect between the carrier and the shipper.

In the surrendered B/L case in the KSC 2006, the original B/L was not issued at all. The KSC rendered that the statement in the back side of the B/L had no effect because the B/L was not issued at all.³

On the other hand, the original B/L was issued and returned to the carrier in the case at issue. Reflecting this difference of the factual situation, the KSC decided that there was agreement of applying the clause in the

² The Seoul High Court case 2006.6.13. Docket No. 2005na54366.

³ The KSC case 2006.10.26. Docket No. 2004da27082.

back side of the original B/L between the carrier and the shipper because the B/L was issued. The uncertainty of legal relation became cleared in this respect.

However, it is still uncertain whether the shipper is eligible for relying on package limitation stated in the original B/L when it is not issued at all but a statement, saying “all terms, conditions and exceptions as per original B/L.” exists on the front page. The author has a firm view that the maritime industry is better to engage in the sea waybill rather than the surrendered B/L. The author agrees with the KSC’s judgment.

II. Events

1. The 9th East Asia Maritime Law Forum

The 9th East Asia Maritime Law Forum hosted by Korea University School of Law was held at Incheon Harbor Park Hotel on November 11 and 12, 2016. The Forum has been held once a year in a rotation basis among Waseda University, Dalian Maritime University and Korea University since 2008. About 60 experts on maritime law from Korea, Japan and China attended at the Forum. Four subjects such as (i) Recent development of maritime law of each countries (ii) Seaworthiness duty (iii) Dangerous goods and (iv) Jurisdiction issues were addressed by several distinguished experts from Korea, China, Japan, Hong Kong and UK. Mr. BS Chung from Kim & Chang made a special speech on the Hanjin Shipping Rehabilitation case.

At the Recent development of maritime law of each countries session, Prof. In Hyeon KIM(Korea University), Prof. James Hu(Shanghai Maritime University) and Prof. Fumiko(Okayama University, Japan) made presentations. At the Seaworthiness session, Prof. Han Lixin(Dalian Maritime University), Mr. CY KIM(Korea Maritime Transport Co.), and Mr. Nakamura(Yoshida & Partner) made speeches. At the Dangerous cargo session, Mr. Yamaguchi(Okabe and Yamaguchi), Prof. Guo Ping(Dalian Maritime University) and Miss NR KIM(Kim & Chang) made presentations. At the Jurisdiction session, Prof. Yvonne Baatz and Felix Chan, specially invited distinguished professors from University of Southampton and Hong Kong, rendered speeches on jurisdiction issues in the Bill of lading and anti-suit injunction respectively.

The 10th East Asia Maritime Law Forum will be held at Kagoshima University in Japan around November, 2017.

2. Translawfer 2016 Seoul Conference

Translawfer 2016 Seoul Conference – the 4th Annual Young Academics Vision on Tomorrow’s Transport Law, hosted by Korea University School of Law Maritime Law Research Centre was held on November 27, 2016 at Korea University CJ Law Hall. About 30 young scholars from Korea, UK, China, Croatia, Italy gathered to exchange views on transport law issues. Prof. In Hyeon KIM from Korea University, Prof. Sinisa Petrovic and Miso Mudric from University of Zagreb, Prof. Achim Puetz from University of Jaume, Spain, Mr. Masimiliano Musi from Italy, Prof. Chen Gang from Wuhan University of Technology and other experts attended the conference and delivered speeches. The 5th conference will be hold at Spain.

<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.

<Notice2> The Korea University Maritime Law Research Centre homepage (www.kumaritimelaw.com) has opened.