고려대학교 해상법 연구센터

Maritime Law News Update

제 19 호 2017.06.05.

136-701 CJ Law building Room 402, Korea University (School of Law), Anam-dong, Seongbuk-gu, Seoul, Korea (postcode: 02841)
- Director of Maritime Law Research Centre, Prof. In-Hyeon KIM 02-3290-2885 (office), captainihkim@korea.ac.kr
- Research fellow Jae-Hee KIM 02-3290-2912 (centre) kjh7280@gmail.com
- Research Assistant Jang, Hyo Eun jhe621@naver.com Home page: http://kumaritimelaw.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 by the donation from Mr. Shin-hwan Park, president of Spark International, Korea.

I. Introduction of Court Decisions

1. Maritime Lien by bunker supplier

(Seosan Branch of Daejon Distric court 2016.1.8. Docket No. 2015tagi180)

(1) Fact

The Korean Bareboat Charterer (hereinafter BBC) of the M/V K. Promise entered into the bunker supply contract with a local bunker supplier (A) at Singapore, and then A requested the same bunker supply to the OW Bunker which, in turn, ordered to supply it to the physical supplier in a Russian port. A Bank had an assignment of the claims from the OW Bunker and applied for auction sale of M/V K. Promise based on the maritime lien in Korea. The Korean lower court accepted the application. However, the owner of the vessel applied for cancellation of the decision.

The Panamanian law was applicable because the flag of M/V K. Promise was Panama because the law of flag of the vessel subject to maritime lien governs the legal relation according to the Korean International Private Law. The creditor alleged that it had lawful right of maritime lien even though it did not have direct contractual relation with the Korean BBC because there was no rule to limit to the direct contractual party for triggering maritime lien under Panamanian No 55 Act.

The application for auction sale was accepted. The ship owner applied for cancellation of the decision.

(2) Court's decision

The court decided as follows:

Article 4 says that vessels shall be liable for the payment of owners' debts, whether common or preferred, and creditors may pursue the same even if in the possession of third parties as long as

such liability exists. In addition, Article 27 says that he who on his own behalf employs a vessel owned by another party for maritime traffic, whether he directs it himself or through another, shall be deemed in his relations to third parties as the owner of the vessel.

Article 244 says, inter alia, the following credits shall have a privilege on the vessel and on her price, in the order expressed in this article.

9. The sums owed by virtue of obligations incurred for the provision and necessities of the vessel.

According to Panamanian Supreme Court's judgment on the Petro Sercvicios, S.A. v. M/V Wedellsborg (2011), if the bunker supplier entered into contract for bunker supply with third party other than charterer or owner of the vessel, it is not allowed to invoke action in rem based on Article 27 and Article 4.

OW Bunker did not have supply order from charterer but from local supplier at Singapore and we are not able to find out any evidence proving that it had direct bunker supply contract with BBC in Korea.

Furthermore, the Korean BBCharterer and bunker supplier A at Singapore are separate entities even though they had same directors and furthermore, we cannot find any evidence that A ordered the bunker supply to OW bunker on behalf of the Korean BBCharterer.

Bunker supply claim incurred from the contract between OW Bunker and A did not bring about maritime lien under the Panamanian law. Accordingly, the previous decision of auction sale should be cancelled.

(3) Opinion

According to Korean Commercial Code, claims from bunker supplies does no longer bring about maritime lien. It was deleted from the categories of maritime lien when the KCC was revised in 1991. However, the case had a foreign factor because the vessel subject to maritime lien was a Panamanian vessel. According to Panamanian No. 55 Law (2008.8.6.), claims from bunker supplies bring about maritime lien. The Korean lower court admitted that the claimant's claim fell within the category of maritime lien.

The court focused on the scope of the debtor who could bring about maritime lien. Article 27 is the relevant provision which says person who engages other person's vessel are able to bring about maritime lien just like the owner of the vessel. The Korean lower court referred to Petro Servicios, S.A. v. M/V Wedellsborg case (2011), under which the Panamanian court decided that only when the bunker supplier entered into contract with owner or ostensible owner such as BBC, time charterer directly, maritime lien was triggered.

In the Korean Supreme Court case *2014.12.24.Docket No. 2014da27128*, a supplier who made supply contract with a repairer of the vessel was not allowed to invoke maritime lien because the repairer did not have any right to bring about the maritime lien under Panamanian law.

The court explained that the OW Bunker did not have direct bunker supply contract with the BBC, rather it got the request of supply from the local supplier at Singapore and thus the OW Bunker did not have contractual relations with the “He who on his own behalf employs a vessel owned by another for maritime traffic (Art. 27)”. Even though the bunker supply claim fell within the definition of Article 244 (9) “supplies” of the Panamanian Maritime Law, the OW Bunker did not meet the ostensible owner’s category(such as BBC or time charterer). As a result, the requirement to trigger the maritime lien in relevant case was not fulfilled. Therefore, the auction sale decision was cancelled.

2. Freight forwarder as the contractual carrier

(The KSC 2017.1.25. Docket No. 2015da225851)

(1) Fact

A Korean exporter (shipper) who tried to export steel cargo requested a freight forwarder in Korea to arrange transportation. It issued combined transportation B/L to the exporter. It entered into the contract for the carriage with the Hanjin Shipping from Pusan and Chennai, India. The Hanjin Shipping issued Master B/L. Because the cargo was rusted, the importer claimed damages against the cargo insurer. The cargo insurer who paid insurance proceeds exercised subrogation right to the freight forwarder argued that it acted as an agent of the exporter and thus it was not liable as the carrier. The lower court admitted the freight forwarder as the contractual carrier and the claims was admitted.

(2) Decision of the KSC

Whether the freight forwarder acted as the carrier or intermediary should be decided by party's intention. In case the party's intention is unclear, we should decide whether it undertook transportation or not by studying the name who issues the House B/L and the type of freight (The KSC case *2007.4.27.Docket No. 2007da4943*).

The lower court decided as follows: (1) Even though the House B/L was surrendered and thus the negotiability of the B/L disappears but the evidential effect to show the contractual relation between the exporter and the carrier still exists in the B/L. (2) Even though the freight forwarder does not possess special transportation facility, it may have intention to serve as the carrier, furthermore, according to the KCC Article 116(2), the freight forwarder is regarded as the carrier in case it issues B/L. (3) if the defendant had intention to serve as an intermediary, it might not have issued the Hose B/L in its name but actually it issued the House B/L. (4) While the geographic scope of the defendant's obligation covered from Pusan container yard to the warehouse of the consignee, that of the Hanjin Shipping cope was from Pusan container yard to the container yard of consignee. Therefore, if the Hanjin Shipping acted as a contractual carrier, there was no contractual carrier in the coverage between the Chennai port container terminal and warehouse of the consignee, which was against the shipper's intention. Accordingly, the defendant acted as the contractual carrier against the exporter. We agree with the lower court judgment.

The lower court decided that the carrier held liable for cargo damages caused by the carrier or crew or its servant unless the carrier prove it exercise due diligence the receipt, loading, carriage, keeping, stowing, discharging and delivery (KCC Article 795(1)). There is no evidence that the carrier and the Hanjin Shipping as an independent contract carried out due diligence in receipt, loading, carrying, keeping, discharging and delivery. The defendant as the contractual carrier hold liable for damages caused by rust. We agree with the lower court decision.

(3) Opinion

Even though the name of person or company includes a freight forwarder, the person or the company engages in the business of transportation in addition to the intermediary business in

Korea. Therefore, in case the freight forwarder was engaged in the contract, we need to make certain that it served which function among as carrier, agent or intermediary. When it serves as a carrier, it invites actual carrier for carrying out its duty of carriage because it does not own or possess vessels to transport the cargo. The freight forwarder as the contractual carrier issues the House B/L, on the other hand, the actual carrier issues the Master B/L.

In the case, the freight forwarder as a defendant argued that it was the agent of the exporter (shipper) and thus it was not liable as the carrier. However, the KSC decided that it acted as the contractual carrier on the ground that (i) the Master B/L was issued and it also issued the House B/L by the freight forwarder, and (ii) the geographic coverage of the House B/L was longer than the Master B/L and thus House B/L became meaningful.

According to the KCC 795(1), the carrier becomes liable for cargo damages unless it proves that it exercise due diligence for carrying cargo. In order for the carrier to be exempted, it should prove that it did exercise due diligence. Because the carrier did not prove it, the liability was admitted by the KSC.