Korea University Maritime Research Centre

Maritime Law News Update

Vol 23 2018.05.07.

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o This News Letter is published by the donation from Mr. Shin-hwan Park, president of Spark International, Korea and Korea Ship owner's Association.

I. Introduction of Court Decisions

1. Unknown Clause and insurer's subrogation

(The KSC 2017.9.7. Docket No. 2017da234217)

(1) Fact

The Korean freight forwarder entered into contract for the carriage with the carrier. The importer received insurance proceeds from the cargo insurer when it found that the cargo was damaged. The insurer who had obtained subrogation right from the importer as the insured exercised it against the carrier.

The carrier argued that (i) there was no reason for it to pay damages to the insurer because the insurer wrongfully paid insurance proceeds even though the payment of the insurance should have been rejected; (ii) the carrier was to be exempted because the dam ages was caused due to "bad package"; (iii) the importer should have verified the bad condition of the cargo at loading because there was "unknown clause" in the B/L but the importer failed. The lower court accepted the carrier's argument. The insurer appealed to the Korean Supreme Court on the (i) and (iii) issues.

(2) KSC's judgment

1) Insurer's subrogation

The lower court decided that the cargo damages was caused by the bad package done before the insurance contract was effective, which was one of events that the insurer should be exempted from liability under ICC(A) (4.3.) It is acceptable for the lower court to have decided that the package of the cargo was not enough.

2) The effect of unknown clause

In case that the cargo interest makes claims against the carrier for cargo damages, he should verify that cargo damages were incurred during the carriage of goods by sea. It is enough for the cargo interest to verify that the cargo was handed over to the carrier without any damages in case that the cargo damages was verified as damaged when the cargo was landed.

However, the carrier is presumed to receive or ship the cargo on board as stated in the B/L(KSC Art. 854(1)). Therefore, if there is no remark on the B/L with apparently good condition statement, the carrier is presumed to receive or ship the cargo in good condition.

However, the apparently good condition subject to the presumption is applicable only for the apparent defects which could be found if the carrier inspected with due care, but not for the apparent defects which could not be found if the carrier inspected with such care.

Therefore, even though the B/L with no remarks was issued, when there is a statement of "Shipper's Load & Count or "Said to contain", the cargo interest should prove that the cargo was handed over the carrier in a good condition(KSC 2001.2.9. Docket No. 98da49074; 2011.2.10. Docket No. 2009da60763).

The lower court rejected the cargo insurer's argument that the presumption against the carrier was admitted because the B/L holder did not verify that the importer handed over the cargo without any damage where there was unknown clause of "said to contain" even if there was loaded in an apparent good condition.

The lower court's judgment is acceptable and thus it is upheld.

(3) Opinion

1) Insurer's subrogation

The cargo interest claims against the cargo insurer when its cargo suffered damages. The insurer which paid the insurance proceeds exercise the subrogation right against the carrier which inflicts damages. It is called as the subrogation right. One of requirement for the insurer to exercise the subrogation right is that it paid the insurance and the payment was right and lawful. Even though there is no reason for the insurer to pay the insurance proceeds but if the insurer paid it to the cargo interest, the subrogation of the insurer is not allowed against the carrier. The KSC decided that the insurer was not allowed to institute the subrogation right if the insurer paid the insurance proceeds even though it should be exempted from liability (KSC 2007.10.12. Docket No. 2006da80667).

According to the ICC clause, the insurer is entitled to exercise the exemption of liability against the insured if the damages was caused by the cargo interest's bad package done before the insurance contract become effective. However, the insurer paid the insurance proceeds. The KSC upheld the lower court's decision that the insurer's subrogation was not admitted.

2) The effect of unknown clause

The cargo interest should prove the fact that the damages were incurred during the voyage in the cargo claims. For the cargo interest to win the lawsuit for cargo damages, it should verify that the cargo was delivered to the carrier in a good condition but the cargo was handed over to it in the damaged condition. However, under the Korean law, when the B/L is issued, the cargo is presumed to have been loaded as stated in the B/L between the carrier and the shipper, and the statement in the B/L had conclusive evidence between the carrier and the holder of B/L.

The carrier started to insert the unknown clause to avoid the disfavored position into the B/L. If the unknown clause is regarded as valid, the burden of proof to prove damage condition is reinstated and thus cargo interest should verify the condition of the cargo at loading port (KSC 2001.2.9. Docket No. 98da49074; 2008.6.26. Docket No. 2008da10105)

The KSC followed the previous decision and required the consignor to verify the good condition of cargo at the loading port. The Court supported the lower court decision that the consignor did not verify such condition the cargo and thus that the cargo was damaged due to the bad package of cargo.

The KCC Article 853(2) says that the carrier is allowed not to enter into the remarks on the weight, volume, number and marks when it had reasonable doubt that they were not exactly stated or there was no method to ascertain them.

The VGM(Verified Gross Mass of Container) system of IMO, effective as of July 1, 2016, imposes the obligation upon the shipper to submit the report on the exact weight of cargo to the carrier. The Korean court may find that the carrier had method of to ascertain the weight of cargo, which makes the court to decide that the unknown clause is null and void.

2. The carrier's duty to stow

(The KSC case 2017.6.8. Docket No. 2016da13109)

(1) Fact

A Korean company S tried to export cargo to the importer in a foreign country. The cargo was exported in 12 container boxes. Y as the freight forwarder issued the house B/L and a Korean company J shipping acted as the actual carrier.

S which had performed stowing work in person for a long time ordered X to stow the cargo this time. The cargo was damaged during the carriage and it was confirmed that the damage was caused by the bad stowing by X. The insurer as the plaintiff which paid the insurance proceeds made recourse claim against Y, arguing that it was the carrier, because it did not discharge its duty to stow with due diligence.

The defendant Y argued that it acted not as the carrier but as a pure freight forwarder, and thus that it only introduced a stowing agent X to the cargo owner S and, in return, it received the money from S which it had paid already to X on behalf of S.

The first instance court rendered the decision as follows.

(1) The plaintiff alleged that the defendant was liable for cargo damages on the condition that it was a party to the contract for the carriage of goods including stowing. But, the plaintiff did not submit sufficient evidence that there was the contract for stowing cargo between S and the defendant Y. The contract for stowing was made between S and the defendant X,

(2) Even though there was fact that the defendant Y issued the house B/L to S, it is based on the presence of master B/L issued by the actual carrier. Therefore, it did not assume the duty outside the scope of the actual carrier's duty.

The plaintiff appealed to the KSC.

(2) KSC's decision

1) Whether Y was the carrier

There are several cases whether the freight forwarder undertakes the carriage of goods as the carrier or not is unclear. The court should make decision on whether it obtains the status of the carrier through studying the party's intentions. However, in case that the party's intention is also unclear, the court should take consideration the name who issued the house B/L, circumstances which the freight was paid etc.(The KSC decision 2007.4.27. Docket No. 2007da4943)

Because the defendant Y issued the house B/L to S as the shipper in its own name, it is reasonable to decide that Y undertook the carriage of goods by sea from S. The defendant Y made a contract for the carriage with J, covering from Pyungtaek to Shanghai, including stowing work into the container at Pyungtaek and made another contract for fastening work with the defendant X.

2) The carrier's duty to stow

Because there was a contract for the carriage between S and defendant Y, Y should have discharge its duty to stow the cargo with due diligence not to bring about cargo damages by hitting each other or ship's rolling. No matter who between the independent contractor(Y) and shipper(S) ordered X to carry out the stowage, Y as the carrier had to exercise its duty for preventing cargo damages, making sure that the cargo was appropriately fastened for the carriage, and ascertaining the nature of the cargo and fastening the cargo according to its nature.

Because the defendant X is a servant or agent of defendant Y, unless Y prove that X was not negligent in fastening the cargo, the defendant Y should be liable for cargo damages (Commercial Code Art. 795(1)).

Nevertheless, the lower court decided that there was no proof that there was the contract for carriage between S and Y, and that even though Y issued B/L and thus it was regarded as the carrier, it is not liable for the damage which occurs outside of the actual carrier's coverage for the carriage contract. The lower court decided that it was not liable for the cargo damage occurred due to bad fastening which was outside of the actual carrier's contract coverage. The above decision of the lower court was wrong and appeal is accepted.

(3) Comment

Notwithstanding the name of the freight forwarder, it carries out several functions in Korea such as the carrier, intermediary and the agent. It is presumed as the carrier if it issues the house B/L in its own name in Korea. The KSC reaffirmed the tradition how to decide whether the freight forwarder acted as the carrier in the case.

The cargo damages were incurred in the course of stowing the cargo not on board the vessel but at the Container Freight Station (at shore). The KSC decided that the contractual carrier had duty to stow the cargo with due care even at shore if it undertake such contract.

There are two different types of stowing for the container cargo such as FCL(Full Container Load) and LCL(Less Than Container Load). There is no way for the carrier to confirm the condition of cargo within the container box in the FCL cargo because it is delivered to the carrier with the sealed condition. However, the carrier is able to make sure the condition of the cargo within the container box in case of LCL cargo because the cargo is stowed by the carrier in the container box.

There is third type of cargo stowage. The several numbers of cargo with the same cargo owner are delivered to the carrier's CFS(Container Freight Station) and the carrier stow them into the container box through its servant, in which case the carrier is able to confirm the condition of the cargo stowage. Therefore, the carrier has duty of care to confirm the condition of the cargo stowage in cases of LCL and the third case but not the FCL case. The case will be a good example to impose duty of care upon the contracting carrier to make sure the cargo stowage condition in the container box.

3. The effect of on-deck clause and consignee in the sea waybill

(The KSC case 2017.10.26. Docket No. 2016da227663)

(1) Fact

The Korean company S Engine tried to import an engine from a German exporter. The freight forwarder P which undertook a carriage arrangement from the exporter selected the M Line as the carrier. P which issued the ocean B/L handed it over the shipper.

The M Line issued the sea waybill to P under which P was listed as the shipper and P's partner (P1) in Korea was listed as the consignee. There were two clauses in the sea waybill relevant to the case, to the effect that the cargo was subject to the carriage on deck without prior notice even in case of container cargo, and that the shipper shall be entitled to change the consignee at any time before delivery of the goods provide it gives the carrier reasonable notice in writing. The cargo was damaged during the carriage on deck.

The S Engine entered into the cargo insurance with the insurer. As soon as the cargo was damaged, the S Engine received insurance proceeds from the insurer. The insurer (plaintiff) exercised the subrogation right on behalf of S Engine against M line as the carrier. The plaintiff brought about the law suit with two causes of actions such as tort and breach of contract. To raise action successfully, the plaintiff should prove that it had contractual relationship with the M Line. The M line issued the sea waybill under which the only P was the party to the contract when it was issued. Therefore, it argued that the name of the consignee was changed into the S Engine, and that the B/L was issued at the later stage by the M Line and then the S Engine became the holder of the B/L. The lower court did not accept the plaintiff's argument.

(2) KSC's decision

The lower court, denied the plaintiff's argument, saying that the sea waybill issued by the defendant M Line was a sea waybill stated in KSC 863, the shipper which entered into the contract with the M line was P and the consignee was P Korea (P1) not S Engine, as a result, the plaintiff was not allowed to raise law suit against the defendant based on the breach of contract. The lower court decided that the prior notice by the shipper in writing to the carrier is required for change of the consignee in the sea waybill but there was no such proof that such notice was given by P or P1 to the carrier.

The lower court also decided as followings.

The plaintiff's argument that the consignee was changed from P to S Engine by issuing the B/L was wrong because the consignee can be changed by the sole power of the shipper without any notice

to the carrier before the cargo is delivered to the consignee, which is against the parties intention to issue the sea waybill rather than B/L by deleting presentation rule and reducing the carrier's burden to hand over the cargo to the holder of the B/L. It is also against the party's intention to make the change of the consignee certain through writing. The lower court decision was right.

The lower court also decided that there was no negligence of the M Line in terms of loading the cargo on deck, because of the presence of on-deck clause, saying that the cargo could be loaded on deck at the carrier's discretion, because the cargo did not have special need to be loaded under deck and because the shipper did not give any order to load the cargo under deck or it did not pay an additional freight to the carrier due to loading under deck.

The cargo was damaged because the rope which fastened the cargo was cut and thus cargo was uncovered, resulting in wet damage by rain. The cargo was packed with tarpaulin by the shipper and there is a remark of 'SHIPPER'S LOAD, STOWAGE, COUNT AND SEAL'. There was no evidence that the rope was cut by the negligence of the defendant M Line. The lower court denied the plaintiff's argument that the cargo damages was caused by the defendant's negligence. The lower court judgment was right.

(3) Comment

When the NVOCC enters into contract for the carriage with the shipper, the actual carrier necessarily becomes involved in the carriage. The contractual carrier issues the house B/L and the actual carrier issues the master B/L. The shipper in the house B/L is not allowed to bring about claims against the actual carrier based on the breach of contract for the carriage because it did not have contractual relation with the actual carrier. It can raise claim based on the tort against the actual carrier.

The carrier may issue one of two documents, either the B/L or the sea waybill. Where the B/L is issued, the consignee is allowed to receive the cargo only when it obtains the B/L in its hand. On the other hand where the sea waybill is issued, the consignee is designated by the order of the shipper. The carrier is obliged to hand over the cargo to the designated person as the consignee in the sea waybill. It is not required to hand over the cargo with the exchange of the B/L and thus it became free from the fear to compensate damages to the holder of B/L in case the cargo was delivered without production of the B/L.

The importer was the S Engine. In the sea waybill issued by the M Line, the S Engine is not listed as the shipper. Therefore, it is not the party to the carriage with the M line and thus it was not allowed to make claim against the M Line based on the breach of the contract. Several allegations by the plaintiff to bridge contractual relationship with the M Line were not accepted by the courts.

In the claims based on the tort, the courts decided that there was no proof of the negligence of the defendant M Line. The plaintiff is required to prove the presence of the negligence of the defendant in order to win the law suit based on the tort.

There was an on-deck clause in the sea waybill. Parties in the contract agreed that the cargo is allowed to be loaded on-deck. The court decided that the plaintiff did not prove the presence of the defendant's negligence, taking into consideration the valid effect of the on-deck clause. As a result, the tort claims was also rejected

II. New development of maritime dispute settlement in Korea

Several dozens of Korean maritime law celebrities established the SMAA(Seoul Maritime Arbitrators Association) in February 28, 2018. The SMAA's main role is supporting the ad hoc arbitration in maritime cases in Korea. Mr. Byung Suk Chung, former president of Korea Maritime Law Association was elected as the first president of the SMAA. The award rendered by the ad hoc arbitration supported by SMAA has the same power as the court judgment according to Korean Arbitration Act. As of February 28, 2018 two different maritime arbitrations started to co-exist in Korea such as the KCAB (Korean Commercial Arbitration Board) and the SMAA. The former is the typical institutional arbitration while the latter is a kind of ad hoc arbitration similar to the LMAA and SCMA. For more information in detail, please visit the website of SMAA(www.smaa.kr.)