Korean Judicial Decisions

Major Decisions in the Second Half of 2016

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Increasingly, domestic courts in Korea are revealing a tendency of applying international law more actively in their decisions. To take a closer look at the changing legal practices and attitudes of the Korean judiciary in applying international law in domestic cases, this article reviews selected major decisions by the Supreme Court of Korea in the second half of 2016.

The first case is Supreme Court Decision 2015Da5194 on the ‘Insurance Proceeds’ which was decided on 23 June 2016.1 Here the plaintiff was a Korean corporation in the trade business, and the defendant is an American corporation in the insurance business which has a branch office in Korea.2 The Plaintiff entered into a cargo insurance agreement with the Defendant in Korea under the terms of WAIOP (With Average Irrespective of Percentage). Under this agreement, the insured recovers for certain inherent maritime perils regardless of the type or scale of maritime loss, as provided under the Institute Cargo Clauses of the Institute of London Underwriters (now the International Underwriting Association of London). But at the same time, the insurance agreement included an ‘On Deck Clause,’ providing for the governing law, stating that “all questions of liability arising under this policy are to be governed by the laws and customs of England”; and with the provision that in the event the plaintiff fails to notify the defendant of the ondeck loading of insured cargos, the scope of coverage is to be limited to Free from Particular Average (FPA), under which general partial loss is not covered beyond ‘Washing Overboard.’

1 Supreme Court, 2015Da5194, 23 June 2016, available at https://casenote.kr/%EB%8C%80%EB%B2%95%EC%9B%90/2015%EB%8B%A45194 (in Korean).
2 The Defendant is an American corporation in the insurance business with a branch office and a separate representative in Korea, which is registered and conducts business in the Republic of Korea. The insurance contract entered into force in Korea through the Defendant’s local agency in Korea.
The plaintiff enlisted Global Cargo Solution Co., Ltd. for marine cargo shipping from the port of Shanghai, China, to the port of Iskenderun, Turkey. The shipment was involved in an accident in which one of the four cargo units, i.e., a boiler, went overboard off the coast of Oman. The plaintiff filed suit, claiming: (1) the ‘On Deck Clause’ is subject to the duty of explanation under the Act on the Regulation of Terms and Conditions of Korea; (2) the defendant failed to adequately explain the ‘On Deck Clause’ to the plaintiff; and therefore; (3) WAIOP, instead of the ‘On Deck Clause,’ is applicable as the substance of the insurance contract.

In this case, since the parties selected a governing law for only a part of the contract having foreign elements, one of the main issues was to decide the applicable law governing the remaining parts of the contract. The Court ruled by citing Articles 25(1), 25(2) and 26(1) of the Act on Private International Law, that the governing law of the part for which the parties did not choose the applicable law shall be the law of the country most closely connected with the contract. The Court highlighted that the instant governing law clause did not designate the governing law for the entirety of the insurance contract. Rather, it provided that the said contract would follow English laws and customs to the extent of the insurer’s “liability.” As such, as to those matters not pertaining to the insurer’s liability, the laws of Korea, having the closest connection with the instant insurance contract, shall be applicable.

However, the Court dismissed the appeal. This is because first, the ‘On Deck Clause’ is commonly included in English cargo clauses and is a part of standard international terms and conditions in the marine insurance market, which is generally used by marine cargo insurers. And second, although it is erroneous for the lower court to have determined that the Act on the Regulation of Terms and Conditions of Korea does not apply to the instant insurance contract, it is ultimately justifiable for it to have determined that this Korean legislation does not apply to the ‘On Deck Clause’ on the ground that the Plaintiff was well aware of the content of the Clause.

3 Article 25 of the Act on Private International Law (Party’s Autonomy), states:
   (1) A contract shall be governed by the law which the parties choose explicitly or implicitly: Provided, That the implicit choice shall be limited to the case in which the implicit choice can be reasonably recognized by the content of the contract and all other circumstances.
   (2) The parties may choose the applicable law regarding a part of the contract.

4 Article 26 of the Act on Private International Law (Objective Connection at Time of Decision of Applicable Law), states: “(1) In case the parties to a contract do not choose the applicable law, the contract shall be governed by the law of the country which is most closely connected with the contract.”