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## Limitation of Liability and Governing Law for Accidents Occurring before Issuance of Bill of Lading\*

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### ABSTRACT

The purpose of this study is to verify the carrier's liability limitation through analyzing two cases. According to the court judgments in the two cases, if the accident occurs during the shipment without issuance of Bill of Lading (B/L), the reverse-side clause of B/L does not apply to the calculation of damage, and the law of the country most closely related to both parties is set as the governing law. The absence of a timely B/L often occurs in transport practice due to the complicated nature of transport practice. So, through analyzing the court judgments in the two cases, this study recommends that transport parties take precautions. First, in order to reduce and settle disputes arising from the absence of evidence of transportation contracts, it is necessary to issue a received B/L bearing in mind the risk of accidents occurring during the shipment process. Second, the use of a Sea Waybill (SWB) which can be issued after the receipt of a cargo shipment, can be an alternative, except when a Letter of Credit (L/C) requires a B/L. Finally, expanding the function of the Commercial Invoice (C/I) to allow it to serve as evidence of the contract of carriage by inserting the contract of carriage phrase into the C/I when the B/L is not issued could be an alternative.

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### 1. Introduction

International trade transactions are premised on cross-border transit. Common types of transport used in international trade transactions include

land transport, maritime transport, air transport, and multimodal transport. Considering the recent trade transaction process, it is observed that cargo

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is being transported multimodally. In addition, the buyer is demanding more convenient and high-quality service, and the combined transportation of one-stop service that carries the goods to the buyer's inland factory is expanding.

However, the responsibility for each section in the contract of carriage can be changed depending on the Incoterms (Terms of Trade). That is, if the trading parties choose Incoterms' E or F term, the buyer is responsible for everything from inland transport in the exporting country to sea transport and inland transport in the importing country. If the C or D terms are used, the seller must make a contract for inland and maritime transport.

Under the terms of trade (Incoterms), the seller or the buyer makes a contract of carriage, and evidence for the contract of carriage is issued in the process. In the case of multimodal transport terms applicable to all modes of transport, the multimodal carrier may issue a multimodal transport document with a single responsibility for the whole transport period. In practice, however, contracts for each section are often made individually. This is because the freight forwarder who is requested to transport cargo from the seller or the buyer is not the actual carrier and often delegates the transportation to another carrier. That results in continuing disputes related to the damaged cargoes among parties in the lower levels of the logistics system.

In this study, the responsibility for the accident occurring within the lower level of logistics infrastructure is investigated. In addition, when the first carrier makes a request for transportation to another carrier, if an accident occurs during the process of container shipment without a B/L being issued, the criteria for adopting the governing law for the calculation of damage and the possibility of applying the reverse-side of B/L for the limitations of the carrier's liability shall be considered.

In section 2 of the study, the B/L, which is the main international trade document, is reviewed. In section 3, the two cases regarding the accident that occurred without the issuance of a B/L are verified, and some precautionary practices are also suggested. Finally, conclusions and implications are presented in section 4.

## 2. Literature Review and Bill of Lading (B/L)

### 2.1. Literature Review

Studies on maritime transport have been carried out examining the following two themes. The first theme is a study of the carrier's liability when the carrier delivers the cargo without reimbursement of the original B/L in the maritime transport transaction in which the B/L is issued (YANG, S.W.(2015), CHEONG, Y.S.(2014), KIM, S.O.(2011) and JUNG, H.D.(2006)), and the second theme is research on the determination of the carrier's status, as a criterion for determining the responsibility of the carrier under the complicated lower level system of transport practice (KIM, S.O.(2005) and YANG, S.W.(2015)). CHOI, S.R. (2016) dealt with the second case of my research in the study "A Comment on the Korean Supreme Court's Judgment of 28 May 2015, Case No. 2014Da88215 on the Legal Status of a Freight Forwarder/Carrier and Declaration of Value by the Shipper." However, previous studies did not address the practical aspects of the complexity of transport practice. Therefore, this study analyzes the two cases caused by the complexity of the transport practice and the practical procedures that are followed in practice, and points out the matters that transport practitioners should pay attention to in the current transport practice.

### 2.2. Bill of Lading (B/L)

#### 2.2.1. Definition, Features, and Functions of Bill of Lading (B/L)

A Bill of Lading (B/L) represents the goods and is a document to prove the contract of carriage, but it cannot constitute the contract of carriage itself. A B/L is issued by a shipping company in accordance with a contract of carriage between a shipper and a shipping company. It means that the shipper carries the goods consigned from the shipper for shipment to the designated destination. Moreover, a B/L is a negotiable document to confirm the delivery of goods with reimbursement of the original B/L.

Next, a B/L is usually issued in sets of three originals, "one of which being accomplished, the others stand void." The reason for this practice originated in early days of international trade, when there was a significant risk of a document being lost; if three were issued and sent separately, there was a good chance that at least one B/L would reach the consignee.<sup>1</sup> A B/L as a formal document should describe the goods (name, weight, volume, quantity, etc.), the marks and symbols of the goods, the port of loading and unloading, the name and nationality of the vessel, shipper and consignee, freight, the number of B/L issuance, and the date and place of issuance according to the provisions of Article 814 of the Korean Commercial Law.

In addition, a B/L is categorized into shipped B/L and received B/L depending on whether it is loaded or not. The B/L issued after the completion of shipment is referred to as a shipped B/L, and the received B/L issued after the receipt of the goods indicates that the goods have been received for shipment.

The B/L has three functions: proof of receipt of cargo, evidence of contract of carriage, and document of title. For the shipping company or its agent, a B/L functions as the cargo receipt indicating that the recipient received the goods on the contract and the B/L from the shipper. Moreover, a B/L is evidence of the existence of the contract as it is issued based on premise of the contract of carriage. In the individual contract of carriage, the B/L itself is a proof of the contract of carriage, and if the ship-owner issues a B/L, a contract of carriage is deemed to exist between the shipping company and the shipper. In addition, as holder of the document of title representing the listed goods, the holder of the B/L can demand the goods from the carrier at destination. Moreover, the B/L can be negotiated to enable the holder either to re-sell the goods (especially in the case of bulk commodity sales) or pledge them with a bank to raise money on their security.<sup>2</sup>

#### 2.2.2. Bill of Lading (B/L) Related Rules

If a problem arises after issuing the B/L, the carrier may be liable based on paramount clause<sup>3</sup> of the B/L, and according to the paramount clause, the Hague/Visby Rules or the United States Carriage of Goods by Sea Act (U.S. COGSA) is applied.

According to the B/L clause related to responsibility, (A) the carrier shall not be responsible for loss of or damage to the goods occurring before

<sup>1</sup> Paul Todd, "Cases and Materials on Bills of Lading", BSP Professional Books, p.5.

<sup>2</sup> Paul Todd, "Cases and Materials on Bills of Lading", BSP Professional Books, p.14.

<sup>3</sup> (A) This Bill of Lading shall have effect subject to the International Convention for the Unification of Certain Rules relating to Bills of Lading, dated Brussels 25 August 1924 (Hague Rules) as enacted in the country of shipment, unless the protocol, signed at Brussels on 23 February 1968 (the Hague/Visby Rules) or the United States Carriage of Goods by Sea Act, 1936 (U.S.COGSA, 46 U.S.C. Appendix 1300-1315) apply compulsorily.

(B) When no such enactments are in force in the country of shipment, the corresponding Hague Rules, Hague/Visby Rules or U.S.COGSA legislation of the country of destination shall apply, but in respect of shipments to which no such enactments are compulsorily applicable, the terms of Hague Rules shall apply.

(C) If any provision within this Bill of Lading is held to be repugnant to any extent to the Hague Rules legislation or any other laws, statutes or regulations applicable to the contract evidence by this Bill of Lading, such provisions shall be null and void to such extent but no further.

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