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Constitution of the Republic of Korea, Article 1 (Oct. 29, 1987).

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Securities and Exchange Act No. 8985, Art.1 (Mar. 21, 2008) (repealed 2009).

(2) Regulations (시행령)
EnforcementDecreeoftheFinancialInvestmentServicesandCapitalMarketAct, Presidential Decree No. 21835, Art. 1 (Nov. 22, 2009).

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Hearing before the Legislation and Judiciary Committee, Session 279-1, 18th National Assembly (Jan. 6, 2009).
Assembly Plenary Session 279-8, 18th National Assembly, at 5 (Jan. 8, 2008).

4. Case Numbers

(1) Korean Constitution Court (헌법재판소) Constitutional Court of Korea, 2005HunGa17 (May 25, 2006).

(2) Korean Supreme Court (대법원) Supreme Court of Korea, Judgement, 90DaKa8845 (Oct. 23, 1990).

(3) Appeals Courts (고등법원) Seoul High Court, 2003Na80798 (Jan. 25, 2005).

(4) District Courts (지방법원) Seoul Central District Court, 2005GaHap80450 (Apr. 19, 2006).

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Hyungbae Kim, Kyuwan Kim & Myungsook Kim, Lecture on Civil Law Theory, at 50-51 (8th ed. 2009)

(2) Articles. Periodical materials from law reviews and journals are cited with the full name of the author, and the title of the article in italics as presented below.

Jeongho, Kim, *A Study on the Path to Introduce the Multiple Derivative Suit in Korea*, Journal of Business Administration & Law Vol. 23, No.4, 2013. at 209-254.

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Abbreviations of terms may be standard legal terms of Korean legislation.

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ARTICLES

Truck Platooning*

Shinichiro YAMASHITA **

ABSTRACT

Truck Platooning is one of the projects led by the Japanese government with multiple purposes such as alleviate truck drivers' fatigue, improve fuel efficiency and avoid collision etc. One type is "drivers on following truck system" and another type is more advanced "non-drivers on following truck system" with three multiple communication system between trucks. Test runs have been conducted and problems in each system have been detected. In order to realize truck platooning system, infrastructure development is also required and Japanese government proposed several items. There may be new legal issues pertaining to platooned truck, but no studies have not been found. Academic analysis is expected to be made public in due course.

KEYWORDS: Truck Platooning, No-drivers on following truck system, Test run, Infrastructure development, Liability issues

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* This article is based on the writer's presentation at the 6th Asia Business Lawyer (ABL) Symposium held on 22 February at Tokyo University, Tokyo, Japan.

** Partner, Hiratsuka & Co.

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1. Basic Information

1.1. Pictures of truck platooning are as below;

1.2. Japanese government's Cabinet Decision on 9 June 2017 is titled "Future Investment Strategy 2017". This is the document in which Truck Platooning in expressway is mentioned as one of the projects for mobility system of next generation. The Cabinet Decision draw strategy to realize "Society 5.0".

Regarding the concept of the "Society 5.0", in effect, Japanese government says the followings;

(i) All people and goods are connected via Internet of Things, various knowledge and information are shared and bland new values are created,

(ii) AI (Artificial Intelligence) provide us necessary information at appropriate time,

(iii) Technology of robot and autonomous car are developed, whereby problems of aging population, small birth rate, depopulation in rural area, wealth inequality are resolved,

(iv) Cyber space and physical space are integrated in high level,

(v) Enormous amount of information is accumulated in cyber space through censors in physical space,

(vi) In cyber space, AI (of which capacity exceeds human) analyze the big data and the results are feedback to people in physical space.

Therefore, it can be said that truck platooning is one of the very high technology system and projects led by the Japanese government. For information, society 1.0 is hunting society, 2.0 is farming society, 3.0 is industrialized society and 4.0 is information-driven society.

1.3. The purposes of truck platooning are said to be the followings;

(i) Solution to alleviate fatigue of truck drivers or solution for shortage of truck drivers; drivers rides on the first truck and drivers on the other trucks receive assistance in driving (Drivers on following truck system) and drivers rides on the first truck only and no drivers on the other trucks (no-drivers on following truck system),

(ii) Improve fuel efficiency; distance between trucks are mechanically controlled and kept in short, whereby air resistance is lessened (no-drivers on following truck system, about 10m distance and 10% reduction in consumption of fuel),

(iii) Avoid rear-end collision between trucks (distance between trucks are electronically and mechanically controlled).

As explained below, two types of truck platooning are envisaged. The purposes are looking to the same direction but not identical. It can be seen that the government final target must be more advanced one, no-drivers on following truck system.

2. Drivers on following trucks system

2.1. Rough image is as below Figure 1;

<Figure 1>

2.2. Outline of the system "Level 2" is the followings; On local road, each driver drives respective truck.

On expressway, each driver remain on respective truck and the system operation can be started. The first truck recognizes its position by GPS (Global Positioning System). The following truck recognizes the distance to objects in front of the truck (in many cases, the preceding truck) by camera and millimeter wave radar. The system contains CACC system (Cooperative Adaptive Cruise Control) for electronic communication between trucks (760Mhz); Following truck receives preceding truck's accel/brake information and automatically increase/reduce speed to keep certain distance. The system contains LKA system (Lane Keeping Assist); each truck's camera detects white line on road and adjust steering to keep truck running within the same lane.

The distance between trucks is assumed to be 30-35 meters. Total length of platoon consisting of 3 trucks is about 100-110 meters.

A driver drives the first truck. During the system operation, other trucks automatically follow the same lane, keeping certain distance, whereby drivers on the following trucks are assisted.

The system operation ends when (i) following drivers decide to end or (ii) lane of trucks are changed – this system is planned to use to drive without lane change.

Test runs on expressway were conducted in 2018. 4 trucks of different manufacturers were controlled. We refer to the reported problems at section 4 of this paper.

Japanese government's target is commercialization in 2021.

2.3 The more developed type "Level 3" has following characteristics; The first truck recognizes its position by GPS and RTK (real time kinematic). The following truck recognizes the distance to objects in front of the truck and inclination by 3-D Lidar (light detection and ranging), camera or millimeter wave radar. All of the trucks monitor

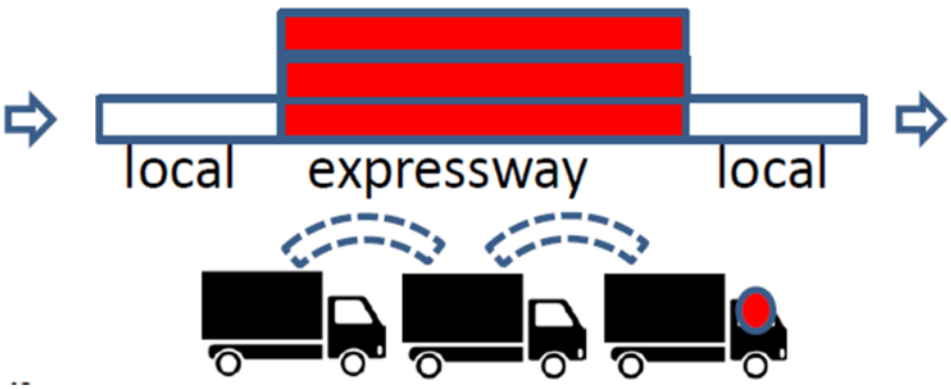
(i) sides of respective truck by millimeter wave radar and (ii) rear of respective truck by camera and/or millimeter radar. The rear-view information is transmitted to the first truck. The distance between trucks is assumed to be about 20 meters. Total length of platoon consisting of 3 trucks is about 80 meters. Japan Automobile Manufacturers Association Inc. intend to commercialize the developed type in 2024.

The more developed type adopts more equipment and advanced technology for the first truck's positioning and recognition of objects surrounding trucks.

3. No-drivers on following truck system

3.1 Rough image is as below Figure 2;

<Figure 2>



3.2. The system "Level 4" contains the following features; On local road, each driver drives respective truck.

In special area besides expressway, trucks are electronically connected and form platoon. A driver rides on the first truck only and the following trucks have no drivers. The first truck recognizes its position by Quasi-Zenith Satellite System GPS, RTK and High-definition 2D map (3 multiple methods). The following truck recognize distance to objects in front of the truck and inclination by 3-D Lidar and millimeter wave radar. The system has three separate communication system between trucks – 760Mhz, 4GLTE/5G and optical communication (3 multiple methods). All of the trucks monitor (i) sides of respective truck by millimeter wave radar, (ii) rear and sides of respective truck by electronic mirror and (iii) rear of respective truck by camera and/or millimeter radar. The view information is transmitted to the first truck.

When the first truck changes lane, the following trucks automatically follow the first truck and change lane. However, if they recognize cars on sides, the system send warning to the first truck driver. If electronic connection between trucks is out of order, the trucks gradually evacuate to shoulder of expressway. In case of emergency, the trucks stop on main lane of expressway by operation of the system.

The distance between trucks is assumed to be about 10 meters. Total length of platoon consisting of 3 trucks is less than 60 meters.

In special area besides expressway, electronic connection is released.

Again, on local road, drivers ride on all trucks.

Test runs on expressway are conducted in 2019/2020.

Japanese government targets commercialization in area between Tokyo and Osaka in 2022. Japan Automobile Manufacturers Association Inc. intend its commercialization after 2025.

As no drivers on following trucks, special cares for safety are applied to the system. Compared to the ordinary type of "drivers on following truck system", equipment installed to each truck is increased and quite advanced. In particular, the key element of communication system between trucks is not one but three multiple methods. Presently, we have not found description regarding costs for the system, but people can easily guess that the system would be very expensive.

4. Results of test run

4.1. Drivers on following truck system

Followings are reported problems which were found through test run;

(i) Machine/system has errored in recognition of lane, by reason for fade away of white line on road and discontinuity of broken line on road at expressway junction.

(ii) Distance between trucks are not even, due to difference of acceleration ability of respective truck – trucks manufactured by different manufacturers were used and connected in the test run.

(iii) Normal car entered into the space between platooning trucks.

(iv) The entered car ran the space between platooning trucks for a long time and did not go out of the space for a long time.

4.2. No-drivers on following truck system

Test runs were carried out with drivers on each truck. Followings are reported problems which were found through test run;

(i) Accuracy of position obtained by GPS was decreased, which resulted in decrease in maintenance of lane.

(ii) Sensors in each truck are affected by rain, snow, dense fog etc.

(iii) There were confusions between pedestrian and platooned trucks at service area or parking area in expressway.

(iv) There were confusions between normal cars and platooned trucks at expressway junction because length of the platoon was long.

4.3. There may be other unreported problems. In order to achieve safety and security, various improvements to cope with the problems are required.

5. Infrastructure development

5.1. On 10 September 2019, Japanese government have announced the basic plan for safety in expressway. The plan states that new expressway between Tokyo and Nagoya and between Nagoya and Osaka should have 6 lanes, taking account of realization of truck platooning (no-driver on following trucks system) in the future.

5.2. On 26 November 2019, one governmental committee has issued interim report on road space for autonomous cars. With respect to truck platooning, the interim report proposes the followings;

(i) To secure safety, exclusive lane/space for truck platooning should be considered.

(ii) To correct error in obtaining position information, new system to provide accurate position information should be constructed.

(iii) To cope with decrease in accuracy of position information in tunnel and underpass, magnetic markers etc. should be developed.

(iv) To avoid confusion between pedestrian and platooned trucks and between normal cars and platooned trucks, development of logistics base with space for forming/releasing platoon should be considered.

(v) The logistics base could be expressway bus stop used by many people in the future.

(vi) To avoid confusion with general traffic at expressway junction (until exclusive lane is developed), assistance system for riding on expressway or ramp metering should be examined.

5.3. Extensive infrastructure works to support truck platooning is specified or suggested in the basic plan or interim report. In line with the above, expressway managing companies have issued performance plan for safety and security in expressway in December 2019. Not only new technology equipped on trucks but also development of infrastructure is required to realize truck platooning system.

6. Possible argument on legal liability

Hereinafter, some possible legal issues are considered regarding truck platooning.

6.1. Carrier's liability to cargo interests on cargo damage

For example, if cargo carried on platooned truck is damaged by collision between the trucks due to malfunction of electronic connection, is carrier liable to cargo interests?

I have not found any studies which are made public. Although I have not seen any signs, there may be special legislation to handle the issue in the future. Under the present legal scheme, relevant provisions to carrier's liability are Article 575 to 577 of the Commercial Code. Free English translation is as follows;

<Article 575>

If carried goods are lost or damaged during period from carrier's receipt of goods to delivery thereof, cause of loss of or damage to the goods is occurred during the period, or delivery of carried goods is delayed, the carrier shall be liable to compensate for damage arising therefrom. However, the said provision is not applicable if the carrier establish that they have not failed to exercise due diligence in receipt, carriage, storage and delivery of the goods.

<Article 576>

1. Amount of compensation for damage in case of loss of or damage to goods shall be calculated by reference to market value of the goods at place and time at which the goods are to be delivered (in case of goods with exchange quotes, the quotes). In case of no market value, the amount shall be calculated by reference to normal price of goods of the same kind and quality at the place and the time.

2. Amount of freight or other expenses which is not required to make payment by reason for loss of or damage to goods shall be deducted from amount of the compensation in the preceding paragraph.

3. The said two provisions shall not be applicable if goods are lost or damaged due to intentional act or gross negligence of carrier.

<Article 577>

1. Carrier shall not be liable to compensate for damage to loss of, damage to or delay in delivery of cash, securities or other valuable goods, unless shipper has notified its kind and value when they entrust carriage.

2. The preceding paragraph shall not be applicable to the following cases;

(i) Carrier has knowledge that the goods are valuables at the time of

conclusion of transport contract,

(ii) Valuable goods are lost, damaged or delayed in delivery due to intentional act or gross negligence of carrier.

However, these provisions are not compulsory and parties to land transport contact may agree different terms. I can point out just general remarks;

(a) Carrier may be liable to cargo interests, subject to contract terms of carriage. Therefore, carrier should review and appropriately arrange/amend the contract terms before practice of truck platooning.

(b) Carrier may claim recourse to connection system provider, subject to cause of malfunction and contract terms of system provider. The system provider should well prepare the contract terms.

6.2. Truck owners' liability to third party – personal injury

Which party is liable to personal injury to third party caused by platooned trucks?

The Ministry of Land, Infrastructure, Transport and Tourism of Japan have disclosed a report by The Study Group for Examination of Liability to Compensate Damage in Autonomous Driving in March 2018. The report's answer is the followings;

(i) If the truck platooning has adopted "no drivers on following trucks" system, electronic connection is constructed same as physical connection for towing under relevant provisions and only the owners of the fist truck has control over operation, liable party is the owner of the first truck, and

(ii) If the truck platooning has not adopted such system, the liable party is the owners of the truck which actually injured third party.

In practice, all of the platooned trucks may be owned by the same company and therefore, distinction of (i) and (ii) may not bring different conclusion. However, in theory, the difference is important. The answer well considers that the most advanced truck platooning system "no driver on following truck" can be controlled by the first truck drivers and, in that case, the owners of the first truck is liable. There are possibilities that special provision may be enacted in the future, but the report is based upon present civil legal liability scheme.

6.3 Truck owners' liability to third party – other than personal injury

I take one example case. Following trucks without drivers became no connection with the first truck and rolled over by accident. The truck blocked traffic and caused loss of income/profit to expressway managers. Is the first truck driver liable to the expressway managers?

No studies have been made public. One possible conclusion is that (i) the owner of the first truck would be liable to managers if the truck platooning system adopt “no drivers on following truck” system, electronic connection is constructed same as physical connection for towing and only the owners of the fist truck has control over operation. (ii) The owners of the first truck which is liable to the expressway mangers may claim recourse to connection system providers, subject to contract terms.

6.4. Government liability

One example; in the said cases (6.1., 6.2. or 6.3.), may cargo owners, injured person or expressway managers successfully claim for compensation for damage against Japanese government by reason for failure to timely develop infrastructures?

I have not found any academic views. Generally, it is difficult to recover from the government. Their omission needs to be evaluated as illegal, which is not so easy. The basic plan of September 20198 is just a plan and would not amount to impose legal obligation on the government.

7. Possible change of insurance policy

7.1. Insurance company’s general approach to new issue is to use traditional insurance policy and new endorsement to cover new risk.

7.2. Reportedly, Japanese insurance company have already developed new endorsement to cope with possible new risk in respect of truck platooning.

The case considered by Japanese insurance company is that, in truck platooning “No drivers on following trucks” system, electronic connection is cut off and the following trucks without drivers are stuck on expressway. Drivers need to be dispatched to the stuck trucks to move them from the position. The dispatch cost is not covered under traditional policy. In 2019, Japanese insurance company have developed new endorsement to cover the cost to be sold after commercialization. As the endorsement have not been sold in insurance market, concrete wording thereof is still unknown.

8. Closing remark

Similar attempts to develop truck platooning are ongoing in Europe and

North America. In broad sense, these movements can be understood on the context of autonomous transportation. In terms of autonomous vessel, Japanese academic has written some articles for analysis on possible legal issues. I expect Japanese academics to write similar analysis of civil and commercial legal issues surrounding on truck platooning is made public in due course.

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The Legal Liability of Time Charterer to Third Party under Korean law*

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ABSTRACT

Who is the liable party between the time charterer and the ship owner has long been discussed in Korea and Japan. Because there is no relevant provision in the Korean Commercial Code (KCC) regarding the liable party while the vessel is operated under a time charter party, the court shall apply Article 850 of the KCC which is applicable in the case of bareboat charter party to a time charter party.

The author explains the Korean Supreme Court's decision on the liable party involved in a time charter party and supports decision of the Court that a navigational matter falls upon the ship owner but a business matter upon the time charterer. Consequently, the ship owner is liable for ship's collision damages and the vessel under a time charter party is subject to maritime lien triggered by tug's service requested by the time charterer.

KEYWORDS: time charter party, bareboat charter party, maritime lien, tort liability, Korean Commercial Code, Japanese Commercial Code, maritime law

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I. Introduction

In the shipping business a ship's operator is required to possess a vessel to carry out the carriage of goods by sea. The operator may either own its vessel or charter in a vessel from her owner.

There are three ways of chartering vessels. Bareboat charter party is the most widely engaged way of chartering vessels in Korea.

In terms of legal issue, time charter party is the most frequently debated matter in Korea. The reason why lots of legal issues have been involved in the time charter parties is that there is no specific provision regarding time charterer's liability to third party under the Korean Commercial Code(hereinafter KCC).[1] The situation in Japan is not totally different from Korea because Japan does not have such provisions in the Japanese Commercial Code (hereinafter JCC) as well.

Fortunately, new developments appeared these days on the liability of the time charterer to the third party in Korea and Japan which is explained below.

II. Typical Time Charter Party

The time charter party form of NYPE is widely used in Japan and Korea. Under a time charter party, the ship owner charters out its vessel to the time charterer with its crews on board the vessel (Art. 842 of KCC), which is the most distinguished feature of a time charter party. Under a bareboat charter

[1] Because both parties make agreement in the time charter party, legal disputes related to the ship owner and the time charterer is solved by the agreement.

party (BBC) the ship owner charters out its vessel to the charterer without crew on board. Instead, the charterer is required to provide the crew (Art. 847 of KCC). These differences are well reflected in the KCC Article 842 and 847 respectively.

Because the ship master is employed by the ship owner, he is a servant not of the time charterer, but of the ship owner. However, the time charterer shall have its own right to give instructions to the ship master to carry out its business. It is solved by insertion of a clause called employment clause such as clause 8 of NYPE. It says, to the effect, that the ship master is required to follow the time charterer's order in respect of ship's business and if the charterer suffers damages due to the master's not following the order, the ship owner is obliged to pay damages to the time charterer.

The legal right and obligation between the ship owner and the time charterer is well settled under the time charter party. Navigation matters fall upon the ship owner while business matters fall upon the time charterer. The former includes items such as taking action of the ship master to avoid collision against an approaching vessel, selecting ship's crewmembers by the shipowner, or whether or not the sea is good enough for the vessel to start to sail.[2] The latter includes items such as selection sailing route for the given voyage,[3] ordering pilot and tugs, and receiving bunker fuel oils.

The above employment provisions were inserted in the KCC Art. 843 when the KCC was revised in 1991. The JCC also followed KCC in this matter. As a result, where there is no employment clause in a time charter party, the relevant provisions under the KCC or JCC as a default rule are applicable in the given case. Therefore, even though there are no such provisions, the ship master is required to follow the order from the time charterer.

By way of the employment provisions under the NYPE or the Commercial Code, it is expected that the most legal matters between the ship owner and the time charterer might be well settled and have been relatively well settled.

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[2] In relation to selecting the time for avoiding an approaching strong wind and high swell, the master is the very person to make decision the time. In Ocean Victory case, the vessel was damaged due to late departure from the dock to the sea. The ship owner raised claims for hull damages against the time charterer. The Tokyo High Court decided that it is the matter of navigation and thus should be decided by the ship's master. Therefore, damages should be borne by the ship owner, not by the time charterer.

[3] The traditional thinking on the power of the ship's master has been deeply considered in Korea soon after the Hill Harmony case was rendered by the UK Supreme Court in 2000. The UK Supreme Court decided that the selection of sailing route is the matter the time charterer because it is closely related to the finance like the selection of ports. Since then, the ship's master's discretion on the navigation has been decreased. It seems that the Korean Court is likely to follow the Hill Harmony's decision. Please refer to In Hyeon Kim, *Transport Law in South Korea*, Wolter Kluwer, 2017, p. 80.

III. Legal matter regarding third party

Legal matter between the time charterer and the third party cannot be solved by the employment clause in the NYPE, but may be solved by the provision in the Commercial Code or other law.

Even though there has been a provision on the legal liability between a bareboat charterer and third party since 1898 in the JCC and 1960 in the KCC respectively, no provision on that between a time charterer and a third party is provided is the KCC and JCC.

In case there is no relevant provision under a law to be applicable to a given case, it is a typical way of solving legal issue for a judge to apply a very similar provision from the same law or other law to the given case in Korea.

The judges and scholars tried to find out the way to solve the legal matter on who is the obligor between the ship owner and the time charterer to a third party when the third party sought for compensation for damages based on the action in tort. They followed the traditional way of solving legal problem asexplained above.

They tried to focus on the provision regarding the bareboat charterer's legal liability to a third party. According to Article 850(1) a bareboat charterer has the same right and obligation as the ship owner in respect of ship's operation. Therefore, where a ship's collision occurs between the vessel under a BBC and a third party's vessel, not the owner but the breaboat charterer is liable for the damages caused by the collision.

If the legal nature of time charter party is very similar to that of BBC, Article 850(1) may be applied to a time charter party case. There is no dispute in Korea that the legal nature of a BBC is a kind of property lease. Therefore, whether the legal nature of time charter party is very similar to that of BBC or not becomes a key element to be addressed to solve the issue.

The legal nature of time charter party has been disputed among scholars and practitioners since 1962 in Korea. The majority view is that time charter party is very similar to property lease and thus just like BBC. They argued that Art. 850(1) could be applied to a time charterer. Consequently, the Korean Supreme Court (hereinafter KSC) decided that the time charterer was liable for the cargo damages under the B/L in the Polsa Dos case in 1991.[45]

During 1990's, several scholars and practitioners from shipping industries deeply influenced by English law started to argue that the legal nature of time

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[4] Please refer to In Hyeon Kim, *ibid.*, p. 77.

[5] *The KSC case 1992.2.25. Docket No. 91da14215.* In the case, the holder of the B/L raised claims against the time charterer. The time charterer argued that the ship owner is liable for cargo damages. The Court decided that the legal nature of the time charter party was very similar to the bare boat charter party and thus the time charterer should be liable for the cargo damages because Art. 766(current Art. 850) is applicable.

charter party is a kind of voyage charter party, that is, a kind of carriage of goods contract. If that is the case, Art. 850 cannot be applied and the ship owner, rather than the time charterer, is liable to a third party.

A typical example is that the collision liability should fall upon the ship owner rather than the time charterer because the collision occurs due to the fault of the ship master who is employed by the ship owner. They further argued that legal basis for collision damages was vicarious liability under Article 756 of the Korean Civil Code. The ship owner is the employer of the ship master on one hand, and the ship master is the employee of the ship owner on the other hand.

They were very concerned about the previous judgment of the Japanese Supreme Court (JSC). In the JSC 1992.4.28. case, the JSC decided that the time charterer was liable for collision damages rather that the ship owner. It was reported that JSC regarded the legal nature of time charter party as a kind of property lease and as a result, it applied the provisions of Art. 704(1) of the JCC which imposes liability upon bareboat charterer to the given case. They argued that the KSC should not follow the Japanese precedent in 1992.

The answer came from the KSC in 2003.[6] The Court decided that the ship owner rather than the time charterer was liable for the collision damages.[7] The Court distinguished the matter of navigation from that of business. It decided that the ship owner has the right and obligation on the navigation matter through its master designated by it. According to its opinion, a collision is obviously a matter of navigation caused by the ship master.

The above decision also involved another dispute on what is the attitude of the KSC on the legal nature of the time charter party. One view argued that the KSC gave up its former position and it took the theory of the carriage of goods by sea contract on the legal nature of the time charter party. However, the majority view explained that the KSC still maintained the theory of property lease in its decision of 1991 with some modification in the case of ship collision.

The prevailing view is that the KSC adopted the so-called navigation-business separation theory and it is a kind of modified theory similar to the property lease theory. Therefore, a time charterer is still liable for damages in case of business matter while the ship owner is liable for damages involved in the navigation matter.

The KSC's decision of 1991 (Polsa Dos) was also criticized by the practitioners who argued that the identity of the obligor should be decided by

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[6] *The KSC case 2003.8.22. Docket No. 2001da65977.*

[7] Prof. Caslav Pejovic argues that the ship owner rather than the time charter should be held liable damages caused by the collision, departing from the application of the legal nature of the time charter party as the lease into the time charterer and thus imposing liability upon the time charterer. Please refer to Caslav Pejovic, "Legal Nature of a Time Charter under Japanese law - to be or not to be", Wave Length, JSE Bulletin No. 54(March 2009), p.17.

the circumstances as to who acted as the carrier, not by the legal nature of time charter party. The view was influenced by the JSC's decision on the Jasmin case.[8]

During the revision of the KCC in 2007, this dispute was not solved and the liability of the time charterer to a third party remained intact.

A scholar still argued that the legal nature of time charter party is very similar to property lease, i.e. BBC), and thus Article 850(2) can be applicable *mutatis mutantis* in a case of time charter party. According to his argument, the claimant has the right to invoke maritime lien on the vessel for claims caused by the time charterer.

IV. New development

According to Art. 850(2) of the KCC, the maritime lien provisions of Art. 777 are applicable to the claim incurred by a time charterer and the claimant has the same maritime lien in relation to a claim incurred by the ship owner.

The arrangement for tug boat and pilot is a matter of the time charterer under the NYPE. Where the time charterer did not pay the remuneration for a tug, the tug owner applied for auction sale of the vessel for which the tug was provided. The tug owner relied upon Article 850(2) in its claim.

The owner of the vessel argued that Art. 850(2) was not applicable to the time charter party case. Because the maritime lien is a matter related to the real right of a property, the claimant is not allowed to exercise it without express wording in the KCC which triggers such right upon the claimant. It further argued that Art. 850(2) was only applicable for a BBC and denied that the legal nature of the time charter party was a kind of property lease and thus the same provision could not be applied in a case of time charter party.

The 1st instance court accepted the allegation of the tug owner and proceeded auction sale procedure of the vessel. However, the 2nd instance court reversed the first instance court's decision and decided that the legal nature of a time charter party was different from that of a BBC and thus Article 850(2) was not applicable to a time charter party.[9]

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[8] In the Jasmin, the JSC decided that the owner of the vessel was liable for cargo damage because the ship owner was regarded as the carrier. It did not rely on the legal nature of the time charter party. If it was decided as a being positive, the time charterer was likely to be a liable party. But, it was decided differently. Professor Caslav Pejovic agrees with the JSC's decision. Please refer to Pejovic, ibid., p.15.

[9] The lower court relied on several other reasons. It relied on its previous decision that the Russian law does not bring about the maritime lien against the vessel incurred by the time charterer.

The 2nd instance decision drew attention from the industry and the scholars as well. According to the second instance decision, the long standing theory of time charter party as a kind of property lease becomes no longer sustained.

The tug owner appealed to the KSC. A professor published his opinion in the maritime law journal supporting that Art. 850(2) should be applied in a case of time charter party.[10] In his article, he introduced a newly adopted provision in the revised Maritime Law Section of the Japanese Commercial Code in 2018. According to new Code, the maritime lien provisions are applicable to the case of claim caused by a time charterer.[11]

The KSC decided that the tug owner had the right to invoke maritime lien on the vessel for a claim incurred by a time charterer.[12] It relied on two circumstances in its decision. First, the legal nature of a time charter party is a kind of property lease in respect of the business matter under a time charter party and thus Art. 850(2) can be applied even though there is no specific provision to allow the claimant to invoke such right in the KCC. It seems that the KSC followed the navigation-business separation theory which it took in its decision in 2003.

Secondly, the KCC took into consideration that the tug owner was in a very detrimental position opposed to the vessel's operator because the Korean Vessel's Entry and Exit Act imposed the obligation upon the tug owner to provide its service compulsorily without any excuse whenever there is a request for the service from the ship's operator. The Court decided that the tug owner should be protected against the ship's operator to get payment under the disfavored position.

The balanced approach between the ship owner and the claimant is needed. As a result of the KSC's decision, a claimant becomes well protected regardless of the status of the ship's operator. The maritime lien arises in a case that the ship owner or the bareboat charterer is the ship's operator by Art. 777 and Art. 850(2) of KCC respectively. Even though the new International Convention on Maritime Lien and Mortgages, 1993 does not stipulate that a claim against time charterer is secured by maritime lien, it was decided as being so secured by the KSC based on the *mutatis mutandis* application of Art. 850(2) of KCC in 2019.

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[10] In Hyeon Kim, "A maritime law case in which the maritime lien was admitted by the claimant against the time charterer" (in Korean), Journal of Korean Commercial Law Association Vol. 37-2(2018.8).

[11] The new Art. 707 of the JCC says that claims incurred by the time charterer bring about the maritime lien like the bareboat charterer's case (Art. 703(2)).

[12] *The KSC case2019.7.24. Docket No. 2017ma1442*. The case was introduced in Korea University Maritime Law News Update Vol. 28(Aug. 7, 2019).

In the meantime, it is noteworthy that there is a proviso in Art. 850(2) of KCC[13] to the effect that the claim is not secured by the maritime lienif the ship owner and the charterer have otherwise agreed and, in addition, the claimant has knowledge of the agreement. Accordingly, if the ship owner or the ship master notified the tug owner of the above agreement, the tug owner as the claimant cannot invoke maritime lien against the vessel. Therefore, the KSC's judgment is not biased to the benefit of the claimant.

Where a foreign element is involved in the legal dispute, the judge in a Korean court is required to apply the International Private Act. According to Article 60 of the Act, the law of the flag of the vessel involved in the case becomes the governing law for deciding whether a certain claim is secured by maritime lien. Where the vessel involved flies the Japanese flag, the Japanese maritime law is applicable for deciding whether the claimant can invoke the maritime lien.

V. Further consideration

In summary, the current law on the liability to third party involved in a time charter party under the Korean law is as follows:

(1) Regarding cargo liability to the holder of B/L, the time charterer is a liable party under the KSC by virtue of Art. 850. But, there exists severe criticism. The majority view is that the carrier under the B/L is the liable party.

(2) The liability for damages caused by ship'scollision shall be borne by the ship owner because it is a matter of the navigation which the ship owner has right and obligation. The legal basis of the ship owner's liability is Art. 756 of the KCC. The ship owner is vicariously liable for the damages caused by the ship master.

(3) A claim incurred by the time charterer brings about maritime lien against the vessel to which service is provided by the claimant. The legal nature of time charter party was revisited in 2019 by the KSC and it is decided as a kind of property lease and as a result, Art. 850(2) is applicable.

Under the current situation, we need to take into consideration the usefulness of the KSC's decision. Is it still useful in solving legal dispute involved in a time charter party?

It has long been discussed whether the legal nature of time charter party is a kind of property lease and thus Art. 850 is applicable to barboat charterer can be applied in a time charter party case. If that is the case, the time charterer

[13] For example, if there is an agreement between the ship owner and the time charterer that the maritime lien is not allowed and the ship master on behalf of the ship owner notified such facts to the opposing party, then the maritime lien is not allowed by the KSC Art. 850(2).

shall be liable just like under the Japanese Supreme Court's judgment. However, the KSC has decided that the ship owner is the liable person in a ship's collision case. Obviously, Art. 850 of the KCC has no longer been applicable to collision liability cases since the decision of the KSC in 2003.

The above case departed from the traditional way of deciding the liable person involved in a time charter party. The KSC's decision of 2019 is a land mark decision which restored the legal nature of time charter party, clarifying the ambiguities with modification of original theory.

The author is of the view that the legal nature of time charter party is a kind of property lease because the charterer has its right and obligation in the business matter, and the ship owner has its right and obligation in the navigation matter. The liability involved in a time chartered vessel can be solved accordingly.

For example, who is entitled to salvage remuneration? Salvage is a mixed event between the business matter and navigation matter. Therefore, both parties have the right to get remuneration. Who is a responsible person for oil pollution? Oil pollution is a matter of navigation and normally occurs due to the fault of ship's crew. Accordingly the ship owner is liable for the damages.

The purpose of the Korean Commercial Code is to provide predictability and foreseeability to the stake holder. There is still ambiguity on the time charterer's liability to a third party. Just like the Japanese maritime law, the KSC is proposed to insert an express provision to allow the claimant to invoke maritime lien to secure a claim incurred by time charterer.

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Marine Cargo Insurance Exclusions: Comparative view between Turkish Law and Japanese Law *

Dr. Sinem Oğiş **

ABSTRACT

In this article, the author make analysis on the cargo insurance exclusions listed under the Institute of Cargo Clauses (ICC). While making this analysis, the author explicitly focuses on delay and insolvency default exclusions as these exclusions bear many uncertainties as to how the coverage is provided and when is provided. For example, delay is generally accepted as a cargo coverage mainly related with the results of another peril. Therefore, it is an awkward concept of cargo coverage. On the other hand, insolvency default exclusion, even though under ICC 2009 is an exclusion clause that is covered, bring some questions on case to case basis. The author in this work analyzes briefly these questions and makes short comparison between Japanese Law and Turkish Law.

KEYWORDS: Cargo Insurance, delay risk, insolvency exclusion clause, Institute Cargo Clauses, comparative law

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I. Introduction

The marine insurance law has a characteristic as an international business. Peoples in Korea or Japan may want to know about Turkey marine insurance law. In the meantime, marine insurance standard term has a uniform characteristic. Almost all of marine cargo insurance contract engages in Institute Cargo Clause all over the world.

The author would like to explain the marine cargo insurance exclusions listed under Institute Cargo Clauses 1982 and 2009. For the purpose of the overview, the author will focus mainly on delay and insolvency/financial default exclusions.

The author further will discuss the issues related to marine cargo insurance arising under Turkish Law as well as Japanese Law and will provide suggestions during the summary of the findings.

II. The History of Marine Cargo Insurance and Brief Overview on the Development of Institute Cargo Clauses

1. The history of marine insurance

The written evidence shows that the origins of marine cargo insurance can be traced back to the sixteenth century.[1] In England for instance, the policy of *De Salizar c. Blackman* of 1555, identified the subject matter as follows:

[1] According to *William Gow*, Marine Insurance: A Handbook (4th edn., 1921), 43 the first marine

> "in the ship called Sancta Crux whereof was capytayn and master Fernando and Peter de Lovona upon all kinde of merchaundies whiche shall be laden in the same ship by the hands of Diego de Frias or Anthony […] The adventure begeynethe from the ower that the said merchaundies or parte thereof shall begin to be laded in the said shippe untill the sayd ship shall be arrived savely in Lixborn"[2]

The policy did not clarify which risks the insurer was willing to undertake. It was only stated that the contract was concluded for the purpose of insurance.

Later, in 1563, the policy of *Whtye c. Besswicke*[3] unlike the previous one, described the risks covered in detail:

> "the dawnger of the see ffrom ffyer and water men of warr hennemys cosaryes pyrattes thyves lettars of marte baratrye of master and maryners jettesonns retaignementt by kynge or prynce or by any by theyr aucthorety or by any other persone or persones whom so evar and ffrom all other parrelles and dawngers what so ever."[4]

Thus, with this policy risks had been classified which were not mentioned in the earlier policies: fire, men of war, enemies, pirates, thieves, letters of marque barratry of the master and mariners, restraint and jettison. In this policy one can see that many risks that were insured show a remarkable resemblance to cargo insurance coverage that is written today.[5]

The increase in trade during the seventeenth and eighteenth century led in turn further developments in marine insurance sector. In 1688, Lloyd's was founded which was not insurance company but an organization of underwriters.[6] In 1779, the famous Lloyd's Policy was drawn up by underwriters. It became the standard policy in marine insurance.[7] This standard

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insurance contracts were for the insurance of goods only.

[2] Admiralty Court Papers, file 29, no. 45, cited from *Reginald G. Marsden*, Select Pleas in t he Court of Admiralty and Upon Appeal therefrom, vol. 2 (1897), 49.

[3] This policy is reproduced in *Marsden* (n. 1), 53 f.

[4] *Marsden* (n. 1), 54.

[5] See http://www.fortunesdemer.com/documents%20pdf/polices%20corps/Etrangeres/Royaume%20Uni/sg%20form%20anglais.pdf (last accessed on 28.01.2020).

[6] See *Henry M. Grey*, Lloyd's Yesterday and Today (1893), 17–20; *H.G. Lay*, Marine I nsurance: A Text Book of the History of Marine Insurance (1925), 34–38; *A.F. Twist*, Widening Circles in Finance, Philanthropy and the Arts: A Study of the Life of John Julius Angerstein 1735–1823 (2002), 23–28.

[7] *Frederick Martin*, The History of Lloyd's and of Marine Insurance in Great Britain: with an Appendix Containing Statistics Relating to Marine Insurance (1876), 157; *William Reynolds Vance*, Handbook of the Law of Insurance (1904), 11; *Lay* (n.6), 85.

policy so-called S. G. policy[8] form was a form appended later to the Marine Insurance Act 1906.

Further companies, Royal Exchange and London Assurance were granted charters by virtue of an Act of Parliament, known as the Bubble Act in 1720.[9] The Act granted the privilege of insuring marine risks to only these two companies and gave them the exclusive right of carrying on this business on a joint stock basis in return for a payment of 600,000 pounds to the Exchequer.[10] Marine insurance business in England was opened to other companies only after 1824. [11]

2. Development of marine cargo insurance

In 1884 Institute of London Underwriters (ILU) was incorporated and issued the first Institute Cargo Clauses in 1912 as a result of the loss of the *Titanic*. The standard clause of all risks was introduced in 1963.[12] About 1982, the London insurance market decided to revise the Lloyd's S. G. policy and Institute of Cargo Clauses. After several meetings, the Technical Clauses Committee of the Institute of London Underwriters succeeded in formulating a new policy in 1982 and five sets of clauses to be used instead of the S.G. policy. The new Lloyd's marine policy (MAR) also agreed to use together with the Institute Cargo Clauses which are to be attached to the policy and are to be considered as an integral part of it. In time, due to the changing risks in the insurance market, it was decided that the clauses should be reviewed by taking into account the market conditions. In 2009, the revised edition of the Institute Cargo Clauses were introduced.

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[8] For the meaning for the initials denoting the S.G. policy, various explanations have been made. Some authors think it signifies *salutis gratia*, which means for the sake of safety. Another assumption is that the initials stand for the words ship and goods, because the form embodied in S.G. policy is applicable to both of these interests. Lay gave ten possible explanations. See *Lay* (n.6), 87–89; *C. Wright, C.E. Fayle*, A History of Lloyd's: From the Founding of Lloyd's Coffee House to the Present Day (1927), 132–134.

[9] See *Harold E. Raynes*, A History of British Insurance (1948), 107; *P.G.M. Dickson*, The Sun Insurance Office, 1710–1960 (1960), 41.

[10] The first seventeen clauses of the Bubble Act, 6 Geo. I c. 18, regulated the incorporation of the two marine insurance companies. The Act provided that "it shall be lawful for his Majesty, by two charters, to erect these two Companies into separate incorporate bodies, for the assurance of ships and merchandise at sea, or for lending money on bottomry. That all other companies shall be prohibited from engaging in these branches of trade, except the East India and South Sea Companies, which may still lend upon the bottoms of their own ships."

[11] *Anonymous*, Considerations on the Dangers of Altering the Marine Insurance Laws of Great Britain (1811), 21.

[12] http://www.ilu.org.uk/history.html (last accessed on 27.01.2020).

III. Institute Cargo Clauses

1. Institute Cargo Clause (A)(B)(C)

Under ICC 2009 there specified three sets of clauses in use for the coverage of most cargoes.. The main sets of clauses are as follows:

The Institute Cargo Clauses "C" is the most restrictive coverage. It provides major casualty coverage during the land, air or sea transit, including coverage for loss of or damage to the subject matter insured that is reasonably attributable to fire or explosion; vessel or craft being stranded, grounded, sunk or capsized; overturning or derailment of land conveyance; collision or contact of vessel, craft or conveyance with any external object other than water; and discharge of cargo at a port of distress.

The Institute Cargo Clauses "B" is considered to be slightly a restrictive cover. It provides all the coverage available under the "C" clauses plus coverage for losses reasonably attributable to earthquake, volcanic eruption or lightening; wet damage from sea, lake or river water and accidents in loading and discharging.

The Institute Cargo Clauses "A" is considered to be one of the widest marine insurance coverage. It provides "all risks" coverage, including losses from theft, shortage and non-delivery.

Each clause is subject to listed exclusions, including wilful misconduct of the insured; ordinary leakage and ordinary losses in weight or volume or ordinary wear and tear; inherent vice or nature of the subject matter insured; delays; or insolvency or financial default of the carrier.[13]

2. Exclusion clauses

As mentioned above, for this article, the author will discuss only the delay and insolvency/financial default exclusions.

(1) Delay

Under Marine Insurance Act 1906 as well as under the Institute Cargo Clauses 1982 and 2009, the losses caused by delay was excluded from the policy coverage. In fact, the ICC 82, article 4.5 corresponds to section 55(2)(b) of the MIA 2009 and states that:

"In no case shall this insurance cover […] loss damage or expense proximately caused by delay, even though the delay be caused by a risk insured against (except expenses payable under Clause 2 above)."

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[13] Institute cargo clauses embedded in a marine insurance policy which covers cargo in-transit. The items being shipped would be considered the goods in-transit only if they have left from the original location and are still in transit to the destination.

However, delay is an awkward concept of cargo coverage. This is because under MIA, as well as under ICC, the cargo coverage is mainly for the loss or damage to the cargo. And the concept of delay does not itself causes losses or damages to the cargo but it is a result of a peril.

(2) Insolvency: Recovery of the Cargo and Related Expenses

Under 1982 ICC, article 4.6 it had stated that "In no case shall this insurance cover […] loss damage or expense arising from insolvency or financial default of the owners managers charterers or operators of the vessel."

Therefore, ICC 1982 clearly excluded the risks of insolvency from the coverage of all risks as well. Instead, ICC 2009 article 4.6 reduced the scope and stated that:

"In no case shall this insurance cover […] loss, damage or expense caused by insolvency or financial default of the owners managers charterers or operators of the vessel *where, at the time of loading of the subject-matter insured on board the vessel, the Assured are aware, or in the ordinary course of business should be aware, that such insolvency or financial default could prevent the normal prosecution of the voyage.* This exclusion shall not apply where the contract of insurance has been assigned to the party claiming hereunder who has bought or agreed to buy the subject-matter insured in good faith under a binding contract".

Therefore, unlike the ICC 1982, this exclusion clause shall not apply where the contract of insurance has been assigned to the party claiming hereunder who has bought or agreed to buy (innocent buyer, assignee, CIF) the subject matter of insured in a good faith under a binding contract.[14] Hence, according to this clause, it is for the insurers to prove that the insured was or ought to have been, in the ordinary course of business, aware of the carrier's insolvency or financial default at time of loading. That means insurer has to establish a proximate cause of the loss that the loss is caused by insolvency and has to show that the insured was aware of the loss. He can do so for instance by analyzing the balance sheet test and showing carrier's financial status i.e. the public knowledge in the industry.[15] Thus, the claim will fail if the insured was aware or should have been aware carrier's financial circumstances. The insured is not expected to carry out a deep forensic accountancy check but must exercise the common sense of a prudent man.

Here a question arises, what if the engine breaks down, and due to financial circumstances of the owner the vessel could not continue the voyage, is the expenses that cargo interest incurs indemnifiable by the insurer?

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[14] The wording has been taken from the Institute Commodity Trades Clauses (5/9/83).

[15] e. g. *alter ego*.

The Institute Cargo Clauses 1982 and 2009 provides an answer to this question:

"It is the duty of the Assured and their employees and agents in respect of loss recoverable hereunder […] To take such measures as may be reasonable for the purpose of averting or minimizing such loss; and […] the insurers will, in addition to any loss recoverable hereunder, reimburse the Assured for any charges properly and reasonably incurred in pursuance of these duties."[16]

Therefore, this clause sets out the rights and obligations of the insured and aims to protect the insured from the reasonable expenses that is incurred during the recovery of his cargo. That is to say, this expenses only covers the voluntary contracts that insured does to diminish the loss.

Consequently, insured who was acting in a good faith, and who was not aware of the financial circumstances of the carrier, could cover his losses from the insurers. Especially the losses that insured incurred to diminish the loss, such as carrying to the cargo to the destination port, could be covered. In fact, if the cargo is not carried to the destination port, the losses of the insurer would be higher. For instance, perishable goods that are delayed and deteriorated or pass their sell by date; loss of market, e.g. nonperishable goods that "miss" the market for instance, for Valentine's day, and any loss or damage occurred might result greater risk of loss.

However, it is also important to analyze each insurance policy. Needless to say, there is no "one size fits all" answer. Thus, whether claim is recoverable depends on whether any extra expenses properly and reasonably incurred and depends upon the wordings of the policy.[17]

IV. Turkish Marine Insurance Law

1. Statutory law

In Turkey, legislation is an important source of insurance law. The main sources in Turkey regulates the insurance are: The Insurance Activities Act, no. 5684 (for corporate, regulatory and operational matters), the Sixth Book of the Turkish Commercial Code,[18] no. 6102 (for insurance contracts) and Turkish Obligations Code, no. 6098 (for general contract law provisions).[19]

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[16] Article 16.

[17] See the leading case of *Integrated Container Service Inc. v. British Traders Insurance Co. Ltd,* (1984) 1 Lloyds Rep. 154.

[18] However, in Turkey, there is no specific act for marine insurance. The Turkish Commercial Code makes no distinction between non-marine and marine insurances. Therefore, all general provisions are applicable to marine insurance.

[19] Turkish Commercial Code, numbered 6102, entered into force on 1st of July 2012.

Secondary legislation, such as regulations, announcements and the general conditions of insurance also plays a major role.

2. General conditions

The general conditions of insurance are contractual conditions that are prepared for the specific type of insurance and attached to the relevant insurance policy. In Turkey, the general conditions of insurance are prepared by the Directorate General of Insurance Activities in accordance with the Act on the Organization and Tasks of the Under secretariat of Treasury No. 4059 and subject to the approval of Under secretariat of Treasury.[20]

Regarding cargo insurance, the general conditions excluded under articles 2 to 7 inherent vice and defect, shortage, rusting and moulding, leakage, usual breakage, self-heating, insufficient packaging, vapour, damage caused by mice, the negligence of the policyholder or the insured, loading of insured goods with dangerous goods, damage arising from delay, war and similar risks, seizure, strikes and piracy. Therefore, contrary to Japanese law that will be discussed below, under Turkish Law delay and inherent vice is an excluded risk.

If one analyses the policies, under international carriage it can be seen that parties in addition to implementing the general conditions of goods in transit insurance in the policy also includes the terms of the ICC 2009 A. In some of the insurance policies however, it can be seen that parties were including in addition an insolvency exclusion clause of Joint Cargo Committee especially where the ICC 1982 clauses are inserted.

This clause states that:

> "It is hereby agreed that the exclusion 'loss damage or expense arising from insolvency or financial default of the owners managers charterers or operators of the vessel' is amended to read as follows: In no case shall this insurance cover loss damage or expense arising from insolvency or financial default of the owners managers charterers or operators of the vessel where the Assured are unable to show that, prior to the loading of the subject-matter insured on board the vessel, all reasonable practicable and prudent measures were taken by the Assured, their servants and agents, to establish the financial reliability of the party in default."[21]

This clause was introduced after the 1982 ICC. As mentioned above, ICC 1982, article 4.6 was excluding the insolvency from the insurance coverage.

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[20] In fact, in Turkey, the Treasury supervises the operations of Turkish insurance and reinsurance market, as well as the activities of Turkish branches of the foreign insurance and reinsurance companies.

[21] JC93, November 1982.

However, this clause did not find any favour and that's why in the same year, in 1982, Joint Cargo Committee introduced the clause below to protect innocent assignee who has bought or agreed to buy the subject matter insured in good faith (similar to ICC 2009 clause approach).

In conclusion, under the insurance policy, attention should be paid to insurance terms and conditions, which may vary depending on the type of transportation (whether it is a domestic or international). It is generally an error / mistake to assume that the expression of all Risks ("All Risk") covers every risk. Therefore, the insured and the insurer should be careful to draft the conditions of the insurance.

3. Comparative study of Governing law and jurisdiction issue between Turkey and Japan

Under Turkish Law, the main issue is that, the general conditions of insurance as well as Turkish Commercial Law remains silent with regards to competent law and jurisdiction, but in the Institute Charter Clause, one can see that the competent law determined as English Law before the English Courts.

However, in 2012 within the new Turkish Law of Obligation Nr. 6098, control mechanism entered into all commercial contracts. This was a big change namely for the incorporation of the provisions into the contract and their validity without testing reasonableness of their contents in this regard.

Accordingly, under article 20 it is stated that:

> "Standard Terms are contractual stipulations which have been drafted solely by a party and submitted to the other party in advance of a contract is concluded so as to be used in many similar contracts subsequent. When classifying these terms, no regard should be made upon their scope, font type or shape or whether they are located in the text or annex of the contract. It does not preclude the provisions of a contract be deemed as standard even the text of the contracts which are concluded for the similar purposes are not equivalent with each other. Where a contract with standard terms involves in its text or in another contract provisions that each of the term or condition has been accepted upon negotiation do not solely exclude them of being standard. The provisions regulating the standard terms apply also to the contracts, notwithstanding their nature, submitted by legal or natural persons who provide services upon a statutory or official permission."

Therefore, as the standard contracts prepared by one of the parties, it is clear that the party who prepares the contract and provides the service is able to take the advantage against the counterparty. Because the counterparty, who

wants to buy goods or services is generally considered in a weaker state, and he will either accept the conditions imposed on him or he will be deprived from this good or service. In order to prevent this, the new Act introduced "standardised terms of the contract."

Accordingly, it is sufficient to have roughly three elements together in terms of the existence of general conditions, these are: the rules included in the contract are set by only one party, there is no thorough negotiation between the parties, and finally these rules are prepared with the potentially strong party. These three elements adequately describe the so-called standardised terms of the contract.

For this reason, under international carriage, when the insurance contract includes the Institute Charter Clause, in case of a dispute, *Turkish judges are reluctant to apply English law. For instance, according to the decision dated 2014,*[22] *it was decided that in accordance with the provisions of the general terms and conditions, the objection regards to the jurisdiction clause was dismissed. Therefore, in Turkey, in practice, Turkish Courts cancel the jurisdiction clause and applies Turkish Law before Turkish Courts.*

Whilst in Japan current Japanese policy forms in fact have a partial incorporation to English law in relation to the claims, and incorporated terms identically from the Institute of Cargo Clauses which are subject to English law and practices. Thus, when an international cargo insurance policy came before the Japanese courts, Japanese judges has no choice but to recognize the meaning of the terms under English law. The reason of such adoption was due to the case *Amin Rasheed Shipping Corp. v. Kuwait Insurance Co (The Al Wahab)*.[23] In this case, it was held that English law plays a role under the Japanese standard form of marine insurance policy. Therefore, after this decision, the Japanese insurance market decided to apply English law for the claims to avoid further disputes.

However, Japanese courts does not apply English law to all matters. For instance, Japanese law applies for the matters related to the formalities of the contract as well as formation of the contract (such as misrepresentation). For instance, later in 1998, in the case of *Connor v. Nippon Fire & Marine Insurance Co. Ltd*[24] Tokyo District Court held that English law and practice *only applies to "liability for and settlement of claims*."[25] Therefore, Japanese law applies to *all other aspects such as validity of the contract, the legality of*

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[22] 6. ATM, 2014/16 E., 2014/75 K. numbered, 15/5/2014 dated.

[23] (1982) 1 Lloyds Rep. 638.

[24] (1998) Hanrei Jiho No. 1675.

[25] See also *Nima SARL v. The Deves Insurance Public Company Ltd. (The Prestrioka)*, (2003) 2 Lloyds Rep. 327.

the voyage as long as contract is issued in Japan. Therefore, when there is an international cargo claim matter, the English law will apply.

However, under domestic law, there are two main sources in Japanese law as to marine insurance cargo. One of which is Insurance Law of 2010 that is the law governing insurance law and the Articles 815 to 841 of the Commercial Code. The Insurance Law provides general provisions to all insurances however, Commercial Code also applies to maritime law and marine insurance matters, which was recently modified in 2019.

Under Japanese Insurance Law exclusions are only stated as: willful misconduct, gross negligence, war and civil commotion.[26] However, the commercial code stated more exclusion clauses for marine insurance, and *added inherent vice exception too, but not the case of delay.*[27]

However, this in practice might cause some issues. For instance, let's assume, a cargo of flowers were sent from port A to port B.[28] During the voyage the shipment of such cargo was delayed. And when the flowers arrived to the destination port, all the flowers were broken, ripped and dead. Cargo insurer requested from its insurer to cover the loss. However, the insurer argued that the loss was caused by the inherent vice character of the flowers and rejected to indemnify the loss. Here, what needs to be determined is what actually caused the loss? In order to do this, it has to be explained the degree of proximate cause rule under Japanese Law. However, even though Japanese law (which is governed by a Civil Code and is not common law), like English law, looks for the proximate cause of loss, the question of causation is not settled. Therefore, insurers must proceed with caution when assessing concurrent causes of business interruption losses governed by Japanese law and not assume that a similar approach as provided under English law would apply. Discussions with experts on a case-by-case basis are necessary to determine a suitable approach to adopt under Japanese law. Ultimately, at present, there is no one certain correct approach.

To come back to the case, if the insurance policy did not specify delay as an excluded risk, insured could argue that the loss did not cause by the inherent vice character of the flowers but caused by delay.

Delay is actually a strange concept, because delay of a perishable cargo is generally not a cause but it is an effect. It may be result for a number of causes for some which such as the inherent defects of the cargo, the carrier then is not liable. State of the proof is to show that the damage is due to either to an excepted peril such as inherent vice or to the carrier's negligent care of the

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[26] Article 17.

[27] Article 829.

[28] Cargo of flowers is considered to be a perishable cargo which can be defined as goods that will deteriorate over a given period of time or if exposed to adverse temperature, humidity or other environmental conditions.

cargo, that is bringing himself within the exception or to show that he has not been negligent. Accordingly, two possible causes, one excepted the other not, were not of equal effectiveness and it is important to determine the dominant cause.

In conclusion where there are concurrent causes, the insurer can only escape liability if he can bring himself within the excepted peril. It may be very difficult to distinguish in which cases delay could be the proximate cause of the loss rather than inherent vice where both of these perils are in operation. That's why for instance ICC clearly excludes both cases as well as MIA 1906.

V. Conclusion and Summary of the Findings

Under Turkish Law, general standard conditions is generally added into the insurance policies. However, these conditions are up to parties free will. That is to say, parties are free to implement these conditions. Primary sources such as Commercial Law and Insurance Activities Act only frames the insurance contracts standard elements. Therefore, in Turkey there is no supervision on insurance contracts. In general, insurance policies, mainly under international cargo insurance policies, applies ICC 2009 clauses. Before that when 1982 clauses were applicable, one can see that policies were in addition including JC93 clause to include the insolvency coverage. That is to say, Turkish Law, in regards to the transit insurance, stated up to date and apply the international standards. However, when there is a dispute before the Turkish Courts, according to the new changes in 2012 in the Obligation Code, even though the English law is said to be applicable especially under Institute Cargo Clauses, the Turkish Law regards this clause as a general standardized term, and disregard the application of the ICC jurisdiction clause. This in fact is causing uncertainties for both parties – the insured and the insurer.

However, under Japanese Law, once can see that under international cargo insurance disputes, if the insurance contract is issued in Japan, for the claims it is settled that English law will apply and only for the formalities of the contract Japanese law will apply. Such division also is causing a problem in Japan, as the understanding of the "claims" can be different on each case.

Further, it is not clear for example, if the engine breaks down, and due to financial circumstances of the owner the vessel could not continue the voyage, is the expenses that cargo interest incurs indemnifiable by the insurer? In Turkish Law as well as under Japanese law there is an ambiguity and the speaker is suggesting that in such cases similar to ICC clauses, if the insured incurs some expenses in order to diminish the loss, such expenses could be recoverable from the insurers. Therefore, speaker is suggesting that in both countries the law needs to be modified accordingly.

Finally, under the exclusion clauses, even though ICC excludes clearly delay and inherent vice, Japanese law, unlike Turkish Law, only excludes where the claim is caused by inherent vice but there is no provision related to delay. However, in practice, the understanding of proximate cause of loss under Japanese insurance contracts is still not a settled issue. Especially whether delay of a perishable cargo caused by inheritable defects of the cargo, or caused by the delay, depending on the wordings of the insurance policy of course (exclusion clauses), might cause an issue. Speaker can only suggest that insurers under insurance policies by including delay as a specific exclusion clause could avoid such problems.

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‘Clean’ Bill of Lading under the UCP: On Some Problems and Controversies*

Časlav Pejović **

ABSTRACT

The paper addresses the issue of the different meanings of the term ‘clean bill of lading’ in the law governing carriage of goods by sea and letters of credit respectively. While under the letter of credit rules, the term 'clean bill of lading' is limited to bills of lading that contain notations related to the defective condition of the goods and packaging, under the carriage by sea rules the meaning of this term is broader and it includes reservations concerning the quantity of the goods. In the latter case, the term ’claused bill of lading’ is often used, and the author argues that the ‘claused bill’ cannot be a ‘clean’ bill. The issue raised by the paper is whether the same term should be given different meanings, even if this may not cause many problems in practice.

KEYWORDS: ‘clean’ bill of lading, ‘claused’ bill of lading, letters of credit, carriage by sea, condition of the goods, quantity of the goods, notations

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In this paper the author revisits a topic that is at the crossroad of law governing carriage of goods by sea and letters of credit; it is about different meanings of 'clean' bill of lading. In previous papers the author argued that there is a problem with the definition of 'clean' bill of lading in the Uniform Rules and Practices for Documentary Credits (UCP600).[1] This paper aims at identifying the cause of the problems and exploring possible solutions. It is interesting to note that none of the texts on documentary credits even mentions this issue; the only scholar who raised this issue was Hugo Tiberg in a paper that is not even easy to trace.[2]

The starting point for this paper will be a question raised by Charles Debattista: Are transport documents under the UCP consistent with trade practice "in associated sectors like transport...?"[3] The paper will attempt to

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[1] *'Clean Bill of Lading in Contract of Carriage and Documentary Credit: When Clean Is Not Clean'*, Penn State Journal of Law & International Affairs (2015) Vol. 4(1) 127-150; Transport Documents in Carriage of Goods by Sea: International Law and Practice (Informa from Routledge, 2020) Chapter 9. This text is partly based on these two texts.

[2] *Hugo Tiberg*, *Carrier's Liability for Misstatements in Bills of Lading*, in. Maritime Fraud (*Skrifter utgivna i samverkan* med Sjörättsföreningen i Göteborg av Handelshögskolan i Göteborg) (Göteborg, 1984) 71–94. As a personal note, I would like to add a few details. During my visit to Prof. Tiberg's home in Stockholm in March 2014, I asked him about this paper in which he promoted the idea that the UCP definition of 'clean' bill of lading should be extended to include notations related to the quantity of the goods. He replied that he belonged to minority holding such view. Around the same time, I talked about this issue with Jan Ramberg, another great Swedish scholar who served for many years in the ICC Banking Commission. He told me that this issue has been discussed about forty years ago and that banking interests had opposed the idea of revising the definition of 'clean' bill of lading. By this paper I would like to pay respect to these two great Swedish scholars.

[3] Charles Debattista, Transport Articles in the Draft UCP, Insights into UCP 600, (2006) Vol. 12 No. 2, 151

answer this question in the context of the meaning of 'clean' bill of lading under the UCP and the rules governing carriage by sea. The paper includes a comparative law note that will attempt to examine whether there is a uniform approach to this problem in various jurisdictions.

I. 'Clean' Bill of Lading under the UCP

Article 27 of the UCP600:

"A bank will only accept a clean transport document. A clean transport document is one bearing no clause or notation expressly declaring a defective condition of the goods or their packaging…."

The UCP rules only make a bill 'unclean' if there are reservations noting that the goods and/or packages are in a defective condition. The UCP definition is in line with a number of well-known cases.[4] This definition remained unchanged throughout a number of the UCP revisions.

Let's now address this issue in the context of question raised by Prof. Debattista: Is the concept of 'clean' bill of lading under the UCP 600 consistent with the corresponding term in carriage by sea.

II. Clean Bill of Lading under the Carriage by Sea Rules

All international conventions governing carriage of goods by sea provide for the right of the carrier to insert reservations regarding leading marks, quantity, the general nature of the goods, and their condition, if the conditions for inserting such reservations are met. The Hague-Visby Rules is used as illustration.[5]

Article 3(3)

"After receiving the goods into his charge the carrier or the master or agent of the carrier shall, on demand of the shipper, issue to the shipper a bill of lading showing among other things:

(a) The leading marks necessary for identification of the goods …

(b) Either the number of packages or pieces, or the quantity, or weight, as the case may be,

(c) The apparent order and condition of the goods.

Article 3(3)

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[4] *British Imex Indus. Ltd. V. Midland Bank Ltd.* (1958) 1 Q.B. 542 (Eng.); *Golodetz & Co. v. Czarnikow* (1980) 1 W.L.R 495 (Eng.).

[5] The Hamburg Rules, art. 16(1), and the Rotterdam Rules, art. 40(1) referring to art. 36(1) contain similar provisions.

> "Provided that no carrier, master or agent of the carrier shall be bound to state or show in the bill of lading any marks, number, quantity, or weight which he has reasonable ground for suspecting not accurately to represent the goods actually received, or which he has had no reasonable means of checking."

Where there is a reasonable ground for suspecting that the data in bill of lading do not accurately represent the goods actually received, or where the master has had no reasonable means of checking those data, he is entitled to insert notations (reservations) in bill of lading. Bill of lading containing such reservations is usually considered to be a 'claused' bill, as opposed to a 'clean' bill.

The problem is that in contrast to the letters of credit, the rules governing carriage by sea have never defined the meaning of 'clean' bill of lading. This led to a variety of approaches. In common law the main authorities are found in case law, while in civil law the scholars are playing dominant role in defining the meaning of 'clean' bill.

Common law

This short overview will use the English and American case law. An illustration of older English case law can be found in *Restitution Steamship v. Sir John Pirie & Company* case:

> "… where, for instance, you insert in the margin of the bill of lading the weight or quantity or quality unknown, that is not a clean bill of lading, because that contains a qualification." [6]

A similar illustration from American case law can be found in *Roberts v Calmar S.S. Corporation* case:

> "However, broadly speaking, it may be said that a 'clean' bill of lading is one which contains nothing in the margin qualifying the words of the bill of lading itself".[7]

In *San Juan Trading Co., Inc. v. The Marmex* case, the court expressly held that a bill of lading cannot be clean if it contains a 'shipper's load and count' type of clause and there has been a shortage in the cargo.[8]

It should be noted that recent English case law refrains from expressly using the term 'clean bill of lading' in cases of notations related to quantity. The courts simply state that where a bill of lading states that the weight of goods is

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[6] *Restitution Steamship v. Sir John Pirie & Company* 61 L.T.R. 330 (Q.B. 1889)
[7] *Roberts v Calmar S.S. Corporation* 59 F. Supp. 203, 209 (E.D. Pa. 1945).
[8] *San Juan Trading Co., Inc. v. The Marmex,* 107 F. Supp. 253, 260 (D.P.R. 1952).

unknown, the carrier can rely on it as evidence to contradict the weight recorded in the bill of lading.[9] The impression is that American courts are clearer in holding as 'unclean' bills of lading those bills that contain notations relating to quantity of the goods.

Civil law

In civil law jurisdictions, bills of lading with notations related to quantity of the goods are generally considered as 'claused' bill (not always stating explicitly, but sufficiently clearly expressing that such bills are not 'clean' bills). Here are some examples from various civil law jurisdictions.

In the newest edition of "Droit maritime", the French author Philippe Delebecque explicitly states that in case of a 'clean' bill 'in no circumstance is a representation been made as to the weight, contents, measure, quantity, quality, description, condition, marks, or value of the goods.'[10] That statement is further supported by illustration of a bill of lading where the master expressly states a shortage of the goods; according to this author this is not a 'clean' bill.[11]

In the new edition of the commentary of the German Commercial Code, the text of the commentary does not explicitly define 'clean' bill of lading, but it uses the term 'the quantity' (*die Menge*) in the context of 'unclean' bill.[12] A similar approach is taken in Italian literature.[13]

Swedish authors leave no doubt that the bill is 'unclean' where the master enters reservations regarding the shipper's statement ('if the carrier notes a discrepancy, he will have enter it into the bill of lading, which is said thereby to become 'unclean').[14] Norwegian authors are not explicit, but still sufficiently clear; "when the carrier makes notations to the effect that the goods do not correspond with the shipper's statement, and especially when the carrier does not confirm that the goods are in 'good order and condition"….the bill of lading will no longer be considered 'clean'.[15] Obviously, "notations to the effect that the goods do not correspond with the shipper's statement" do not

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[9] The Mata K [1998] 2 Lloyd's Rep. 614.

[10] Philippe Delebecque, Droit Maritime (14th. Ed. Précis Dalloz, Paris, 2020) para 735. This author actually reproduces the definition of 'clean' bill of lading from some bill of lading forms, such as CNC Line Bill of Lading (http://www.cnc-ebusiness.com/static/eCommerce/Attachments/BILL_OF_LADING_CNC_LINE.pdf)

[11] *Ibid*, para.744. See also, René Rodière, *Connaissement clean et lettred de garantie*, BTL, 1962, 185.

[12] Rolf Herber, *Münchener Kommentar* zum Handelsgesetzbuch: HGB Bd. 7: Transportrecht, (Beck C. H.; 4th. edition 2019) Sect. 517, No.21.

[13] Michele Grigoli, Diritto fella navigazione (UTET, Torino 1982) 320.

[14] Hugo Tiberg, Johan Schelin Transport Law in Sweden (Kluwer Law International , 2016) para. 400.

[15] *Thor Falkanger*, Bull, Hans Jacob Bull, Lasse Brautaset, *Scandinavian Maritime Law*: The *Norwegian* Perspective (4th. Ed, Oslo, 2017) para.14.10.6.

relate to condition of the goods, because the shipper does not state the condition of the goods in the bill of lading.

The leading Croat scholar Branko Jakaša expressly stated that bills of lading with notations relating to the quantity are not 'clean' ('čista teretnica').[16] A Greek scholar is also clear: 'If the master (shipowner) does not agree with any of the statements made in the bill of lading he will add a clause to this effect, thereby causing the bill of lading to be termed as 'unclean', 'foul', or 'claused.'[17]

Based on this comparative overview, it can be concluded that there is no uniformity with regard the definition and meaning of 'clean' bill. The diffrence is mainly whether a bill of lading which contains notations refering to the quantity is explicitly defined as a 'clean' bill, or it is referred to as 'claused' bill. Of course, if a bill is 'claused' it cannot be 'clean'. That would defy common sense.

III. Analyses

When a comparison is made between the meaning of a 'clean' bill of lading under rules that apply to carriage by sea and the meaning under rules that apply to letters of credit, discrepancies become obvious. The UCP definition of 'clean' bill deviates from the carriage by sea rule under which the notations related to quantity make bills 'unclean'.

The definition of a 'claused bill of lading' in the financial dictionary of Investopedia can be used as a starting point to discuss the problem of the UCP definition of a clean bill of lading.[18] According to this definition a 'claused bill of lading' (one that is not 'clean') is 'a bill of lading that shows a shortfall or damage in the delivered goods'. It can be assumed that this definition is aimed at defining the meaning that 'claused bill of lading' has in financial transactions, such as letters of credit, rather than in carriage of goods. However, this definition actually corresponds to the meaning of 'claused' bill in carriage by sea and it is inconsistent with the UCP concept of a clean bill.

The term 'shortfall' relates to shortage, deficiency, 'the quantity or extent

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[16] Branko Jakasa Sistem plovidbenog prava (Zagreb, 1982) Knjiga III/svezak 3 para 653.

[17] Nicholas Kouladis, Principles of Law Relating to International Trade (New York, Springer, 2006) 270.

[18] Investopedia is a privately owned website based in New York that focuses on investment education and financial news, and it may not be a reliable authority on this complex issue. The Investopedia definition is used here as an illustration of a view regarding the meaning of clean B/L in the business community. This also demonstrates that this kind of source should be used with caution, as this definition clearly deviates from the definition of clean B/L under the UCP600.

by which something falls short'.[19] It does not include 'defective condition'. If there is any doubt whether the notations regarding to quantity may be construed as referring to condition, such doubt is dispelled by the Oxford Dictionary: 'condition' means 'the state of something with regard to its appearance, quality, or working order'.[20]

The UCP definition of a clean bill is in conflict with the rules that apply to carriage by sea. Where the reservation expressly states that there is a shortage, that is still 'clean' bill under the UCP, but it is 'unclean' under the carriage by sea rules.[21] For some unclear reason, reservations regarding quantity are omitted from the UCP definition of a clean bill of lading

IV. Rationale of Notations in Bill of Lading

As a general principle, the rationale for requiring a 'clean' bill of lading is that the bill of lading should be merchantable to protect the bank's interest. Hence, bills of lading that indicate a defective condition are not easily resalable which may compromise the bank's security.

Why has the UCP omitted from its definition of a 'clean' bill of lading reservations regarding quantity? Is there any difference in rationale between notations relating to quantity and those relating to condition?

Let's start with notations regarding condition. Why does Art. 27 of the UCP provide that a 'clean' bill of lading is one which does not state defects in the condition of the goods or packages? There are two reasons. The first is to protect the interests of the buyer/applicant, who would be at risk if the goods delivered for carriage are defective. The second is to protect the bank's own interests against the same risk, since the bank relies on the bill of lading as security, and this security would be undermined if the goods for which the bill of lading is issued are defective. A reservation that refers to a minor defect may be acceptable to the buyer, but not to the bank, because such notation makes a bill of lading 'unclean' under the UCP rules.

In the case of a reservation related to quantity, the rationale of notations is to protect the carrier against liability, as well as the interests of the buyer/applicant whose interests would be at risk if the goods delivered for carriage are less than paid for.[22] This means that there is the same rationale in

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[19] http://www.dictionary.com/browse/shortfall

[20] https://en.oxforddictionaries.com/definition/condition

[21] Hugo Tiberg, Johan Schelin Transport Law in Sweden Kluwer Law International , 2016) para. 400

[22] The legal effect of remarks relating to condition is different from remarks relating to quantity, as the first one deprives the statement on apparent good order and condition regularly found in bill of lading of its legal effect, while remarks relating to quantity (and for that matter, also

both cases: notations related to condition of the goods and notations related to the quantity. In the case of reservations related to the quantity the rationale exists perhaps even to a greater degree than in the case of a defective condition. In some cases, the buyer may prefer to receive the goods with minor defects rather that to receive the goods with shortage in quantity. Minor defects in condition might not actually affect the value of the goods, while a shortage of the goods would normally affect their value.

If the same rationale exists in the case of condition as it does in the case of shortage, and in the case of shortage arguably to a higher degree than in the case of condition, then why does the UCP fail to include shortage of the goods in its definition of a clean bill of lading? What is that can make a bill of lading that states a shortage of the goods acceptable, while a bill of lading with notations regarding condition, and which may be even inaccurate,[23] is considered unacceptable? What is the logic underlying the UCP definition? How can a bill of lading that expressly states that there is a shortage of the goods be a 'clean' bill? How can a 'claused' bill be 'clean'? No clear explanation or justification can be found.

V. Problems in Practice

Just as good laws do not guarantee good practice, defects in the law do not necessarily create problems. This may be the case, for example, where there is a kind of parallel system that helps bridge the gap created by a defective rule. In the case of the UCP, there is such a parallel mechanism: the 'strict compliance' principle.[24]

Art. 14(d) of the UCP acts as a safety device in cases like the one described above. Potential problems that may be caused by the flawed definition of a 'clean' bill are remedied by relying on Art. 14(d), which states that data in a document submitted under documentary credit 'must not conflict with data in that document, any other stipulated document or the credit.' Any discrepancy in quantity between what the documentary credit requires and what is declared on the bill of lading makes the bill non-compliant, and the bank can reject such document. In other words, banks will reject a bill of lading stating shortage not because it is an 'unclean' bill, but because it is not acceptable under the 'strict

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remarks regarding identification marks and kind of the goods) deprives of legal effect the statements of the shipper regarding the quantity.

[23] *Owners of Cargo Lately Laden on Board the David Agmashenebeli v. Owners of the David Agmashenebeli (The David Agmashenebeli)* [2003] 2 Lloyd's Rep. 92.

[24] In the last 40 years, not a single ICC Opinion has been released in response to such issues, which would suggest that these issues have never caused a problem with respect to documentary credits. The problems are related mainly to the sale contract, and the party most directly affected is the buyer, not the banks.

compliance' principle. If the bill contains a reservation stating a shortage, the bank will reject it because such reservation indicates a discrepancy in the quantity as stated in the bill of lading, or as stated in other documents presented under letters of credit, such as an invoice.[25]

Thus, from a practical point of view, there is no problem. The only issue is whether this kind of flaw in the definition of a 'clean' bill should be tolerated from the aspect of clarity and the need that identical terms used in international trade are not given different meanings.

Another point of confusion and possible cause of problems relates to Art. 26(b) of the UCP. According to this provision, banks will accept bills of lading that contain clauses such as 'shipper's load and count', 'said by shipper to contain', or words of similar effect.[26] In the context of the UCP, this provision can be justified by the fact that these clauses do not expressly declare a defective condition of the goods and, therefore, do not make bills of lading 'unclean' under the UCP rules.

The situation, however, can be different in the contract of carriage.[27] In contracts of carriage, where the goods are carried in containers packed and sealed by the shipper, the clauses like 'shipper's load and count' or 'said by shipper to contain' can have the effect of making a bill of lading 'claused'.[28] The consequence is that under the UCP rules banks may be obliged to pay against a bill of lading with 'said to contain' type of clauses even where such bill is 'unclean' under carriage by sea rules, and may thereby, wrongfully or innocently, misrepresent the goods. This discrepancy of the rules exposes the buyer to the risk of fraud.[29]

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[25] *Libau Wood & Co v. H Smith and Sons Ltd* (1930) 37 Ll. L. rep 296. The court in this case used the term 'proper bill of lading', which can be distinguished from 'clean bill of lading'.

[26] *See* UCP, *supra* note 2, art. 26(b).

[27] *San Juan Trading Co., Inc. v. The Marmex,* 107 F. Supp. 253, 260 (D.P.R. 1952). In this case the court held: 'Here, the bill of lading on which libellant relies, is not a "clean" bill of lading. The carrier, in the typewritten condition appearing on its face and quoted supra, specifically warned any holder thereof that the merchandise had been counted and measured by the *shipper* and that the vessel would not be prejudiced or bound thereby, but had accepted it subject to have the same counted and measured at the port of destination…The fact remains that it never was, and cannot be claimed to be a "clean" bill of lading'. See also, *Plastique Tags, Inc. v. Asia Trans Line, Inc*, 83 F.3d 1367 (11th Cir. 1996).

[28] *Aetna Ins. Co. v. General* Terminals (1969) AMC 2449 (Ap. Ct. 4th. Cir. Louisiana), *Recumar Inc. v. Dana Arabia* (1985) AMC 2284 (SDNY); *Plastique Tags, Inc. v. Asia Trans Line, Inc*, 83 F.3d 1367 (11th Cir. 1996); see, sect. 7-301(a) 0f the UCC. *Com. Antwerp October 26, 2004* (2005) ETL 385. In this case the court held that the carrier cannot be required to check the condition of the goods when they are delivered to him in closed and sealed containers particularly where the transport document contains the numbers of the seals and the words "said to contain" and "shipper's load and count". Similar stance is taken by Italian courts, e.g. *Cass. Italy July 12, 2008* (2009 Dir. Trasp.) 455.

[29] For more details, see, Pejović, Transport Documents para. 9.11.

VI. Conclusion: Revising the definition of 'clean' bill in the UCP?

As a matter of principle, legal instruments should avoid giving the same name to concepts that are not the same. The same term should not be given multiple meanings, unless there are strong and convincing reasons for doing so. No such reasons can be identified for the discrepancies described above. As stated above, it is difficult to understand the rationale for omitting reservations regarding quantity from the UCP definition of a 'clean bill of lading'.

The simplest solution would be for the ICC to bring the UCP definition of a clean bill of lading into line with the meaning of a clean bill in the carriage by sea rules. The fact is that the UCP works fine in practice, and the logical question that can be raised is: Why change something that works well? Would the UCP rules work any less effectively if they were made clearer and less confusing? The answer is: No. Despite that, it is unlikely to expect any change in this respect in the UCP700 that may be adopted in the near future. The words of Jan Ramberg from the introduction to this text contain a wisdom that banks prefer stability over technicalities in legal drafting, where no problems arise in practice. Still, it should be stated as a matter of principle that legal text should aim at creating clarity and certainty rather than ambiguity and confusion. Moreover, this confusion in the meaning of 'clean' bill may lead to documentary fraud and expose the buyers to a serious risk.

The terminological confusion is likely to persist in the future. This paper has a modest ambition to point out to this confusion and potential problems that it may cause; even if it is unrealistic to expect the solution of this problem, we should at least be aware of its existence.

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CASES

Supreme Court Decision 2016Da223494 Decided February 27, 2020【Damages (Etc.)】

【Main Issues and Holdings】

[1] The content of the duty to protect investors borne by an asset management company under the former Indirect Investment Asset Management Business Act and whether this duty applies likewise to the case where a third party practically took the lead in the creation of investment trusts (affirmative)

[2] In a case where there exist extraordinary circumstances to conclude that an asset management company under the former Indirect Investment Asset Management Business Act practically took the lead in the creation of investment funds that are not directly created or managed by the said asset management company, whether the said asset management company bears the duty to protect investors by conducting a reasonable investigation of the income structure and risk factors when soliciting investors for the said investment trust product and providing accurate information to investors (affirmative)

【Summary of Decision】

[1] According to Article 4(2) and Article 56(1) and (4) of the former Indirect Investment Asset Management Business Act (repealed by Addendum Article 2 of the Financial Investment Services and Capital Markets Act, No. 8635, Aug. 3, 2007), an asset management company is an entity that creates investment trusts and manages the property of investment trusts and is in the position of a primary producer and distributor of information about investment trusts. Investors make investment decisions depending on the belief in the accuracy of investment information provided by an asset management company by trusting its expertise, knowledge, and experience. For this reason, an asset management company bears the duty to protect investors, whereby it needs to provide accurate information about investment trusts and, where there is insufficient information about the income structure and risk factors of investment trusts, provide such circumstances to investors. An asset management company is not exempt from this duty simply because a third party practically led the creation of investment trusts.

[2] Under the former Indirect Investment Asset Management Business Act (repealed by Addendum Article 2 of the Financial Investment Services and Capital Markets Act, No. 8635, Aug. 3, 2007), an entity that wants to become an asset management company that runs the business of managing indirect investment assets needs to satisfy certain requirements and obtain the

authorization of the Financial Services Commission (Article 4(1)), and an entity that is not an asset management company is prohibited from using the words "asset management," "investment trust," and similar wordings in its trade name (Article 7(2)). In addition, an asset management company and an investor have differences in the knowledge, experience, and competence in investment trusts. In light of this information asymmetry as well as the general characteristics of indirect investment, which is that the collection and provision of investment information in the market is, by and large, borne by professional investment managers, and where there are extraordinary circumstances to conclude that an asset management company practically took the lead in creating investment trusts that are not directly created or managed by the said asset management company itself by practically making decisions on the major content relating to the income structure or risk factors of the said investment trust asset, an asset management company that solicits investors for a particular investment trust product ought to be considered to shoulder the duty to protect investors as a solicitor for an investment trust product, whereby it is obliged to conduct a reasonable investigation of the income structure and risk factors of an investment trust and provide accurate information to investors to whom it recommends the said investment trust.

【Reference Provisions】 [1] Article 4(2) and Article 56(1) and (4) of the former Indirect Investment Asset Management Business Act (repealed by Addendum Article 2 of the Financial Investment Services and Capital Markets Act, No. 8635, Aug. 3, 2007) / [2] Article 4(1), 7(2), and 56(1), (2), and (4) of the former Indirect Investment Asset Management Business Act (repealed by Addendum Article 2 of the Financial Investment Services and Capital Markets Act, No. 8635, Aug. 3, 2007)

Article 4 of the former Indirect Investment Asset Management Business Act (Asset Management Company)

(2) Any person who obtains a license in accordance with paragraph (1) shall run the business falling under each of the following subparagraphs:

1. The business of establishing and terminating the investment trust;
2. The business of managing the investment trust property and offering management instructions;
3. The business of managing the investment company property; and
4. Other businesses prescribed by Presidential Decree.

Article 7 of the former Indirect Investment Asset Management Business Act (Firm Name)

(2) Any person who is not the asset management company shall be prohibited from using the letters of "asset management", "investment trust" or similar letters in his/her firm name.

Article 56 of the former Indirect Investment Asset Management Business Act (Investment Prospectus)

(1) Every asset management company of investment trust or every investment company (referring to incorporators when such investment company is in the process of its incorporation; hereafter the same shall apply in this Article) shall, if it issues

indirect investment securities, make the investment prospectus and provide every distribution company with the investment prospectus after obtaining the confirmation of the conformity of contents of the investment prospectus with the Acts and subordinate statutes, contents of the trust deed and the articles of incorporation of the investment company from the relevant trustee company or the relevant asset custody company. The same shall apply to a case where contents of the investment prospectus are altered in response to a change in the trust deed and the articles of incorporation of the investment company, etc. (excluding the case prescribed by Presidential Decree).

(4) Every asset management company of investment trust or every investment company shall enter the matters falling under each of the following subparagraphs in the investment prospectus:

1. Ideas and ways of managing the relevant indirect investment fund;
2. Matters concerning investment risk, including the fact that the investment principal is not guaranteed, etc.;
3. Matters concerning fund managers in charge of the management of the relevant indirect investment fund;
4. The management performances of the past, if they exist; and
5. Other matters prescribed by Presidential Decree for the protection of investors.

【Reference Case】 [1] Supreme Court Decision 2014Da15996 decided Nov. 12, 2015 (Gong2015Ha, 1877)

【Plaintiff-Appellant】 National Credit Union Federation of Korea (Hyun Law, Attorney Kim Dongchul et al., Counsel for the plaintiff-appellant)

【Defendant-Appellee】 Daishin Asset Management Co., Ltd. and one other (Shin & Kim LLC et al.)

【Judgment of the court below】 Seoul High Court Decision 2015Na2032248 decided April 22, 2016

【Disposition】 Of the lower judgment, the part on KRW 2,682,556,346 and the penalties for the late payment therefor are reversed, and this part of the case is remanded to the Seoul High Court.

【Reasoning】 The grounds for the final appeal are examined.

1. Details of the case

The reasoning of the lower judgment and the records reveal the following.

A. Defendant Daishin Asset Management Co., Ltd. (hereinafter "Defendant Daishin") decided to invest in a development project for the construction of a conference hotel furnished with rooms and a conference center in [Region name omitted] of Orlando, Florida, United States. Defendant Daishin created the Daishin Ravallo Fund I with an investment trust asset of KRW 10 billion on December 7, 2007 and created the Daishin Ravallo Fund II with an investment trust asset of KRW 8.5 billion on December 27, 2007, respectively. Institutional investors including the Construction Workers Mutual Aid Association purchased beneficiary certificates of the Daishin Ravallo Fund I and the Daishin Ravallo Fund II, and the assets of each of the said funds were

used to acquire 100% of Daishin Ravallo Limited Company, which was founded specifically for the development project. Daishin Ravallo Limited Company acquired all shares of Dashin Ravallo USA LLC, an American company, and Daishin Ravallo USA LLC acquired the shares of Ravallo Resort Development Company LLC, an American development company in charge of the instant development project (hereinafter "Ravallo Company") (a 15% stake at the time of the acquisition).

B. Defendant Daishin created the Daishin Ravallo Fund III of KRW 19 billion and the Daishin Ravallo Fund IV of KRW 4 billion on May 16, 2008. The assets of each of the said funds were used to acquire a 100% stake of Daishin Ravallo USA 2nd LLC (hereinafter "Daishin Ravallo 2"), an American company controlled by Defendant Daishin, and to give a loan to Daishin Ravallo 2. Dashin Ravallo 2 acquired a 13% stake of Ravallo Company.

C. At first, Defendant Daishin planned the size of the investment trust asset of the Daishin Ravallo Fund III and the Daishin Ravallo Fund IV as KRW 32 billion. In May 2008, Defendant Daishin solicited the Plaintiff to purchase KRW 9 billion worth of the beneficiary certificates of the said funds and provided explanations of the instant development project and distributed investment prospectus. The Plaintiff sought to purchase beneficiary certificates of the said funds; however, the purchase of the beneficiary certificates of special asset investment trusts is prohibited under the Credit Unions Act, which thwarted the Plaintiff's investment. For this reason, the total size of the Daishin Ravallo Fund III and the Daishin Ravallo Fund IV decreased to KRW 23 billion.

D. When it became impossible to purchase the beneficiary certificates of the Daishin Ravallo Fund for the abovementioned reason, the Plaintiff made arrangements with officials in charge in Defendant Daishin and Defendant Koreit Asset Management (trade name before change: Myasset Asset Management Co., Ltd.) (hereinafter "Defendant Myasset") to make an investment in Daishin Ravallo 2 in the manner that the Plaintiff purchases the beneficiary certificates of a real estate investment trust created by Defendant Myasset. Around that time, Defendant Myasset distributed a prospectus entitled "Myasset Private Equity Ravallo Investment Trust" to the Plaintiff, which contains the same content as contained in a prospectus distributed by Defendant Daishin upon making solicitation for the Daishin Ravallo Funds regarding the income structure and risk factors of the fund. Unlike Defendant Daishin's prospectus, the prospectus distributed by Defendant Myasset does not contain provisions for contingent considerations for an asset management company. Rather, it includes extra provisions that investment trust properties will be loaned to domestic special purpose companies and then reinvested to the U.S. special purpose company (Daishin Ravallo 2), and a real estate investment trust and the Dashin Ravallo Fund are joint stakeholders of the U.S. special purpose company having equal rights according to their stakes and the income produced will be fairly distributed.

E. The Plaintiff purchased KRW 8 billion worth of the beneficiary certificates of a real estate fund created by Defendant Myasset (hereinafter "instant investment trust") pursuant to the abovementioned arrangement and promised to pay the advisory fees of 0.94% of the Trust's capital every year. Accordingly, Defendant Myasset received advisory fees from the Plaintiff. Defendant Myasset founded Texco Investment 2-cha Limited Company (hereinafter "Texco"), a domestic special purpose company and a real estate development company. Moreover, Defendant Myasset lent the instant investment trust assets to Texco, and Texco acquired part of the stakes of Daishin Ravallo 2 and again loaned money to Daishin Ravallo 2.

F. As a result, the Daishin Ravallo Fund III and the Daishin Ravallo Fund IV owned a 72% stake of Daishin Ravallo 2, and Texco possessed a 28% stake of Daishin Ravallo 2. Daishin Ravallo 2 acquired a 13% stake of Ravallo Company.

G. Nevertheless, the instant development project was eventually shut down as a construction loan that was initially planned was not obtained, and the construction did not commence until June 16, 2011, which is the maturity date of the instant investment trust.

2. The lower court's determination

As stated in its reasoning, the lower court dismissed the Plaintiff's claim by determining as follows, after examining whether the Defendants violated its duty to protect investors as an asset management company of the instant investment trust when it solicited investors for the investment trust, and whether it violated fiduciary duties to its clients when managing assets.

A. Defendant Daishin is not an asset management company of the instant investment trust.

B. Defendant Myasset, an asset management company of the instant investment trust, agreed with the Plaintiff that instead of actually managing the instant investment trust properties, it would deposit the said properties to the account of Daishin Ravallo 2 controlled by Defendant Daishin, thereby completing its task.

C. Therefore, all of the Defendants do not bear the duty to provide explanations on the instant investment trust, the duty to protect investors, and the fiduciary duties to the Plaintiff.

3. The Supreme Court's determination

A. The duty to protect investors shouldered by an entity making a solicitation of investment trust products

1) According to Article 4(2) and Article 56(1) and (4) of the former Indirect Investment Asset Management Business Act (repealed by Addendum Article 2 of the Financial Investment Services and Capital Markets Act, No. 8635, Aug. 3, 2007), an asset management company is an entity that creates investment trusts and manages the property of investment trusts and is in the position of a primary producer and distributor of information about investment

trusts. Investors make investment decisions depending on the belief in the accuracy of investment information provided by an asset management company by trusting its expertise, knowledge, and experience. For this reason, an asset management company bears the duty to protect investors, whereby it needs to provide accurate information about investment trusts and, where there is insufficient information about the income structure and risk factors of investment trusts, provide such circumstances to investors. An asset management company is not exempt from this duty simply because a third party practically led the creation of investment trusts (*see, e.g.*, Supreme Court Decision 2014Da15996, Nov. 12, 2015).

2) Under the former Indirect Investment Asset Management Business Act (repealed by Addendum Article 2 of the Financial Investment Services and Capital Markets Act, No. 8635, Aug. 3, 2007), an entity that wants to become an asset management company that runs the business of managing indirect investment assets needs to satisfy certain requirements and obtain the authorization of the Financial Services Commission (Article 4(1)), and an entity that is not an asset management company is prohibited from using the words "asset management," "investment trust," and similar wordings in its trade name (Article 7(2)). In addition, an asset management company and an investor have differences in the knowledge, experience, and competence in investment trusts. In light of this information asymmetry as well as the general characteristics of indirect investment, which is that the collection and provision of investment information in the market is, by and large, borne by professional investment managers, and where there are extraordinary circumstances to conclude that an asset management company practically took the lead in creating investment trusts that are not directly created or managed by the said asset management company itself by practically making decisions on the major content relating to the income structure or risk factors of the said investment trust asset, an asset management company that solicits investors for a particular investment trust product ought to be considered to shoulder the duty to protect investors as a solicitor for an investment trust product, whereby it is obliged to conduct a reasonable investigation of the income structure and risk factors of an investment trust and provide accurate information to investors to whom it recommends the said investment trust.

B. As to the claim against Defendant Daishin

Examining the factual relationship of the instant case in light of the foregoing legal doctrine, the lower judgment that denied the liability of Defendant Daishin is unacceptable for the following reasons.

In the first place, the Plaintiff sought to purchase the beneficiary certificates of the Daishin Ravallo Fund following the recommendation of Defendant Daishin. When it became impossible to buy the beneficiary certificates of the Daishin Ravallo Fund, a special asset fund, because of the restriction under the Credit Unions Act, the Plaintiff made arrangements with

officials in charge at Defendant Daishin and Defendant Myasset and decided to purchase the beneficiary certificates of the instant investment trust that has the identical income structure with the Daishin Ravallo Fund as it earns returns by investing in the instant development project. The content of the prospectus on the Daishin Ravallo Fund punished by Defendant Daishin and the prospectus on the instant investment trust punished by Defendant Myasset indicate the fees each receive as an asset management company and the differences between the Daishin Ravallo Fund and the instant investment trust in terms of investment structure; however, the explanation about the income structure and risk factors is practically identical as both aims to make money through the instant development project. Moreover, Defendant Daishin had already created the Daishin Ravallo Fund I and the Daishin Ravallo Fund II and completed the sales of the beneficiary certificates thereof when it decided to additionally sell the beneficiary certificates of the Daishin Ravallo Fund III and the Daishin Ravallo Fund IV. In other words, Defendant Daishin was in absolute need of additional investment money, in whatever form it be, for the success of the instant development project. In light of this, it is reasonable to conclude that the Plaintiff's purchase of the beneficiary certificates of the instant investment trust was made following the advice of Defendant Daishin and, furthermore, Defendant Daishin practically took the lead in the creation of the instant investment trust by deciding substantively key issues concerning the income structure and risk factors of the instant investment trust.

Therefore, even if Defendant Daishin does not shoulder fiduciary duties to the Plaintiff at the time of managing assets as it is not an asset management company of the instant investment trust, once it makes recommendations to the Plaintiff for the purchase of the beneficiary certificates of the instant investment trust, Defendant Daishin does bear the duty to protect investors by conducting a reasonable investigation of the income structure and risk factors thereof. However, based on the grounds stated in its reasoning, the lower court determined otherwise and concluded that Defendant Daishin did not bear the investor protection duty to the Plaintiff even at the time of making investment recommendations insofar as it was not an asset management company of the instant investment trust. In so determining, the lower court erred by misapprehending the legal doctrine regarding the investor protection duty borne by an entity soliciting investors for investment trust instruments under the former Indirect Investment Asset Management Business Act. The grounds of the final appeal assigning this error are with merit.

C. As to the claim against Defendant Myasset

Defendant Myasset is an asset management company of the instant investment trust that concluded an asset management contract of the instant investment trust with the Plaintiff and has been receiving legal fees from the Plaintiff. While the investment prospectus distributed by Defendant Daishin explains about the Daishin Ravallo Fund, the investment prospectus distributed

by Defendant Myasset also explicitly indicates that the instant investment trust assets will be invested to Daishin Ravallo 2 through Texco, a domestic special purpose company and that the instant investment trust and the Dashin Ravallo Fund are different in terms of their investment structure. While Defendant Daishin wrote in the said prospectus that it will receive not only regular fees but also contingent considerations from the investors of the Daishin Ravallo Fund, the prospectus of the instant investment trust distributed by Defendant Myasset indicates that Defendant Myasset only receives regular fees but do not receive contingent considerations. In addition, Defendant Myasset continued to receive fees for asset management from the Plaintiff after making deposits of the Plaintiff's investments into the account held by Daishin Ravallo 2.

That said, Defendant Myasset bears the fiduciary duty to protect the Plaintiff, an investor, at the time of making recommendations for the conclusion of an asset management contract as an asset management company of the instant investment trust and bears the fiduciary duty to manage the Plaintiff investor's assets at the time of managing the assets. Moreover, Defendant Myasset is not exempt from this duty even if the creation of the instant investment trust was led by a third party, which is, in this case, Defendant Daishin.

Although there are no grounds for accepting the allegation that there exist special circumstances under which Defendant Myasset is exempt from the fiduciary duty that it is supposed to shoulder as an asset management company, the lower court determined that Defendant Myasset did not bear the investor protection duty as an asset management company and the fiduciary duty. In so determining, the lower court erred by exceeding the bounds of the principle of free evaluation of evidence against logical and empirical rules and by misapprehending the legal doctrine regarding the duty of an asset management company under the former Indirect Investment Asset Management Business Act, thereby adversely affecting the judgment. The grounds of the final appeal assigning this error are with merit.

4. Conclusion

Therefore, without further proceeding to decide on the remaining grounds of the final appeal, the part of the lower judgment regarding KRW 2,682,556,346 and the penalties for the late payment therefor, which is the gist of the final appeal, is reversed, and this part of the case is remanded to the lower court for further proceedings consistent with this Opinion. It is so decided as per Disposition by the assent of all participating Justices on the bench.

Justices Kim Seon-soo (Presiding Justice)
Kwon Soon-il
Lee Ki-taik (Justice in charge)
Park Jung-hwa

Supreme Court Decision 2016Da233538, 233545 Decided November 28, 2019【Confirmation of Nonexistence of Obligation and Damages (Etc.)】

【Main Issues and Holdings】

[1] Standard of determining illegality in a case where a third person is damaged by harmful emissions resulting from facilities that are legitimately operated or provided for the public

[2] Meaning of "any defect in the construction or maintenance of a structure" stipulated in Article 758(1) of the Civil Act and standard of determining whether the damage caused by the use of the structure exceeds "the limit to what a third person can tolerate"

[3] The distribution of burden of proof on causality in pollution lawsuits

[4] In a case where Party A, who is an operator of an orchard near a highway, claimed damages against the Korea Expressway Corporation, arguing that the damage including that the trees in the orchard withered to death was caused by the exhaust fumes discharged from vehicles running on the highway and the deicing chemicals used by the Korea Expressway Corporation as the growth and fruit of the fruit trees planted in the first and second rows adjoining to the highway among fruit trees planted in the orchard became considerably sluggish and stagnate compared with those planted in other places, the case holding that the liability for damages of the Korea Expressway Corporation was acknowledged by deeming the illegality to be admitted on the grounds that this went beyond the endurable limits as well as that the damage, such as defoliating the fruit trees, impeding the growth and fruition of the trees and decreasing the commodity sales, was caused as a result of the fact that the gases emitted from the highway installed and supervised, and the elements such as chloride included in deicing chemicals sprayed, by the Korea Expressway Corporation affected Party A's orchard

【Summary of Decision】

[1] In that illegality as a requirement for the establishment of a tort ought to be judged not by the integral determination on the whole related acts but by the separate and relative determination on each act in question, the illegality ought to be separately determined in a case where a third person is damaged by harmful emissions resulting from a facility that is legitimately operated or provided for the public. In this instance, the standard of judgment depends on whether the harmful level goes beyond the limits to be generally tolerated by social norms.

[2] If any damage has been caused by any defect in the construction or maintenance of a highway, the person who constructed and maintained the highway shall be liable for such damages in accordance with Article 758(1) of the Civil Act. The defect in the construction or maintenance of a structure means that the instant structure is not equipped with safety which ought to have in accordance with its intended use. The condition that safety is not guaranteed, namely, that there is a danger of causing damage to another person, includes not only the case where there is any physical and external defect in the physical facilities themselves which make up the instant structure or the instant structure does not have necessary physical facilities, thereby having an adverse effect on their users, but even the case where the damage that goes beyond the limits to be generally tolerated by social norms (hereinafter referred to as "the limit of endurance") are caused to a third person by exceeding the certain limit in the process of using the instant structure for its original purposes. In this case, whether the damage beyond the limit of endurance has been caused ought to be determined based on full consideration of all the circumstances: the nature and degree of the damage; the publicity of the profits arising from the damage; the variety and shapes and forms of the harmful act; the public nature of the harmful act; the perpetrator's preventive measures or possibility of the avoidance of harm; whether the standard for control is violated under public law; the property and use of the area where the land is located; and the order of land usage.

[3] In the case of lawsuits related to a claim for damages as a result of torts, the burden of proof on a perpetrator's harmful act, the damage done to a victim and the causal relationship between the perpetrator's harmful act and the damage done to the victim is generally placed on the victim, who is a claimant. However, in lawsuits claiming damages on the grounds of environmental pollution caused by atmospheric pollution or water pollution, requiring scientifically strict proof concerning the existence of the factual causality to a victim may lead to the result of rejecting the legal relief against environmental pollution, while, in the sense that not only are there more cases where the investigation of the cause not by a victim but by a perpetrator is a lot easier from the technical and economical perspective, but there is concern that the perpetrator may conceal the cause of the occurrence of damage, the casual relationship between the harmful act and the victim's damage may be admitted unless the perpetrator proves that it is innocuous in a case where the perpetrator emitted a harmful causative agent and the damage were caused when it reaches the damaged products. However, even in this case, the burden of proof regarding the fact that a perpetrator emitted at least a harmful causative agent; the harmful level went beyond the limits to be generally accepted by social norms; it reached the damaged products; and, since then, the damage was caused to the victim is still placed on the victim.

[4] In a case where Party A, who is an operator of an orchard near a highway, claimed damages against the Korea Expressway Corporation, arguing

that the damage including that the trees in the orchard withered to death was caused by the exhaust fumes discharged from vehicles running on the highway and the deicing chemicals used by the Korea Expressway Corporation as the growth and fruit of the fruit trees planted in the first and second rows adjoining to the highway among fruit trees planted in the orchard became considerably sluggish and stagnate compared with those planted in other places, the case holding that the liability for damages of the Korea Expressway Corporation was acknowledged by deeming the illegality to be admitted on the grounds that this went beyond the endurable limits as well as that the damage, such as defoliating the fruit trees, impeding the growth and fruition of the trees and decreasing the commodity sales, was caused as a result of the fact that the gases emitted from the highway installed and supervised, and the elements such as chloride included in deicing chemicals sprayed, by the Korea Expressway Corporation affected Party A's orchard

【Reference Provisions】[1] Article 750 of the Civil Act / [2] Article 758(1) of the Civil Act / [3] Article 750 of the Civil Act, Article 288 of the Civil Procedure Act / [4] Article 750 of the Civil Act, Article 758(1) of the Civil Act, Article 288 of the Civil Procedure Act

Article 750 of the Civil Act (Definition of Torts)

Any person who causes losses to or inflicts injuries on another person by an unlawful act, intentionally or negligently, shall be bound to make compensation for damages arising therefrom.

Article 758(1) of the Civil Act (Liability of Possessor, Owner of Structure, etc.)

(1) If any damage has been caused to another person by reason of any defect in the construction or maintenance of a structure, the person in possession of the structure shall be liable for such damages: Provided, That if the person in possession has exercised due care in order to prevent the occurrence of such damages, compensation for the damage shall be made by the owner.

Article 288 of the Civil Procedure Act (Facts not Requiring Attestation)

The facts confessed by the parties in the court and the evident facts do not require any attestation: *Provided*, That confession contrary to the truth may be revoked when it is attested that it has been made due to any mistake.

【Reference Cases】 [1] Supreme Court Decision 99Da55434 decided Feb. 9, 2001 (Gong2001Sang, 606) / [2] Supreme Court Decision 2010Da98863, 98870 decided Nov. 11, 2011; 2011Da91784 decided Sep. 24, 2016 (Gong2015Ha, 1596) / [3] Supreme Court Decision 2012Da111661 decided Oct. 11, 2013; 2014Da67720 decided Dec. 29, 2016

【Plaintiff (Counter-Defendant)-Appellant】 Korea Expressway Corporation (Law Firm JP, Attorneys Kim Yong-uk, Counsel for the plaintiff (counter-defendant)-appellant)

【Defendant (Counter-Plaintiff)-Appellee】 Plaintiff (Counter-Plaintiff) (Law Firm Gonghwa, Attorneys Lee Kyung-hwan et al., Counsel for the plaintiff (counter-plaintiff)-appellee)

【Judgment of the court below】 Suwon District Court Decision 2014Na10790 decided Jun. 9, 2016

【Disposition】 The final appeal is dismissed. The cost of the final appeal is borne by the Plaintiff.

【Reasoning】 The grounds of final appeal are examined.

1. As to ground of appeal Nos. 1 or 2

A. In that illegality as a requirement for the establishment of a tort ought to be judged not by the integral determination on the whole related acts but by the separate and relative determination on each act in question, the illegality ought to be separately determined in a case where a third person is damaged by harmful emissions resulting from a facility that is legitimately operated or provided for the public. In this instance, the standard of judgment depends on whether the harmful level goes beyond the limits to be generally tolerated by social norms (hereinafter referred to as "tolerable limits") (*see* Supreme Court Decision 99Da55434, Feb. 9, 2001).

If any damage has been caused by any defect in the construction or maintenance of a highway, the person who constructed and maintained the highway shall be liable for such damages in accordance with Article 758(1) of the Civil Act. The defect in the construction or maintenance of a structure means that the instant structure is not equipped with safety which ought to have in accordance with its intended use. The condition that safety is not guaranteed, namely, that there is a danger of causing damage to another person, includes not only the case where there is any physical and external defect in the physical facilities themselves which make up the instant structure or the instant structure does not have necessary physical facilities, thereby having an adverse effect on their users, but even the case where the damage that goes beyond the limits to be generally tolerated by social norms (hereinafter referred to as "the limit of endurance") are caused to a third person by exceeding the certain limit in the process of using the instant structure for its original purposes. In this case, whether the damage beyond the limit of endurance has been caused ought to be determined based on full consideration of all the circumstances: the nature and degree of the damage; the publicity of the profits arising from the damage; the variety and shapes and forms of the harmful act; the public nature of the harmful act; the perpetrator's preventive measures or possibility of the avoidance of harm; whether the standard for control is violated under public law; the property and use of the area where the land is located; and the order of land usage (*see*

e.g., Supreme Court Decision 2010Da98863, 98870, Nov. 10, 2011; 2011Da91784, Sep. 24, 2015).

In the case of lawsuits related to a claim for damages as a result of torts, the burden of proof on a perpetrator's harmful act, the damage done to a victim and the causal relationship between the perpetrator's harmful act and the damage done to the victim is generally placed on the victim, who is a claimant. However, in lawsuits claiming damages on the grounds of environmental pollution caused by atmospheric pollution or water pollution, requiring scientifically strict proof concerning the existence of the factual causality to a victim may lead to the result of rejecting the legal relief against environmental pollution, while, in the sense that not only are there more cases where the investigation of the cause not by a victim but by a perpetrator is a lot easier from the technical and economical perspective, but there is concern that the perpetrator may conceal the cause of the occurrence of damage, the casual relationship between the harmful act and the victim's damage may be admitted unless the perpetrator proves that it is innocuous in a case where the perpetrator emitted a harmful causative agent and the damage were caused when it reaches the damaged products. However, even in this case, the burden of proof regarding the fact that a perpetrator emitted at least a harmful causative agent; the harmful level went beyond the limits to be generally accepted by social norms; it reached the damaged products; and, since then, damage was caused to the victim is still placed on the victim (*see e.g.,* Supreme Court Decision 2012Da111661, Oct. 11, 2013; 2014Da67720, Dec. 29, 2016).

B. The factual basis of the instant case that the lower court admitted, citing the first instance judgment, is as follows.

(1) The Plaintiff (Counter-Defendant; hereinafter referred to as the "Plaintiff") is the supervisory agency of the OO Highway and the Defendant (Count-Plaintiff; hereinafter referred to as the "Defendant") is operating the instant orchard, which is south of the four-lane road located approximately 80 kilometers in the □□ direction of the ΔΔ fork in the OO Highway.

(2) The west part of the instant orchard is a little higher than the Highway, while its east part of about 200 meters adjoins the Highway in the form of a little lower and gentler slope compared with the Highway and is about 10 meters away from the four-lane road of the Highway and about 6-7 meters away from the end of the shoulder adjoining to the four-lane road and a two-meter high wire fence is installed in the boundary between the Highway and the orchard.

(3) The average daily traffic volume on the section of the Highway adjoining to the instant orchard was 57,000 vehicles in 2008, 57,932 vehicles in 2009 and 60,894 vehicles in 2010 and, in case of snow, the Plaintiff removed snow in the manner of spraying calcium chloride solution (30%) and salt to the area close to the floor, but the amount of the calcium chloride used on the above

section was 390 kilograms in 2008, 873 kilograms in 2009 and 980 kilograms in 2010.

(4) The growth and fruit of the fruit trees planted in the first and second rows adjoining to the highway among those planted in the instant orchard became considerably sluggish and stagnate compared with those planted in other places. To be specific, three apple trees and one peach tree among the fruit trees in the instant orchard as of 2011 withered to death and forty two apple trees and forty one peach trees showed significantly sluggish growth and, among the fruit trees planted in the instant orchard as of October 2012, seven apple trees, twenty six peach trees and two apricot trees withered to death and forty-two apple trees and fifty six peach trees were remarkably sluggish.

(5) On July 4, 2011, the Defendant filed a petition for adjudication, demanding damages to the National Environmental Dispute Resolution Commission, arguing that sleep was interrupted on account of the traffic noise on the Highway and the exhaust gas and the use of deicing chemicals had caused damage, including defoliating the fruit trees in the instant orchard, and the National Environmental Dispute Resolution Commission did not admit the damage by the traffic noise on November 3, 2011, but admitted the damage caused by the exhaust gas and the use of deicing chemicals and, thus, adjudicated that the Plaintiff shall pay KRW 8,844,760 to the Defendant

C. The lower court determined as follows, citing the first instance judgment on the basis of the factual basis as above. In other words, fully considering all the following circumstances, it is reasonable to view that the damage, such as the decrease in yield caused by the result that the fruit trees planted near the Highway among the instant orchard had gone to the bad and withered to death in the end, was caused by the automobile exhaust fumes arising from the Highway maintained by the Plaintiff and the dispersion of deicing chemicals used by the Plaintiff.

(A) The exhaust fumes consistently caused by vehicles are known to inhibit photosynthesis, and hinder enzyme action, of the fruit trees and have an adverse effect on the fruit trees.

(B) Chloride contained in deicing chemicals has a bad influence by reducing cold tolerance in plants, hindering water absorption and inhibiting photosynthesis and it is known to defoliate the fruit trees up to 8 years after the use of deicing chemicals for severe cases.

(C) A study conducted by experts has shown that the dispersion of chloride in the air brings about damage up to 15 meters in height and 100 meters around it, creates greater damage within 10-15 meters around it and results in more damage in a downhill road than in an uphill road, but the instant orchard is located in a downhill road within about 10 meters away from the Highway

(D) Considering that the sales rate of the fruit yielded from the trees planted in the first and second rows among the instant orchard is 5 percent, but

the sales rate of the fruit from the trees planted in all but the first and second rows is amounting to 95 percent, it is clear that the damage in the first and second rows is serious.

(E) As the use of deicing chemicals by the Plaintiff dramatically increased from 2009, the Defendant began to complain of the damage sustained to the fruit trees.

(F) As of October 2012, the pH level is much the same between the section of the instant orchard where the damaged trees were planted and the rest of the orchard. In light of the study done by experts that the pH level of the soil exposed to deicing chemicals throughout the winter rises in spring, goes down from summer and turns into slightly acid when autumn comes, it is difficult to readily conclude that there has been no damage done to the instant orchard by the deicing chemicals on the sole basis of the pH level gauged in October.

(G) There is no other apparent cause for the damage sustained only to the fruit trees planted near the Highway among those in the instant orchard.

D. In accordance with the foregoing legal doctrine, considering the aforementioned factual basis, the circumstances mentioned by the lower court, and the following circumstances revealed by the record, namely, even the circumstance that the Defendant appears to have been operating the instant orchard before the Plaintiff widened the part of the road adjoining to the instant orchard among the Highway to the four lanes, the exhaust fumes caused by the OO Highway constructed and maintained by the Plaintiff and the calcium chloride included in deicing chemicals sprayed by the Plaintiff reached the instant orchard operated by the Defendant and, as a consequence, not only did the orchard suffer the damage including that the fruit trees withered to death, the growth and fruition was disrupted and the sales rate of the trees declined, but the illegality can be deemed to be recognized in that this exceeds the limit to be borne.

Although the lower court did not clearly determine whether the illegality of the Plaintiff's harmful act may be recognized, it appears to acknowledge the Plaintiff's liability for damages on the premise that such illegality is admitted. Moreover, there appears to be a somewhat inappropriate part of the lower judgment, excluding the result of appraisal conducted by the Nonparty, an appraiser, but the lower court does not seem to determine on the premise that the burden of proof concerning the liability for the influx of toxic substance is placed not on the victim but on the perpetrator.

Therefore, the lower judgment regarding this part, as otherwise alleged in the grounds of appeal, did not err by failing to exhaust all the necessary deliberations on, lacking the reasoning for, and misapprehending legal principles regarding, torts which affect the conclusion of the judgment or by misapprehending the legal doctrine on the mitigation of the onus of proof in relation to pollution lawsuits.

2. As to ground of appeal No. 3

According to the reasoning of the lower judgment, the lower court acknowledged the fact that the sales rate of the fruit from other fruit trees among those planted in the instant orchard was 95 percent and that of the fruit from the damaged fruit trees was 5 percent and then assessed the amount of damages by deeming the damage rate of the damaged trees as 90 percent, which is definitely seen to restrict the Plaintiff's liability by considering natural forces, such as freezing damage to be responsible for the damage done to the victim. Thus, the allegation in this part of the grounds of appeal that the lower judgment which did not limit the Plaintiff's liability by admitting the liability for damages on the entire Defendant's property damage erred by misapprehending the legal doctrine regarding the restriction on liability for damages is unacceptable.

3. Conclusion

The final appeal is dismissed, and the cost of the final appeal is assessed against the losing party. It is so decided as per Disposition by the assent of all participating Justices on the bench.

Justices Ahn Chul-sang (Presiding Justice)
Park Sang-ok
Noh Jeong-hee
Kim Sang-hwan (Justice in charge)

Supreme Court Decision 2017Da208232, 208249 Decided December 27, 2019【Action Demanding Confirmation of Right to Receive Hull Insurance and Action for Confirmation of a Person Entitled to Demand Deposit Payment】

【Main Issues and Holdings】

[1] A case where a person not entered in a contract of insurance as the insured under the Law of the United Kingdom may be recognized as the insured

[2] In a case where: (a) Stock Company B, a charterer of the body of a ship owned by Foreign Corporation A entrusted the ship management to Stock Company C; (b) Stock Company C concluded an insurance contract, including a hull insurance contract that any loss or damage of the instant ship constitutes an insured accident, with Insurance Company D, limiting the insured to "Foreign Corporation A, a ship owner, and Stock Company C, a ship manager," under the insurance policy; (c) after the insurance incident, both Foreign Corporation A and Stock Company B requested the payment of the insurance, arguing that each is entitled to claim insurance money; and (d) Insurance Company D deposited the insurance money for performance on the grounds that an obligee is unidentified, the case holding that: (a) the interpretation of the aforementioned insurance contract is governed by the Law of the United Kingdom; (b) Stock Company B, which was not entered in the insurance policy as the insured, cannot become the insured of the foregoing insurance contract in accordance with the "legal doctrine of unnamed principal or undisclosed principal," as referred to in the Law of the United Kingdom; (c) in the same regard, the lower judgment, which did not accept Stock Company B's argument that it corresponds to the insured under the instant insurance contract, was justifiable; and (d) in so determining, it did not err by misapprehending the legal principle regarding the construction of the insurance contract under the Law of the United Kingdom

【Summary of Decision】

[1] There are cases where a person who is not specified in a contract of insurance as the insured under the Law of the United Kingdom may be recognized as the insured. In other words, in a case where an agent, who has the power of attorney concerning the conclusion of an insurance contract for a principal, did not identify the principal to the other party, but the principal's existence has become clear to the other party as the existence of the principal was disclosed, the unnamed or unidentified principal may have rights and duties

under the insurance contract. Moreover, even in a case where the other party, who concluded an insurance contract with an agent, is unable to know the existence of a principal, if the agent intended to conclude the insurance contract for the principal at the time of the conclusion of the insurance contract based on the power of attorney regarding the conclusion of the insurance contract conferred by the undisclosed principal and the contents of the insurance contract did not prohibit the undisclosed principal from becoming a party to the contract, the undisclosed principal may have rights and duties under the insurance contract (so-called "the legal doctrine of unidentified principal or undisclosed principal").

[2] In a case where: (a) Stock Company B, a charterer of the body of a ship owned by Foreign Corporation A entrusted the ship management to Stock Company C; (b) Stock Company C concluded an insurance contract, including a hull insurance contract that any loss or damage of the instant ship constitutes an insured accident, with Insurance Company D, limiting the insured to "Foreign Corporation A, a ship owner, and Stock Company C, a ship manager," under the insurance policy; (c) after the insurance incident, both Foreign Corporation A and Stock Company B requested the payment of the insurance, arguing that each is entitled to claim insurance money; and (d) Insurance Company D deposited the insurance money for performance on the grounds that an obligee is unidentified, the case holding that: (a) the interpretation of the aforementioned insurance contract is governed by the Law of the United Kingdom; (b) at the time of the conclusion of the insurance contract, it may not be seen that Stock Company C stated the purpose that it could conclude a contract on behalf of somebody to Insurance Company D or Insurance Company D was able to know such circumstances; (c) it is also difficult to determine that Stock Company C, holding the right of attorney to conclude an insurance contract on behalf of Stock Company B, intended to conclude an insurance contract for Stock Company B at the time of the conclusion of the contract; (d) Stock Company B, which was not entered in the insurance policy as the insured, cannot become the insured of the foregoing insurance contract in accordance with the "legal doctrine of unnamed principal or undisclosed principal," as referred to in the Law of the United Kingdom; (e) in the same regard, the lower judgment, which did not accept Stock Company B's argument that it corresponds to the insured under the instant insurance contract, was justifiable; and (f) in so determining, it did not err by misapprehending the legal principle regarding the construction of the insurance contract under the Law of the United Kingdom.

【Reference Provisions】 [1] Article 25(1) of the Act on Private International Law, Article 665 and 666 Subparagraph 7-2 of the Commercial Act / [2] Article 25(1) of the Act on Private International Law, Article 665 and 666 Subparagraph 7-2 of the Commercial Act

Article 25(1) of the Act on Private International Law (Party's Autonomy)

(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 which the implicit choice can be reasonably recognized by the content of the contract and all other circumstances.

Article 665 of the Commercial Act (Liability of Non-Life Insurers)

Any insurer of a contract of non-life insurance is liable to compensate the insured for losses against his/her property caused by the occurrence of a peril insured against.

Article 666 of the Commercial Act (Non-Life Insurance Policy)

The following matters shall be entered in a non-life insurance policy, and an insurer shall write its name and affix its seal, or affix its signature, thereon: <*Amended by Act No. 4470, Dec. 31, 1991; Act No. 12397, Mar. 11, 2014*>

7-2. The address, name or trade name of the insured;

【Plaintiff (Counter-Defendant)-Appellant】 S & B Korea Co., Ltd. (Law Firm Segyeong, Attorneys Kim Chang-jun et al., Counsel for the plaintiff (counter-defendant)-appellant)

【Defendant (Counter-Plaintiff)-Appellee】 GM Shipping Corp. (Attorneys Jeong Byeong-seok et al., Counsel for the defendant (counter-plaintiff)-appellee)

【Judgment of the court below】 Seoul High Court Decision 2015Na2029365, 2029372 decided Jan. 10, 2017

【Disposition】 The final appeal is dismissed. The cost of the final appeal is borne by the Plaintiff (Counter-Defendant).

【Reasoning】 The grounds of the final appeal are examined.

1. Whether the Plaintiff (Counter-Defendant; hereinafter referred to as the "Plaintiff") is the insured of the instant insurance contract

A. The instant insurance contract includes a hull insurance contract regarding the loss or damage of a ship as an insured accident and, since the instant ship, which is the subject matter of the insurance, is registered in Cambodia and the Defendant, designated as the insured, as the owner of the vessel is a Panamanian Corporation, the instant insurance contract contains foreign factors and thus its governing law ought to be determined in accordance with the Act on Private International Law. The main text of Article 25(1) of the Act on Private International Law stipulates that "a contract shall be governed by the law which the parties choose explicitly or implicitly," and, as the Institute Time Clauses-Hulls applied to the instant insurance contract prescribes that "this insurance is subject to English law and practice," it ought to be governed

by the United Kingdom law when the interpretation of the instant insurance contract comes into question.

B. There are cases where a person who is not specified in a contract of insurance as the insured under the Law of the United Kingdom may be recognized as the insured. In other words, in a case where an agent, who has the power of attorney concerning the conclusion of an insurance contract for a principal, did not identify the principal to the other party, but the principal's existence has become clear to the other party as the existence of the principal was disclosed, the unnamed or unidentified principal may have rights and duties under the insurance contract. Moreover, even in a case where the other party, who concluded an insurance contract with an agent, is unable to know the existence of a principal, if the agent intended to conclude the insurance contract for the principal at the time of the conclusion of the insurance contract based on the power of attorney regarding the conclusion of the insurance contract conferred by the undisclosed principal and the contents of the insurance contract did not prohibit the undisclosed principal from becoming a party to the contract, the undisclosed principal may have rights and duties under the insurance contract (so-called "the legal doctrine of unidentified principal or undisclosed principal").

C. The lower court determined that the claim for the payment of insurance money of the instant case where Hyundai Marine & Fire Insurance Co., Ltd. (hereinafter referred to as "Hyundai Marine & Fire Insurance"), the insurer of the instant insurance contract, deposited the subject matter of performance on the grounds that the obligee is unascertained is vested in the Defendant, who is the insured and the owner of the instant vessel under the insurance policy. In addition, for the following reasons, the lower court rejected the Plaintiff's insistence that the Plaintiff, who is not listed in the insurance policy as the insured, corresponds to the insured under the instant insurance contract.

(1) The instant insurance contract, which was concluded on July 6, 2013, in relation to the instant vessel, was made by the Suseung Corporation (hereinafter "Suseung") to which the Plaintiff, a bareboat charterer, entrusted the management of the instant vessel. Suseung also concluded an insurance contract regarding the instant vessel with Hyundai Marine & Fire Insurance on July 6, 2012, and the insured had been listed as the "Plaintiff, an owner, and Suseung, a manager," in the insurance policy of the instant insurance contract, but, concluding the instant insurance contract, the insured was changed into the "Defendant, an owner, and Suseung, a manager." This was not caused by Suseung's mistake or error but done through discussion between the Plaintiff and an officer of Suseung in charge, and the owner in the insured column appears to have been altered from the Plaintiff to the Defendant to protect the insurable interest of the Defendant, the owner of the instant vessel.

(2) Suseung and Hyundai Marine & Fire Insurance have never agreed that the Plaintiff was the insured irrespective of the statement in the insurance policy at the time of the conclusion of the instant insurance contract.

(3) One of the important factors when estimating the insurance premium rate of the vessel insurance contract is the manager's ability to manage the vessel and the risk measure factors, including the likelihood of an accident, depend on who manages the vessel. Accordingly, it is stipulated that the manager is necessarily included in the insured column of the insurance policy as a rule of thumb in the vessel insurance circles and, in a case where the manager is changed in midstream, the validity of the insurance under the insurance clauses is lost. Moreover, Suseung was able to reduce the insurance money by obtaining the insurance in the form of a fleet of ships, including several vessels under its management at the time of the conclusion of the instant insurance contract. In this light, Suseung is seen not to be an agent of the Plaintiff, who is the bareboat charterer, but to be listed as the insured of the instant insurance contract as the manager of the instant vessel, which also accords with the exterior indicating Suseung's ability as "a manager" in the insured column under the instant insurance policy.

(4) The common stipulation relevant to the bareboat charter includes that the charterer covers the maintenance expenses of the instant vessel, including the insurance money of the vessel, and the bareboat charter of the instant vessel also shares the same regulations and thus it cannot be acknowledged that the instant insurance contract is for the Plaintiff's interest or the Plaintiff corresponds to the insured on the ground that the Plaintiff provided the insurance money of the instant insurance contract.

D. Examining the reasoning of the lower judgment in light of the foregoing legal doctrine and record, Suseung stated the purpose that it concluded a contract on behalf of somebody to Hyundai Marine & Fire Insurance at the time of the conclusion of the instant insurance contract, or there are no data to see that Hyundai Marine & Fire Insurance was able to know such circumstances and it is also difficult to determine that Suseung, holding the right of attorney to conclude an insurance contract on behalf of the Plaintiff, intended to conclude the insurance contract for the Plaintiff at the time of the conclusion of the contract. Therefore, the Plaintiff not listed as the insured in the insurance policy cannot be seen to become the insured of the instant insurance contract in accordance with the "legal doctrine of unnamed principal or undisclosed principal," as referred to in the Law of the United Kingdom. In the same regard, the lower judgment, which did not accept the Plaintiff's argument, is justifiable and, in so determining, as otherwise alleged in the grounds of appeal, it did not err and affect the conclusion of the judgment by misapprehending the legal principle regarding the construction of the insurance contract under the Law of the United Kingdom.

2. Whether the Plaintiff's right to claim insurance money may be admitted

The lower court dismissed, on the same ground as indicated in its reasoning, the Plaintiff's first auxiliary claim seeking the settlement of the instant insurance money on the premise that "BARECON 2001" shall apply to the instant bareboat charter or apply mutatis mutandis to it.

Examining the reasoning of the lower judgment in light of the relevant legal doctrine and record, the foregoing judgment of the lower court, as otherwise alleged in the grounds of appeal, did not err or affect the conclusion of judgment by exceeding the bounds of the principle of free evaluation of evidence contravening the logical and empirical rules, thereby misapprehending relevant facts or legal principles.

3. The construction of the instant bareboat charter and the scope of the Defendant's unjust enrichment to be returned

The lower court, on the ground in its reasoning, rejected the Plaintiff's insistence that the scope of the Defendant's unjust enrichment to be returned to the Plaintiff is limited to KRW 19,370,000, equivalent to the ship delivery cost out of the amount the Plaintiff paid on the basis of the instant bareboat charter, and the amount corresponding to the transfer commission or hire purchase included in the amount of money the Plaintiff paid for a fifty-month charter hire except for that ought to also be considered as unjust enrichment and thus restituted as the total amount of insurance money belongs to the Defendant legally in accordance with the instant insurance contract on the premise that the legal character of the instant bareboat charter is that the hire purchase option was attached after the termination of the time charter period, but its essence was a demise charter.

Examining the reasoning of the lower judgment in view of the related legal principles and record, the foregoing judgment of the lower court, as otherwise alleged in the grounds of appeal, did not err or affect the conclusion of judgment by misapprehending the legal doctrine regarding the interpretation of the document for disposition, construction of the governing law and rules of evidence or by inconsistent reasoning.

4. Conclusion

Therefore, the final appeal is dismissed, and the cost of the final appeal is assessed against the losing party. It is so decided as per Disposition by the assent of all participating Justices on the bench.

Justices Park Jung-hwa (Presiding Justice)
Kwon Soon-il
Lee Ki-taik (Justice in charge)

Supreme Court Decision 2019Da218462 Decided December 27, 2019【Lawsuit Claiming for Charter Fees】

【Main Issues and Holdings】

[1] Meaning of "redelivery" in a time charter contract concluded by specifying the applicable law as U.K. law and in a case where the said time charter contract provides that: (i) the shipowner shall take over and pay for the bunkers on board at the time of redelivery to a charterer; (ii) the charterer shall give advance notice to the shipowner of the time of redelivery and the place of redelivery on several accounts; and (ii) the requirements and procedure regarding the quality of bunker fuels on board at the time of redelivery and the minimum bunker quantity expected to be required at the time of redelivery, whether redelivery in this case includes cases in which vessels are returned because of early termination of a time charter contract, etc. (negative in principle)

[2] In the case where: (a) Company A concluded a time charter contract with Foreign Corporation B, etc. with respect to each of the vessels it owns by specifying the applicable law as U.K. law, based on which it chartered vessels; (b) an administrator of Company A terminated each of the above charters upon commencement of rehabilitation procedures and returned the vessels to Foreign Corporation B, etc.; (c) thereafter, Foreign Corporation B, etc. filed a claim for payment of the charter fees pursuant to a time charter contract against Party C, Company A's bankruptcy trustee; (d) Party C submitted a defence of setoff by using its payment claims for residual bunkers as a counterclaim against Foreign Corporation B, etc., the lower judgment concluded that: (a) in a case where the administrator of Company A terminated a time charter contract upon commencement of Company A's rehabilitation procedures, alleging that the said contract constitutes a bilateral contract under which both parties failed to fulfill their contractual obligations, the addendum clause of the said time charter contract providing that the shipowner shall take over and pay for residual bunkers at the time of redelivery does not apply, by which Party C's payment claims for residual bunkers against Foreign Corporation B, etc. becomes nonexistent; (b) thus, Party C's setoff defence using the said payment claims for residual bunkers as a counterclaim is meritless, and the case holding that, the lower court, in so determining, did not err by misapprehending the legal doctrine regarding the interpretation of a contract and the ownership of bunkers

【Summary of Decision】

[1] In a time charter contract, where the shipowner has possession of a vessel and the right to appoint the captain and its seafarers and to exercise

overall control and management of a vessel, the term "redelivery" principally refers to a charterer's return of a ship to the shipowner in accordance with conditions established in a time charter contract. If a time charter contract provides that (i) the shipowner shall take over and pay for the bunkers on board at the time of redelivery to a charterer; (ii) the charterer shall give advance notice to a shipowner of the time of redelivery and the place of redelivery on several accounts; and (ii) the requirements and procedure regarding the quality of bunker fuels on board at the time of redelivery and the minimum bunker quantity expected to be required at the time of redelivery, the term "redelivery" in this case, barring special circumstances, is presumed to follow the conditions established in a time charter contract, and thus ought to be understood as excluding a case in which vessels are returned because of early termination of a time charter contract, etc.

[2] In the case where: (a) Company A concluded a time charter contract with Foreign Corporation B, etc. with respect to each of the vessels it owns by specifying the applicable law as U.K. law, based on which it chartered vessels; (b) an administrator of Company A terminated each of the above charters upon commencement of rehabilitation procedures, and returned the vessels to Foreign Corporation B, etc.; (c) thereafter, Foreign Corporation B, etc. filed a claim for payment of the charter fees pursuant to a time charter contract against Party C, Company A's bankruptcy trustee; (d) Party C submitted a defence of setoff by using its payment claims for residual bunkers as a counterclaim against Foreign Corporation B, etc., the case held that the lower court did not err by misapprehending the legal doctrines regarding the interpretation of a contract and the ownership of bunkers and that the lower judgment was justifiable in having determined as follows: (a) comprehensively taking into account the fact that (i) the said time charter contract provides that a charterer shall provide advance notice to the owner of a ship of the time and place of redelivery and shall redeliver the vessel with the same bunker quantity as on delivery, which is difficult to be fulfilled in the event of early termination of a time charter contract; (ii) the said time charter contract was drafted based on NYPE (New York Produce Exchange) Form 1946 with revisions of some of the clauses by annex, and one of the clauses in the annex providing that the shipowner shall take over and pay for residual bunkers includes only "delivery" and "redelivery" but does not include completion of a time charter contract due to its early termination, in a case where the administrator of Company A terminated a time charter contract upon commencement of Company A's rehabilitation procedure on account of nonfulfillment of contractual obligations by both parties to the contract, the said clause in the annex does not apply; (b) this renders Party C's payment claims for residual bunkers against Foreign Corporation B, etc. nonexistent, and thus Party C's setoff defence using the said payment claims for residual bunkers as a counterclaim is meritless.

【Reference Provisions】 [1] Article 25(1) of the Act on Private International Law; Article 842 of the Commercial Act / [2] Article 25(1) of the Act on Private International Law; Article 842 of the Commercial Act; Article 492 of the Civil Act

Article 25 of the Act on Private International Law (Party's Autonomy)

(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 which the implicit choice can be reasonably recognized by the content of the contract and all other circumstances.

Article 842 of the Commercial Act (Meaning of Time Charter)

A time charter shall come into effect when a shipowner agrees to provide a charterer with a ship serviced by the crew on board and equipped with navigation facilities for a given period to be used for navigation, and the charterer agrees to pay the fare determined by the period in response thereto.

[This Article Wholly Amended by Act No. 8581, Aug. 3, 2007]

Article 492 of the Civil Act (Requisite for Set-off)

(1) If two persons are bound to each other by obligations whose subject is of the same kind and both of which have become due, each obligor may make a set-off to the extent of the amount corresponding to that of his obligation: *Provided*, That this shall not apply where the nature of the obligations does not so permit.

(2) The preceding paragraph shall not apply to where the parties have declared an intention to the contrary: *Provided*, That such declaration of intention cannot be so set up against a third person acting in good faith.

【Plaintiff-Appellee】 Comodo Bay Shipping REFO Ltd. and one other (Attorney Jeong Byeong-seok et al., Counsel for the plaintiff-appellee)

【Defendant-Appellant】 Defendant, a bankruptcy trustee of the creditor Hanjin Shipping Co., Ltd. (Law Firm DR & AJU, Attorney Lee Gyu-cheol et al., Counsel for the defendant-appellant)

【Judgment of the court below】 Seoul High Court Decision 2018Na2044464 decided February 13, 2019

【Disposition】 The final appeal is dismissed in entirety. The costs of the final appeal are assessed against the Defendant.

【Reasoning】 The grounds of final appeal are examined.

1. As to the ground of final appeal No. 1

A. Each of the time charters in the instant case is a contract with a foreign element, concluded between the Plaintiffs, a corporation based in the Republic of Liberia, and a Republic of Korea corporation; thus, the applicable law must be determined in accordance with the Act on Private International Law. The main text of Article 25(1) of the Act on Private International Law states, "A

contract shall be governed by the law which the parties choose explicitly or implicitly." Since each of the time charters in the instant case determined that the applicable law would be U.K. law, it is U.K law that will be applied with respect to the instant case in which the Plaintiffs seek payment of charter fees under each of the time charters in the instant case.

In a time charter contract, where the shipowner has possession of a vessel and the right to appoint the captain and its seafarers and to exercise overall control and management of a vessel, the term "redelivery" principally refers to a charterer's return of a ship to the shipowner in accordance with conditions established in a time charter contract. If a time charter contract provides that (i) the shipowner shall take over and pay for the bunkers on board at the time of redelivery to a charterer; (ii) the charterer shall give advance notice to a shipowner of the time of redelivery and the place of redelivery on several accounts; and (ii) the requirements and procedure regarding the quality of bunker fuels on board at the time of redelivery and the minimum bunker quantity expected to be required at the time of redelivery, the term "redelivery" in this case, barring special circumstances, is presumed to follow the conditions established in a time charter contract, and thus ought to be understood as excluding a case in which vessels are returned because of early termination of a time charter contract, etc.

B. Based on the comprehensive analysis of circumstances as illustrated in its reasoning, the lower court determined that each of the Defendant's payment claims for residual bunkers against the Plaintiffs was nonexistent, and thus, the Defendant's setoff defence using such claims as a counterclaim was meritless, as will be examined *infra*.

1) The applicable law of each of the time charters in the instant case concluded between the Plaintiffs, the owner of each of the vessels in the instant case, and Hanjin Shipping Co., Ltd (hereinafter "Hanjin Shipping") is U.K. law. Considering that the Plaintiffs have filed a claim for payment of charter fees against the Defendant, a bankruptcy trustee of Hanjin Shipping, pursuant to each of the time charters in the instant case, and that the Defendant has submitted a setoff defence in response to the Plaintiffs' claim by using each of the payment claims for residual bunkers as a counterclaim, the principle of legal set-off under the U.K. common law is applied with respect to the requirements and validity of the abovementioned setoff defence.

2) Each of the time charters in the instant case provides that a charter shall provide advance notification to the owner of a ship about the time and place of redelivery upon redelivery of a vessel, and redeliver the vessel with the same quantity of bunker as on delivery. Yet, a charterer is unable to fulfill such an obligation toward a shipowner upon early termination of a time charter contract. Also, each of the instant time charter contracts was drafted based on NYPE (New York Produce Exchange) Form 1946 with revisions of some clauses by annex. Article 33 of the annex provides that the shipowner shall take over and

pay for residual bunkers mentions only "delivery" and "redelivery," but does not include completion of a time charter contract due to its early termination. This is distinguishable from the revised NYPE Form 2015 that revised the text to provide that the shipowner shall take over and pay for bunkers "on any termination."

Considering these circumstances, Article 33 of the annex does not apply in the instant case, where the administrator of Hanjin Shipping terminated each of the time charters in the instant case, upon commencement of Hanjin Shipping's rehabilitation procedures, on the grounds of nonfulfillment of contractual obligations by both parties to the contract.

3) Furthermore, whilst supplied with bunkers from each of the oil suppliers, the Defendant agreed to defer the transfer of ownership until full payment of the price of bunker fuels supplied. Yet, admitting that the Defendant paid in full the price of bunker fuel to each oil supplier is difficult. In addition, according to the case law of the U.K. court, ownership of residual bunker may be transferred to the owner of a ship on condition that a charterer is in possession of the said ownership. As such, where a shipowner repurchased the ship from a charterer who did not have ownership of the residual bunker, the ownership of the residual bunkers is not necessarily deemed to have been transferred to the shipowner. Therefore, the Defendant's allegation that it has each of the payment claims for residual bunkers against the Plaintiffs is groundless.

C. In light of the legal doctrine and record seen earlier, the lower court did not err by misapprehending the legal doctrine regarding the interpretation of a contract and the ownership of bunkers, contrary to what is alleged in the ground of final appeal.

2. As to the ground of final appeal No. 2

The Defendant's ground of final appeal No. 2 that does not recognize the validity of setoff submitted by the Plaintiffs, which used each of the Defendant's payment claims for residual bunker against the Plaintiffs as a passive claim prior to the filing of the instant lawsuit pertains to the lower court's hypothetical and auxiliary judgment. Inasmuch as the lower court's judgment that each of the Defendant's payment claims for the residual bunker against the Plaintiffs is nonexistent is justifiable, whether or not this hypothetical and auxiliary judgment is reasonable does not affect the outcome of the judgment, and, therefore, the arguments relating thereto is unacceptable without the need for further examination.

3. Conclusion

Therefore, the Defendant's final appeals are all dismissed, and the costs of final appeal are assessed against the losing party. It is so decided as per Disposition by the assent of all participating Justices on the bench.

Justices	Lee Ki-taik (Presiding Justice) Kwon Soon-il (Justice in charge) Park Jung-hwa