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THE ASIAN BUSINESS LAWYER

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The Asian Business Lawyer is published twice a year: **May 31 and November 30**.

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(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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ARTICLES

Maritime and International Commercial Courts: Commercial dispute resolution for the 21st century*

Hon. Sir William Blair[**]
Hon. Sir Robin Knowles[***]

ABSTRACT

The offering by States in relation to commercial dispute resolution is under review in a number of countries, including some of the main players in international trade. The London Commercial Court is often seen as a model because of the amount of international business it deals with, and in recent years there has been a noticeable number of "international commercial courts", such as in Singapore, or specialised chambers of national courts, as in France, which adopt similar procedures, sometimes including judges from other jurisdictions. These developments help to create synergy with international commercial and maritime arbitration, which is successfully used internationally. Proposals in Korea to establish a Maritime and International Commercial Court accord with these developments. The new court would seem further to enhance the reputation of Korea with its internationally respected judiciary and would be commensurate with the country's technical and economic success as a progressive force in international legal affairs.

KEYWORDS: London Commercial Court, Maritime Cases as a Specialised Type of Dispute, New York Commercial Courts, New International Commercial Courts, Innovative Reforms, Standing International Forum of Commercial Courts, International Commercial Arbitration, Legislative Proposal in Korea

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* This article is based on the authors' presentation at the JPRI International Conference 2018 held in Seoul, Korea, on the subject of '*The future of judiciary: a global perspective'* (December 4, 2018).

** Former Judge in Charge of the Commercial Court, arbitrator at 3VB Chambers, London.
*** Judge of the High Court of England & Wales, nominated Commercial Court Judge.

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I. Introduction

The commercial world will receive with pleasure the news that a bill to establish a maritime and international commercial court has been introduced in the Korean National Assembly. This has been under discussion for a long time, but considering the fact that Korea ranks in the global top ten by GDP and takes a significant place in global supply chains, the moment seems now propitious for this proposal to come to fruition.

The purpose of this article is to provide some background to these developments both by describing the work of the Commercial Court[1] in London – which is generally regarded as the world's paradigm commercial court so far as international maritime and commercial cases are concerned[2] – and by explaining how reforms of their commercial courts have been introduced in a number of other countries. This is on policy grounds to enhance the provision of commercial dispute resolution, and to complement the growth of their arbitration centres. Arbitration is often specified in marine contracts, and the UK experience shows that the synergy between the court and arbitration is important, particularly (so far as the UK is concerned) with the London Maritime Arbitrators Association (LMAA) and the London Court of International Arbitration (LCIA).

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[1] One of the Business and Property Courts of England & Wales, and part of the Queen's Bench Division of the High Court. (The legal system in the UK applies differently to the countries that make up the UK, that is, England, Wales, Scotland and Northern Ireland.)

[2] Stephan Wilske, "International Commercial Courts and Arbitration – Alternatives, Substitutes or Trojan Horse?", at 153-192, Contemporary Asia Arbitration Journal Vol. 11, No. 2, 2018.

II. The Admiralty and Commercial Court in England & Wales

Maritime cases are a specialised type of dispute, which benefit from specialist dispute resolution because (1) the law needs to be applied uniformly to disputes which often raise similar fact situations, (2) participants in the market need to have disputes decided in a manner that does not tie up valuable assets, (3) the time frame may be tight for other reasons, *e.g.* perishable cargo, and (4) the development of internationally recognised legal rules applied impartially supports the development of trade and commerce. Impartiality is particularly important, because as Presiding Judge Sung-Keun Yoon has observed, if a court of a nation fails to show its fairness by rendering a decision favouring its own citizen, it is harming the more important national interest in exchange for the private interest of the specific individual.[3]

In English practice, maritime disputes involving ships themselves – *e.g.* collisions and salvage - are assigned to the Admiralty Court, which also has an important in rem procedure relating to the arrest of vessels. The Admiralty Court and the Commercial Court in effect operate as a single specialised court, the Commercial Court dealing with maritime disputes generally arising from international trade. More specifically, these include disputes relating to cargo claims (bills of lading), charterparties, marine insurance, payment and trade financing, and other important subjects such as warehouse claims (*e.g.* arising through warehouse receipts).

When the Court was established in 1895, the circumstances were favourable in that English commercial law was already developed, and the structure of the courts had recently been reformed with a modern procedural code. The immediate reason for setting up the Court was practical *i.e.*, to facilitate the allocation of commercial cases to specialist judges. Within the Civil Procedure Rules, the Court maintains considerable procedural informality. The historically close connection with arbitration has tended to foster a relatively informal and decidedly commercial approach by the judges.

Only the New York courts surpass the international connections of the Court, reflecting New York's position not just as a global centre but as the financial capital of the world's largest economy. The United States District Court for the Southern District of New York (SDNY) is a Federal Court of general jurisdiction established in 1789, but much more recently the Commercial Division of the New York State Supreme Court was established as a State court in 1995.

It is important to point out that the work of the London Commercial Court is not limited to maritime cases and focuses on complex cases arising out of business disputes, both national and international but particularly international.

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[3] Key note address delivered at the 6th East-Asia Maritime Law Forum in 2013.

As well as shipping and maritime disputes generally, the case load includes insurance and reinsurance, aviation, banking and financial markets, energy, commodities, and arbitration (as the designated court in international arbitrations with a seat in England & Wales). The two courts apply the Commercial Court Guide[4] and share the same bench of nominated judges. Each however has its own User Group.[5] They are part of the Business and Property Courts (B&PC) of England and Wales which have other important international jurisdictions, *e.g.* intellectual property and international insolvency schemes of arrangement. There are regional courts within the B&PC that deal with smaller disputes, but international disputes are usually tried in London.

III. New Developments in International Commercial Courts

Turning to the wider international picture, in recent years, a number of new international commercial courts or specialised chambers set up within the court system with the view of trying international cases have been established. A number of factors are driving this, including the perception that it is in the national interest to improve the commercial dispute offering of States, and a growing appreciation in the utility of a system of commercial dispute resolution that embraces the courts, arbitration and mediation in a mutually supportive relationship. The structure of these institutional reforms differs. But the general driver is often the same – so although the London Commercial Court is part of the domestic court system with no foreign judges (unlike the Singapore International Commercial Court), the prime reason that it has been an important influencer behind this trend is the international nature of much of its caseload,[6] which is what the new courts and chambers that are being set up aspire to as well.

Sometimes these reforms have been quite innovative. A conventional analysis in order of establishment is – the London Commercial Court (1895), the New York State Supreme Court, Commercial Division (1995), the Dubai International Financial Center (DIFC) Courts (2004), the Qatar International Court (2009), the Abu Dhabi Global Market (ADGM) Courts (2015), the Singapore International Commercial Court (SICC) (2015), the Astana

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[4] An explanatory guide for practitioners and judges which is an important supplement to the Civil Procedure Rules, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/672422/The_Commercial_Court_Guide_new_10th_Edition_07.09.17.pdf

[5] Through which the courts maintain links with the legal practitioner community and commercial user associations to discuss matters such as those relating to procedure.

[6] Estimates vary, but a conventional figure is that about 70% of the claims brought in the Court do not involve domestic UK disputes.

International Financial Centre (AIFC) Court, Kazakhstan (2018), the Chamber of International Commercial Disputes, Regional Court, Frankfurt (2018), the International Chamber of the Paris Commercial Court and the Paris Court of Appeal (2018), the China International Commercial Court (CICC) (2018), and the Netherlands Commercial Court (2019). One feature of all these courts is the acceptance to a greater or lesser degree of the English language in proceedings – in some courts, the entire proceedings are or may be conducted in English, in others the courts will (for example) accept documents in English without requiring translation. The intention is to increase accessibility to foreign commercial parties. Crucially, the courts all share a respect for party autonomy which is the basis of contemporary international commercial dispute resolution.

Although many of these courts are common law courts, including the specialised courts set up in the Gulf and Central Asia, civil law jurisdictions in Europe and Asia have also set up such bodies. Some courts are within a Free Trade Zone (FTZ) *e.g*. DIFC, some are an integral part of national system of courts *e.g*. the Paris courts, and whereas some have only national judges, *e.g*. London, others include judges from other jurisdictions, *e.g*. QIC. In Asia, the CICC (which has an International Commercial Expert Committee but no judges from other jurisdictions) and the SICC (which does have judges from other jurisdictions) are standard bearers, and the proposed new court in Korea would join them as a new standard bearer.

As already noted, the London Commercial court – like most of those listed above – is part of the national system of courts in England & Wales, which differentiates the London Commercial court from the international commercial courts which operate in FTZs or similar areas (*e.g.* Dubai or Kazakhstan), and in respect of which the jurisdiction, practice and even the law differs from that in the rest of the State.

As it has become clear that more States are establishing or reforming their commercial courts, it has also become clear that there is common ground between these courts that can be valuably explored. The Standing International Forum of Commercial Courts (SIFoCC) is an initiative established in 2017 which seeks to examine issues of common concern such as best practice, case management, enforcement, the growing impact of technology, *etc*. It has also done extensive work as regards the operation of courts during the pandemic, and its emphasis on remote hearings may continue to resonate even after the pandemic lifts. SIFoCC has met in London, New York, and Singapore – at the latter meeting Korea participated for the first time as one of 31 participating countries and 38 jurisdictions.

What are commercial parties looking for when agreeing governing law clauses and dispute resolution clauses whether through arbitration or through the courts? This is an important consideration when considering reform. The main components are likely to be (1) certainty, (2) an absence of artificial barriers to bringing or defending claims, (3) predictability, (4) transparency, (5)

independence, (6) efficient case management, (7) expertise, and (8) an effective and fair outcome, including enforcement if necessary. Many in the commercial dispute resolution community today would increasingly add two more, namely (9) that the process needs to be accomplished within a reasonable time and (10) at a reasonable cost. Achieving these factors gives parties confidence in the outcome and promotes stability – that confidence and stability can be seen as building blocks for sound trade and commerce.

IV. The Rationale for International Commercial Courts

There are a number of respects in which international commercial courts have addressed the question of cost. One is the modest fees payable to the court itself for the bringing of cases, compared to the costs of arbitrations. This is because the State maintains the courthouse, provides the staff, provides the judges, and so forth, the direct financial contribution of the parties being limited to the fee payable on filing. Another is the existence of a single level of appeal, in other words, a two instance rather than a third instance system, which shortens the time the proceedings take. The latter is the case in the QIC court in Qatar, for example, as well as in the SICC court in Singapore. (On the other hand, there is generally no, or a very limited, right of appeal in the case of arbitrations awards internationally.) Another are initiatives to cut down the scope of discovery of documents (which is a feature of common law systems) and other procedural reforms.

There is a further point to take into account. International commercial arbitration has become very successful in recent years, has developed sophisticated institutional support in the form of arbitration bodies, and is international in the sense which the domestic courts(even those with a strong international profile) are not. The leading arbitrators have justifiably worldwide reputations. It is true that much arbitration is slow and expensive, but the same can be said for litigation in the courts. Why not therefore focus exclusively on the development of arbitration, and, so the argument would go, accept that domestic courts have at best a subordinate role to play?

Addressing this question, Chief Justice Sundaresh Menon of Singapore has said:

> "… arbitration, by its very nature, cannot provide a complete solution to propel the vessel of global commerce forward. Arbitration was conceived as an ad hoc, consensual, convenient and confidential method of resolving disputes. It was not designed to provide an *authoritative* and *legitimate* superstructure to facilitate global commerce. It cannot, on its own, adequately address such things as the harmonisation of substantive

commercial laws, practices and ethics."[7]

There are a number of other reasons why arbitration cannot provide a complete solution despite its central importance.[8] First, the dispute may not be subject to an arbitration agreement. Many disputes over intellectual property are an example in point. Even where there is an agreement, since arbitration is by definition consensual, there is no power to join non-parties. Second, arbitration is subject to the supervision of the courts of the seat, which for that reason alone play an essential part. Third, domestic courts must develop their own expertise in commercial dispute resolution if only to deal with domestic disputes – arbitration cannot be expected to take the place of the courts. Fourth, it is unlikely in the long-term that States will be prepared to contract out decision-making in areas of key public policy. This very consideration has had the effect of weakening investment arbitration recently, despite the fact that the process of investment arbitration is generally highly respected for its professionalism.[9]

V. Conclusion

The legislative proposal to establish a maritime and international commercial court in Korea stipulates that a person or entity is allowed to bring a dispute to the court if the case meets requirements such as that (i) it has foreign factor (*e.g*. one of parties is a foreigner), (ii) it is a commercial matter, and (iii) the parties agreed to settle the dispute before the court. The case will be heard by the judges through two instances (not three) as is normal in civil cases in Korea.

The proposal is fully in accord with the international developments outlined in this article. If the legislation is enacted, the new court would seem further to enhance the reputation of the Republic of Korea with its internationally respected judiciary, and would be commensurate with the country's global technical and economic success as a progressive force in international legal affairs.

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[7] Sundaresh Menon, *International Courts: Towards a Transnational System of Dispute Resolution*, DIFC Courts Lecture Series 2015.

[8] See William Blair, '*The New Litigation Landscape: International Commercial Courts and Procedural Innovations*', International Journal of Procedural Law, Volume 9 (2019), No. 2, at 215

[9] Burkhard Hess, *The Private-Public Divide in International Dispute Resolution*, The Hague Academy of International Law, 2018, paras. 13, 171 et seq.
The establishment of an international investment court system has been one of the major objectives of the European Commission since 2015.

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William Blair, "The New Litigation Landscape: International Commercial Courts and Procedural Innovations", International Journal of Procedural Law, Vol. 9, No. 2, 2019

This article is published in *The Asian Business Lawyer (ABL)* Vol. 26.

The publication of *ABL* Vol. 26 has been financially supported by KIM & CHANG

Singapore International Commercial Court*

*Lee Ming Chua***

ABSTRACT

This article provides an overview of the Singapore International Commercial Court ("SICC"). It explains the establishment of the SICC, its jurisdiction and its role in the resolution of international commercial disputes. This article also examines the similarities and differences between the SICC and international arbitration in key areas, including confidentiality and transparency, procedural flexibility, joinder of parties, appeals and enforcement.

KEYWORDS: Dispute Resolution, International Commercial Disputes, International Commercial Court, International Arbitration, Singapore International Commercial Court

* This article is based on the writer's presentation at the JPRI International Conference 2018 held in Seoul, Korea (December 4, 2018).

** Judge of the High Court, Singapore.

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I. Introduction

The Singapore International Commercial Court ("SICC") was established in 2015 to provide parties with efficient and effective resolution of international commercial disputes. Set up as a division of the General Division of the High Court of Singapore, the SICC offers court-based adjudication of international commercial disputes; the disputes need not be governed by Singapore law or have any connection with Singapore.

The judges of the SICC comprise Singapore judges specialized in commercial disputes and international judges from both civil law and common law jurisdictions.

II. Jurisdiction

Generally, the SICC has jurisdiction to hear and try an action where[1]:

(a) the claim in the action is of an international and commercial nature;

(b) the parties to the action have submitted to the SICC's jurisdiction under a written jurisdiction agreement; and

[1] Supreme Court of Judicature Act (Cap. 322, 2007 Rev Ed), section 18D; Rules of Court (Cap. 322, R5), Order 110 .

(c) the parties to the action do not seek any relief in the form of. or connected with, a prerogative order (including a Mandatory Order, a Prohibiting Order, a Quashing Order or an Order for Review of Detention).

Parties to an agreement to submit to the jurisdiction of the SICC shall be considered to have agreed to submit to the exclusive jurisdiction of the SICC, unless the agreement states otherwise.[2] Parties can enter into an agreement to submit to the jurisdiction of the SICC when contracts are entered into or at any other time, such as after a dispute has arisen. Recommended model clauses for submitting to the SICC's jurisdiction (both pre and post dispute) are available on the SICC's website.[3]

The SICC may decline to assume jurisdiction if it is not appropriate for the action to be heard by the SICC. However, it will not decline to assume jurisdiction in an action solely on the ground that the dispute between the parties has few or no connecting factors to Singapore if there is a written jurisdiction agreement between the parties to submit the claim for resolution by the SICC.[4]

In addition, the SICC has jurisdiction as a supervisory court under the International Arbitration Act (Cap 143A) to hear matters arising from international commercial arbitrations that are seated in Singapore.[5]

The SICC may also hear cases which are transferred from the General Division of the High Court of Singapore.[6]

III. SICC's caseload

As at March 2021, 69 cases have been dealt with by, or are pending before, the SICC. 63 cases were transferred from the High Court of Singapore to the SICC and six cases were originating cases that were filed in the SICC. The first originating case was filed in the SICC in 2018. These cases involved parties of 35 different nationalities with claims ranging from S$1.2 million to S$1 billion. The SICC has issued 65 written judgements. The Court of Appeal has issued 15 written judgments in connection with appeals against decisions of the SICC.

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[2] Supreme Court of Judicature Act (Cap. 322, 2007 Rev Ed), section 18F.

[3] Singapore International Commercial Court Model Clauses (June. 7, 2018), available at https://www.sicc.gov.sg/docs/default-source/guide-to-the-sicc/sicc_model_clauses.pdf

[4] Rules of Court (Cap. 322, R5), Order 110, Rule 8.

[5] Supreme Court of Judicature Act (Cap. 322, 2007 Rev Ed), section 18D(2).

[6] Supreme Court of Judicature Act (Cap. 322, 2007 Rev Ed), section 18J(2); Rules of Court (Cap 322, R5), Order 110, Rule 7(2).

An appeal from the SICC that was first heard on an expedited basis was dealt with in just 36 days between the filing of the notice of appeal and the issuance of the written judgment by the Court of Appeal.

IV. The SICC advantage

International arbitration remains relevant to the resolution of international commercial disputes. It provides confidentiality, parties can appoint the arbitrators and its procedures are generally flexible. However, there have been complaints of delay and rising costs. There is also no avenue for an appeal and third parties cannot be joined as parties in an arbitration without their consent.

On the other hand, the resolution of international commercial disputes through domestic courts may face jurisdictional issues if the dispute has little or no connecting factors to the jurisdiction of the courts. In addition, the rules of procedure applicable to such courts may not offer the parties the flexibility that is available in international arbitrations.

The SICC fills the gap between international arbitration and domestic courts. It offers a court-based mechanism for dispute resolution that enables parties to avoid one or more of the problems encountered in international arbitrations. At the same time, it offers a degree of flexibility that is not available in domestic courts. The SICC thus provides an alternative option for the resolution of international commercial disputes.

1. International jurists

The SICC offers litigants the expertise and experience of judges from both common law and civil law jurisdictions. The judges in the SICC currently include 16 international judges from Australia, Canada, France, Hong Kong SAR, India, UK, and USA.

2. Confidentiality/transparency

Arbitration hearings and decisions are confidential. As a consequence, there is an absence of developed jurisprudence in international arbitrations and a lack of consistency of arbitration decisions. In contrast, domestic courts provide transparency. Its trials are open to the public and there is a developed jurisprudence since its judgments are published.

The SICC offers transparency; its hearings are held in open court and its judgments are published. However, the SICC also offers parties the flexibility

of confidentiality. The SICC may make any or all of the following orders[7]:

(a) an order that the case be heard in camera;

(b) an order that no information or document relating to the case may be revealed or published;

(c) an order that the Court file be sealed.

In deciding whether to make any of the above orders, the SICC may have regard to[8]:

(a) whether the case is an offshore case (*ie*, an action that has no substantial connection to Singapore), and

(b) any agreement between the parties on the making of such an order.

An order for confidentiality may be made with or without exceptions or conditions, including any directions on what information relating to the proceedings may be published.[9]

3. Representation by foreign lawyers

Parties can be represented by foreign lawyers in certain cases, including[10]:

(a) offshore cases (*ie*, actions with no substantial connection with Singapore, excluding any proceedings under the International Arbitration Act (Cap. 143A, 2002 Rev Ed) that are commenced by way of any originating process, and an action *in rem* under the Singapore High Court (Admiralty Jurisdiction) Act (Cap. 123, 2001 Rev Ed); and

(b) where the SICC has made an order that any question of foreign law be determined on the basis of submissions instead of proof.

Foreign counsel who seek to represent parties in proceedings before the SICC must be registered with the SICC. The SICC website provides a simple process for the registration of foreign lawyers. As of March 2021, there were

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[7] Rules of Court (Cap. 322, R5), Order 110, Rule 30(1).
[8] Rules of Court (Cap. 322, R5), Order 110, Rule 30(2).
[9] Rules of Court (Cap. 322, R5), Order 110, Rule 30(4).
[10] Supreme Court of Judicature Act, (Cap. 322, 2007 Rev Ed), section 18M; Rules of Court (Cap 322, R5), Order 110, Rule 1 and Rules 25–29.

88 registered foreign lawyers from diverse jurisdictions, both common law and civil.

A foreign lawyer may apply for either full registration or restricted registration. A foreign lawyer who is granted full registration may represent and advise the parties in cases before the SICC (including any appeal).[11] A foreign lawyer who is granted restricted registration may appear solely for the purposes of making submissions on questions of foreign law that the SICC has ordered to be determined on the basis of submissions and to advise the parties on the same.[12]

4. Procedural flexibility

Not unlike arbitrations, the procedure in the SICC is flexible and provides parties with a high level of autonomy.

First, the SICC may, with the consent of all parties, direct that memorials be used in lieu of pleadings.[13]

Second, the default rule for the production of documents is that each party must provide to all other parties all documents available to it on which it relies.[14] The more extensive general discovery regime applicable to the domestic High Court does not apply to proceedings in the SICC unless otherwise ordered. The SICC may, with the consent of the parties, dispense with discovery or production of documents altogether.[15]

Third, the Court may, with the agreement of all parties, order that any rule of evidence found in Singapore law shall not apply, and that other rules of evidence (*eg*, the IBA Rules on the Taking of Evidence in International Arbitration) shall apply instead.[16] Some examples of substantive rules of evidence under Singapore law include the rule that hearsay evidence is generally not admissible, the rule that witnesses of fact may not give opinion evidence, and the rule that oral evidence is not admissible to contradict, vary, add to or subtract from the terms of a complete written contract.[17]

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[11] Legal Profession Act (Cap. 161, 2009 Rev Ed), section 36P(1).
[12] Legal Profession Act (Cap. 161, 2009 Rev Ed), section 36P(2).
[13] Singapore International Commercial Court Practice Directions, paragraph 77(13).
[14] Rules of Court (Cap. 322, R5), Order 110, Rule 14.
[15] Rules of Court (Cap. 322, R5), Order 110, Rule 21A.
[16] Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed), section 18K; Rules of Court (Cap. 322, R5), Order 110, Rule 23.
[17] Singapore International Commercial Court User Guides (Jan. 31, 2019), Note 4. Disapplication of Singapore Evidence Law, available at

Fourth, questions of foreign law may be decided based on submissions instead of proof.[18] As stated earlier, such submissions may be made by foreign counsel who are granted restricted registration.

To complement the procedural flexibility, case management conferences are judge-led. This results in greater efficiency, with greater control over time and costs.

The SICC is expected to introduce new rules of procedure soon. These new rules afford the parties and the Court greater flexibility to tailor the court procedure to suit the proceedings at hand.

5. Joinder of related parties

It may be necessary and more efficient to join other related parties to proceedings that have been commenced. Related parties may not be joined in arbitration proceedings without their consent. However, two or more persons may be joined as plaintiffs or defendants in an action before the SICC where the claims by or against each of them involve some common question of law or fact and all rights to relief claimed in the action are in respect of or arise out of the same transaction or series of transactions.[19]

A defendant in proceedings before the SICC may also bring a claim against a third party if he or she[20]:

(a) claims any contribution or indemnity against the third party;

(b) claims any relief against the third party that is substantially the same as some relief claimed by the plaintiff; or

(c) requires that any question relating to the original subject-matter of the claim should be determined not only as between the plaintiff and defendant but also as between either or both of them and the third party.

Joinder of other persons as parties to an action before the SICC is not permitted if the claims by or against the person to be joined include a claim for

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https://www.supremecourt.gov.sg/docs/default-source/default-document-library/sicc-user-guides-(as-at-31-jan-2019).pdf

[18] Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed), section 18L; Rules of Court (Cap. 322, R5), Order 110, Rule 25.

[19] Rules of Court (Cap. 322, R5), Order 110, Rule 9 and Order 15, Rule 4.

[20] Rules of Court (Cap. 322, R5), Order 110, Rule 9 and Order 16, Rule 1.

a prerogative order or if the claims are not appropriate to be heard in the SICC.[21]

A State or the sovereign of a State may not be made a party unless the State or the sovereign has submitted to the jurisdiction of the SICC under a written jurisdiction agreement.[22]

6. Appeals

There is no appeal against decisions in international arbitrations. Although arbitration decisions may be reviewed by courts, the grounds for review are limited. Parties to an arbitration agreement agree to be bound by decisions of the arbitral tribunal, whether right or wrong. There is no right of recourse to the courts where, the arbitral tribunal has simply made an error, whether of fact or law, and even if the error is obvious.

In contrast, an appeal lies against a decision of the SICC to the Court of Appeal of Singapore, although certain specific matters are either non-appealable (*eg*, consent judgements or orders) or appealable only with the leave of the court (*eg*, cases where the only issue in the appeal relates to costs).[23] Parties have the flexibility of agreeing not to file an appeal.

In deciding on the appropriate dispute resolution mechanism, parties should carefully consider whether they are prepared to give up the right to appeal, and if so, whether they have sufficient reasons that justify trading off the right to correct a wrong decision.

7. Costs

Resolving disputes in the SICC is likely to be less costly than in international arbitrations. The fees for proceedings in the SICC are on a fixed basis unlike *ad valorem* fees in arbitrations.

V. Enforcement

The recognition and enforcement of foreign arbitral awards have been greatly assisted by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, commonly known as the New York Arbitration

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[21] Rules of Court (Cap. 322, R5), Order 110, Rule 9(1).
[22] Rules of Court (Cap. 322, R5), Order 110, Rule 9(2).
[23] Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed), sections 18C, 28A and 29(1).

Convention.

As a division of the General Division of the High Court of Singapore, the SICC is a superior court of law. SICC judgments can be enforced in almost all major commercial jurisdictions and many other regional ones. A note issued by the SICC on enforcement of SICC judgments is available on SICC's website.[24]

First, SICC judgments may be enforced pursuant to the 2005 Hague Convention on Choice of Court Agreements (the "2005 Hague Convention"). The 2005 Hague Convention came into force in 2015. Contracting Parties are required to recognize and enforce judgments issued by each other's courts. The Convention has more than 30 Contracting Parties, including Singapore, the European Union, Mexico, Montenegro, and the UK. As Singapore is a Contracting Party, SICC judgments may be enforced pursuant to the 2005 Hague Convention.

Second, SICC judgments may be enforced under reciprocal enforcement arrangements. Under the Reciprocal Enforcement of Commonwealth Judgments Act (Cap. 264, 1985 Rev Ed) and the Reciprocal Enforcement of Foreign Judgments Act (Cap. 265, 2001 Rev Ed), SICC judgments may be enforced by registration in:

(a) Australia (federal jurisdiction, New South Wales, Queensland, South Australia, Tasmania, Victoria, Western Australia, Australian Capital Territory, Norfolk Island and Northern Territory);
(b) Brunei Darussalam;
(c) Hong Kong SAR;
(d) India (except the State of Jammu and Kashmir);
(e) Malaysia;
(f) New Zealand;
(g) Pakistan;
(h) Papua New Guinea;
(i) Sri Lanka;
(j) UK; and
(k) The Windward Islands.

Third, SICC judgments may be enforced in common law jurisdictions by commencing an action on the judgment debt. As for civil law jurisdictions, SICC judgments may be enforced on the basis of reciprocity between superior courts of law. Judgments of the Supreme Court of Singapore, of which the SICC is a part, have been enforced in China, Japan and Vietnam.

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[24] See https://www.sicc.gov.sg/guide-to-the-sicc

Parties to an agreement to submit to the jurisdiction of the SICC are considered to have agreed (unless the agreement states otherwise) to (a) carry out any judgment or order of the SICC without undue delay, and (b) waive any recourse to any court or tribunal outside Singapore against any judgment or order of the SICC, and against the enforcement of such judgment or order, insofar as such recourse can be validly waived.[25] These deeming provisions may assist in enforcing SICC judgments. In addition, the model SICC dispute resolution clauses includes provisions that parties who have submitted to or agreed to submit to the SICC's jurisdiction are deemed to have waived their right to defend against an action based on a SICC judgment in any jurisdiction.[26]

Reports on how foreign judgments in civil and commercial matters are recognized in 15 countries (ASEAN Member States, Australia, China, India, Japan and South Korea) are available in a publication by the Asian Business Law Institute on the Recognition and Enforcement of Foreign Judgments in Asia.[27]

Enforcement of Foreign Judgments in Asia contains reports on how foreign judgments in civil and commercial matters are recognized in 15 countries.

The Supreme Court of Singapore has also entered into Memoranda of Guidance as to the Enforcement of Money Judgments with courts in different jurisdictions, which set out the mutual understanding of the procedures for the enforcement of money judgments by each other. Such Memoranda of Guidance have been entered into with the following courts:

(a) Supreme Court of Bermuda;
(b) Supreme People's Court of the People's Republic of China;
(c) Supreme Court of the Union, Republic of the Union of Myanmar;
(d) Qatar International Court and Dispute Resolution Centre;
(e) Abu Dhabi Global Market Courts; and
(f) Dubai International Financial Centre Courts.

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[25] Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed), section 18F(1)(*b*) and (*c*).
[26] See paragraph 15, Note on Enforcement of SICC Judgments at https://www.sicc.gov.sg/guide-to-the-sicc
[27] https://www.abli.asia/projects/foreign-judgments-project

VI. Conclusion

Established as a court, the SICC provides a mechanism for dispute resolution that enables parties to avoid one or more of the problems encountered in international arbitrations. At the same time, it offers a degree of flexibility that is not available in domestic courts. As stated on the SICC's website, the SICC serves as a companion rather than a competitor to arbitration as it seeks to provide parties in transnational business with one more option for the resolution of transnational commercial disputes.[28]

[28] https://www.sicc.gov.sg/about-the-sicc

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This article is published in *The Asian Business Lawyer (ABL)* Vol. 26.

The publication of *ABL* Vol. 26 has been financially supported by KIM & CHANG

Admiralty in Maritime Law: The Phenomenon in Proper Perspective

Proshanto K. Mukherjee[*]

ABSTRACT

Admiralty as a phenomenon in maritime law is often inadequately perceived and its indiscriminate use in certain quarters inhibits clarity of understanding in its proper perspective. This article attempts to clarify such misapprehension in academic and judicial circles by tracing its historical significance and evolution in terms of its English roots and heritage and emphasizes that Admiralty is as much a matter of jurisdiction as it is of law, the two concepts being inherently inseparable. The correlation between claims, for which a ship can be arrested pursuant to convention law and statute and causes that attract Admiralty jurisdiction, particularly in the United Kingdom, is examined. In conclusion, all concerned with shipping and maritime affairs in various capacities are admonished to re-think the verities and adopt positive measures to avoid misconceptions of important precepts and practices in the sphere of maritime law like the phenomenon of Admiralty law and jurisdiction which characterizes the common law.

KEYWORDS: Admiralty Law, Admiralty Jurisdiction, Historical Evolution, Civil Law Origins, Action *in rem*, Admiralty Procedures, Chinese Maritime Law

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I. Introduction

The phenomenon of Admiralty is often misunderstood in certain quarters and the indiscriminate and fallacious use of the appellation inhibits its ubiquitous understanding by all and sundry. This article attempts to clarify that misapprehension by resorting to the grassroots of Admiralty which necessitates walking back to its genesis and historical evolution. It is important to appreciate the legal system and legal history that embellishes the phenomenon of Admiralty and gain an adequate perception of it which is one reason for the undertaking of this task.

It must be stressed at the outset that the term "Admiralty" encompasses and adjectivizes the words "law" and "jurisdiction" as its two inherent and inseparable dimensions. In this regard, it must be brought to the attention of the reader that the phrase in the title is not "Admiralty *and* Maritime Law" (emphasis added) which in some instances is used to describe a subject matter, a legal discipline, or a particular variety of court or judicial institution. Contrary to what many believe mistakenly or erroneously, the two words "admiralty" and "maritime" are not congruently synonymous.[1] It is submitted that "maritime" is macro whereas "admiralty" is micro, a proposition that will be elaborated as the discussion unfolds. The present work is intended to be less academic in tone and more informational and explanatory bordering on the argumentative. The

[1] See, for example, the explanation given in *Encyclopaedia Britannica*, per Nicholas J. Healy uniting the two words in the same breath. The point is elaborated later in the present work

expression "in perspective" in the title reflects a personal viewpoint based on the author's experience in several maritime circles including his current academic abode in a renowned maritime university in China.

II. The Semantics of "Maritime"

In the present author's book *Maritime Legislation*, the very first chapter dwells on semantics relating to the law governing matters maritime across the spectrum from public to private law.[2] It is observed there that consistent with the opinions of others, there is a public and private dimension to maritime law when it is viewed holistically which includes international law of the sea, regulatory maritime law, admiralty law as known in common law jurisdictions as well as commercial law.[3] Whereas the term "maritime law" is all-encompassing, admiralty law refers to the substantive law and procedural rules of the Admiralty Courts in common law jurisdictions and which originated in England. Shipping law, in which Admiralty law is subsumed, concerns ships and shipping and has a wider connotation extending to private and regulatory maritime law.[4] With regard to terminology relating to the discipline of maritime law, Professor Srikrishna Deva Rao points to the distinction between admiralty law and shipping law by referring to the case of *Port Maina Maritime MA* v. *Owners and Parties Interested in the Vessel M. V. Gati Majestic*[5] and explains it in the following words:

> Admiralty law is that branch of law developed by the English Courts of Admiralty to exercise their jurisdiction over matters at sea, whereas shipping law encompasses aspects such as commercial maritime law, maritime safety, pollution prevention and labour law as well as admiralty law without extending to the public international law of the sea.[6]

The explanation is at once unequivocal and insightful, and one with which there can be no quarrel.

To appreciate what is Admiralty, there must first be a clear understanding

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[2] Proshanto K. Mukherjee, *Maritime Legislation*, First Edition, Malmo: WMU Publications, 2002, at 1-3.

[3] *Ibid*.; see also F.R. Sanborn, *Origins of the Early English Maritime and Commercial Law*, Milton Park, Abingdon, Oxon: Professional Books Ltd., 1989 Reprint, at xvi.

[4] Mukherjee, *supra* note 2, at 2.

[5] AIR 2014 Cal 47 (1) CHN (Cal) 126.

[6] Srikrishna Deva Rao, "Introduction" in Samareshwar Mahanty, *Maritime Jurisdiction and Admiralty Law in India*, Second Edition, Gurgaon: Universal Law Publishing LexisNexis, 2018, at xiv.

of what is maritime. It is important to recognize the respective legal connotations of the two words. In the most simplistic terms, maritime law is the law that is concerned with matters maritime. Given that, maritime law has been variously described, defined and elaborated in different ways reflecting some subjective perceptions tempered by semantics. In one authoritative text, it is said that "maritime law provides the legal framework for maritime transport"[7] meaning that it is the law governing maritime transportation - a description that is at once succinct and seemingly definitive. The duo of authors Schoenbaum and Yiannopoulos have said in their book that maritime law consists of a "body of legal rules and concepts concerning the business of carrying goods and passengers by water.[8] In the opinion of the present author, both these characterizations are perceptibly narrow in scope; however, the first reflects a generality that can be construed as extending beyond the confines of the purely private domain of maritime business and commerce to accommodate the more public law areas of regulatory concern. By contrast, the second definition is clearly limited to the legal regimes dealing with shipboard carriage of goods and passengers.

At any rate, it would seem that any such description of maritime law as depicted above would preclude consideration of the subject known as law of the sea which is indubitably a part of public international law albeit in relation to the sea, or to put it in another way, the public law pertaining to international ocean space.[9] Be that as it may, the present author's view in consonance with those of some distinguished authors is that maritime law consists of two correlated components, the public law and the private law. One of them, Professor Sanborn wrote in 1930 –

> The words "maritime law," as commonly used today, denote that part of the whole law which deals chiefly with the legal relations arising from the use of ships. But in the earlier period, of which this work treats, the law maritime had a considerably wider scope. It dealt … with the primitive ancestors of some branches of our modern commercial law, dealt, too, with the germs of that public law which we today style international law.[10]

Another distinguished author of more recent times, Professor Edgar Gold has critically highlighted the anomaly from the public law side of the equation

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[7] *Guide-Lines for Maritime Legislation*, Third Edition, (Guidelines Vol. I); United Nations Publication, Economic and Social Commission for Asia and the Pacific (ESCAP), Bangkok, Thailand, (ST/ESCAP/1076), at 1.

[8] Thomas J. Schoenbaum and A.N. Yiannopoulos, *Admiralty and Maritime Law, Cases and Materials*, Charlottesville, Va., 1984, at 1.

[9] See E.D. Brown, *The Legal Regime of Hydrospace*, London: Stevens & Sons, 1971

[10] See Sanborn, note 3, at xvi.

in the following words:

> . . . the new law of the sea has … addressed itself to almost all areas of ocean use except the one that since before the dawn of history, has been preeminent - the use of the ocean as a means to transport people and their goods from place to place on this planet, so much more of which is water than is land. Marine transport has been discussed in an almost abstract manner, as if it did not really fit or belong within the public domain but needed to be confined to the more "private" region of international commerce, which was considered to be outside the scope of the law of the sea.[11]

The public side of maritime law comprises public international law typified by the law of the sea and regulatory maritime law mostly framed through international conventions. The customary international law of the sea is today largely codified and entrenched in the United Nations Convention on the Law of the Sea, 1982 (UNCLOS).[12] The private maritime law concerns its commercial aspects largely consisting of carriage of goods and passengers by sea and marine insurance, and also a host of uniquely maritime subjects *inter alia*, collisions, salvage, general average, ship arrest and proprietary interests in ships such as maritime liens and mortgages.

Be that as it may, placing public and private maritime law into two watertight compartments is counterproductive, as from a practical standpoint, they are closely interrelated making the distinction artificial and anomalous. Shipping invariably involves legal transactions that concern general commercial and trade law which are not even necessarily maritime in scope.[13] On the other hand, public maritime law includes the regulatory law of shipping largely established through international conventions and related instruments. This branch of public maritime law is inseparable from its private law counterpart as mentioned above. Interestingly and remarkably, the distinguished author Professor Gold has pointed out that the major maritime states saw it advantageous to their national interests and policies to bifurcate maritime law into its public and private components.[14] It is submitted that this approach to maritime law is a product of the combination of perceived superiority of public power on the one hand and inherent biases of the commercial world on the other.[15]

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[11] Edgar Gold, *Maritime Transport: The Evolution of International Marine Policy and Shipping Law*, Toronto: Lexington Books, 1981; Introduction, at xix.

[12] 1833 *UNTS* 3

[13] Mukherjee, *supra* note 2, at 2. See also William Tetley, M*aritime Liens and Claims*, 1st Edition, 1985; London: Business Law Communications Ltd. at 1.

[14] Gold, *supra* note 11.

[15] Mukherjee, *supra* note 2, at 2

In support of the contention that maritime law should not be compartmentalized into its public and private law components, the reader's attention is drawn to the etymological root of the word "maritime". It is derived from the Latin and means "of or pertaining to the sea."[16] It has been said that in the modern milieu, maritime law encompasses "the entire body of laws, rules, legal concepts and processes that relate to the use of marine resources, ocean commerce, and navigation."[17] A semantic analysis of this kind inevitably points to the inseparability of "maritime law" as an all-embracing term and "law of the sea" in the wider sense of sea law or law pertaining to the sea.[18] Interestingly, the expression "law of the sea" has on occasion been used and construed broadly as a generic term. In the case known as *The Scotia*,[19] this expression was used as a descriptive synonym for what would otherwise be referred to as "maritime law". But it is to be observed that "law of the sea" was used in a generic sense in that case. This contention is evidenced by the dictum of Strong J. He stated-

> Undoubtedly no single nation can change the law of the sea . . . whatever may have been its origin whether in the usages of navigation, or in the ordinances of maritime states, or in both, it has become the law of the sea only by the concurrent sanction of those nations who may be said to constitute the commercial world.[20]

Clearly, the connotation is one pertaining to commercial maritime activity and not singularly in reference to the law of the sea as a branch of public international law. Another term that has been used by one author at least to describe the same phenomenon is "common law of the sea".[21] Also, as exemplified in *United Africa Ltd.* v. *Owners of the m.v. Tolten* (*The Tolten)*, the term "general or common law of the seas" was used by the English Court of Appeal.[22] Other expressions such as "sea law" and "common or transnational law of the sea" have been used by the courts. In *m.v. Elisabeth* v. *Harwan Investment and Trading Pvt. Ltd.*,[23] the Supreme Court of India referred to

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[16] Thomas J. Schoenbaum, *Admiralty and Maritime Law*, 2nd Edition, Vol. 1, St. Paul, Minn., West Publishing Co., 1994, at 1.

[17] *Ibid*. at 2.

[18] Gleaned from personal communication with Professor Si Yuzhou, esteemed erstwhile President of Dalian Maritime University that he subscribes to the same view.

[19] (1872), 14 Wall 170.

[20] *Ibid*. at 187-88.

[21] See G. L. Canfield, in "Note" (1922), 20 *Mich. L. Rev.* 535, where the author refers to ". . . the general maritime law; or common law of the sea and the established practices and requirements of the business".

[22] (1946), 2 All E.R. 372 at 378. See also Mahanty, *supra*, note 6 at 2 and 4.

[23] AIR 1990 SC 1014 at 1036

maritime law as "international common law or transnational law".[24]

III. Admiralty: The Phenomenon

As mentioned earlier, the words "maritime" and "admiralty", in that order or *vice versa*, are sometimes expressed in the same breath or used interchangeably to refer to a species of law or to jurisdiction pertaining to it. The well-known American lawyer and author Nicholas J. Healy states - "In English-speaking countries, "admiralty" is sometimes used synonymously (with maritime law) …" and then continues - "but in a strict sense the term refers to the jurisdiction and procedural law of courts whose origins may be traced to the office of Admiral."[25] The comment is highly instructive which goes to the very heart of the term "Admiralty" as elaborated below. Even the United States Constitution in its Article III refers to "… admiralty and maritime jurisdiction". Other examples of the duality of terminology are two textbooks already referred to in this work[26] but all these pertain to usage in jurisdictions belonging to the common law tradition and therefore may be justifiable.

The jurisdiction and the law administered by the Admiralty Court with roots in England have been adopted by all common law countries and territories which were former colonies of Great Britain**.** The juxtaposition of admiralty law and jurisdiction, apart from the major western common law countries like the United Kingdom (UK) itself, Canada, Australia and New Zealand, the historically rooted admiralty law and jurisdiction of England are vibrantly present in numerous Asian and African countries and regions including India, Pakistan, Bangladesh, Myanmar, Malaysia, Singapore, Hong Kong, Ghana, Sierra Leone, Nigeria, Tanzania, Uganda and Kenya, as well as a host of Caribbean countries including Antigua and Barbuda, Barbados, The Bahamas, British Virgin Islands, Cayman Islands, Dominica, Grenada, Jamaica, St. Vincent and the Grenadines, and Trinidad and Tobago.

In that vein, two observations are crucial; one is that the phenomenon of Admiralty is steeped in English history, and secondly, as opined above, it is as much a matter of jurisdiction as it is of substantive law, both being inextricably tied to each other. It is thus virtually impossible to gain an understanding of admiralty law without obtaining a thorough appreciation of the historical evolution of admiralty jurisdiction. In the context of the common law in India, the exclusivity of admiralty jurisdiction was upheld in *Kamalakar Mahadev* v. *S.S. Navigation Co. Ltd*.[27] to the extent that a non-Admiralty civil court could

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[24] See Mahanty, *supra* note 6, at 11, 27.
[25] See Healy, *supra* note 1
[26] Schoenbaum, *Admiralty and Maritime Law, supra* note 16 and Mahanty, *supra* note 6.
[27] AIR 1961 Bom 180

not entertain an admiralty cause.

The word "Admiralty" originates in the office of the Lord High Admiral, the root meaning of which is derived from the Arabic possibly through Spanish or French.[28] The predominant view is that historically, admiralty law and admiralty jurisdiction are of English law origin. It must be pointed out, however, that there is a French connection as well. The supervision of maritime affairs by Admirals including their oversight of seafarers was in fact an integral part of the French history of the times. In that regard, James Reddie refers to "a jurisdiction which ultimately assumed the name of Admiralty" because the Admiral was designated to preside over navigation and to exercise maritime power in France.[29] Be that as it may, the rationale for that peculiar kind of jurisdiction in France and the appellation, seem not to exist anymore whereas in the United Kingdom it indubitably does, for reasons that will unfold as the discussion progresses.

Admiralty law refers to the body of law including procedural rules developed by the English Courts of Admiralty in their exercise of jurisdiction over matters pertaining to the sea. Originally, this brand of law encompassed those subject matters over which the Admiralty Court had jurisdiction. In virtue of such jurisdiction, cases of maritime vintage were tried in the Admiralty Court, which was quite separate and distinctively different from the common law courts. A particular characteristic of Admiralty is the action *in rem* which is not available in the common law and is exclusive to Admiralty jurisdiction. An insightful description of admiralty law is that it is "a special law, a distinct entity because of its distinct origin, history, field of application and distinct courts to administer it".[30] It is said that in the United States, matters subject to admiralty jurisdiction are those that the courts decide as such.

Whereas in its home base, the admiralty law became increasingly influenced by the common law of England, the admiralty law in the United States retained much of the original flavour of the continental civil law which had inspired it. In England, and subsequently, in the rest of the United Kingdom, subject matters of maritime character were set out in statutes enacted over time which codified the judge-made law generated by decided cases and the customary or consuetudinary maritime law. Matters subject to admiralty jurisdiction in the current milieu of United Kingdom law are those that are specified by statute.[31] Incidentally and interestingly, as pointed out by the former Admiralty judge Mr. Justice David Steel, it is noteworthy that

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[28] Mukherjee, *supra* note 2, at 1; see also *supra* note 8.

[29] James Reddie, *An Historical View of the Law Maritime Commerce*, Edinburgh, London: William Blackwood & Sons, 1841 at 337. See also William Tetley, *Maritime Liens and Claims*, Montreal: Yvon Blais Inc., 1989 at 14.

[30] Mahanty, *supra* note 6, at 14.

[31] See Senior Courts Act 1981 (c. 54), Section 20

throughout the long history of the English Admiralty Court, "[T]he users of the Admiralty Court are overwhelmingly from overseas".[32] The reasons cited by him are *inter alia*, transparency, fairness and efficiency of the Court. Needless to say, the foreign litigants hail from both other common law as well as civil law jurisdictions around the world.

In contrast to the above observations, the term "Admiralty law" is virtually unheard of in European continental and other civil law countries because jurisdiction in the civil law system, with few exceptions,[33] is inherent in the hierarchical system of the courts without heed to any so-called "Admiralty" subject matter. In particular, the English historical background through which Admiralty jurisdiction evolved, is largely irrelevant in those countries.[34] The same reasoning would apply to China which has a civil law legal system with no link whatsoever to the historical background which has perpetuated the concept and phenomenon of Admiralty in England, and the common law countries to which it was exported. The indiscriminate use of the term "Admiralty" in China is therefore devoid of any rationale notwithstanding the flimsy, superficial and equivocal explanations that seem to prevail in academic and judicial circles.

IV. Admiralty: An Historical Overview

Even though the basic source of modern maritime law in England is the Black Book of Admiralty which was derived primarily from the *Rôles d'Oléron*, the advent of Admiralty in terms of law and jurisdiction as we know it, predates the existence of that renowned compilation. It is of incidental significance as recorded by the great maritime historian James Reddie that the Rôles ". . . were neither framed by nor for the accommodation of the people of England, but were framed by and for the accommodation of the industrious trading and seafaring people of the western coast of France . . ."[35]. In that historical vein, it is instructive to note that the common law and chancery courts, occasionally meted out maritime justice, albeit inadequately, but the courts of the seaports known as the "Cinque Ports" ("*cinque*" meaning five in French) located along the English Channel were exclusively maritime in character dealing only with shipping and commercial maritime disputes. Originally the courts were three in

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[32] David Steel, Foreword to the Fourth Edition of Nigel Meeson and John A. Kimbell, *Admiralty Jurisdiction and Practice*, London: Informa, 2011, at vii.

[33] In France, for example, constitutional issues are dealt with by the *Conseil d'etat.*

[34] France is an exception to the extent that historically there was an Admiralty Court and consequently, Admiralty jurisdiction, in that country as pointed out earlier but there is no "Admiralty jurisdiction" as such in the contemporary French legal domain and there is certainly no action *in rem.*

[35] Reddie, *supra* note 29, at 413

number, then grew to five and were eventually seven but they have always been identified as *cinque* or five. The French connection including the linguistic affiliation points to the importance of the cross-channel ties in trade at that time and the European continental influence on English maritime commerce and shipping.

The period of the crusades in English and European medieval history brought with it many features, some good and some not so good. England experienced great expansion in commercial ventures and maritime expeditions but there were downsides as well. Piracy went on the rise and insubordination and disorderly conduct among seafarers became rampant. Indeed, the problem with piracy assumed such unmanageable proportions that the need arose for a single judicial body to control it, following several failed attempts to do so through other ways and means. The Office of the Lord High Admiral was thus established which marked the genesis of a proper Court of Admiralty in England.

In 1360, the English sovereign King Edward III granted a commission to John de Beauchamp as "Admiral of all the fleets of ships, south, north and west" who was vested with executive and regulatory jurisdiction over all ships and seafarers under his command and predominantly over piracy and prize cases. By another commission of 1386, the King empowered the Admiral to hear complaints – ". . . of all and singular of such matters as belonged to the office of Admiral and to take cognizance of maritime causes and to do justice and . . . to do and exercise all other things which to that office appertained as of right and according to maritime laws shall have to be done".[36] The Admiralty Court was a court established by the Lord High Admiral. In effect it was his Court; hence the designation and appellation "Admiralty Court". To the Lord High Admiral was granted the Royal Prerogative in maritime matters. Thus, the Admiralty Court came into existence for the adjudication of maritime disputes and offences which fell within the jurisdiction conferred on the Lord High Admiral by virtue of the Royal Prerogative.[37] Maritime causes were addressed by the Admiralty Court separately from causes that fell within the ambit of the common law. Unsurprising, therefore, is the highly instructive remark that "[T]he practice and procedure of the Admiralty Court is not founded on common law principles but on civil law concepts developed and adapted by the civil law practitioners …"[38] In contrast to that, mercantile or commercial subject matters were subsumed into the common law and dealt with by the

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[36] Edgar Gold, *Canadian Admiralty Law, Introductory Materials*, 7th. Edition, Dalhousie University, Faculty of Law, Halifax, 1990 at 1- 3.

[37] F.L. Wiswall, *The Development of Admiralty Jurisdiction and Practice Since 1800*, Cambridge University Press, 1970, at 149-152.

[38] Nigel Meeson and John A. Kimbell, *Admiralty Jurisdiction and Practice*, 4th. Edition, London: Informa, 2011, at 1.

common law courts.

The co-existence of the seaport courts of the Cinque Ports, the Admiralty Court, and the common law courts led to confusion and rivalry with respect to jurisdiction. In 1389 and 1391, two statutes were enacted effectively limiting the jurisdiction of the Admiralty Court to things "done upon the sea" which, as noted earlier, was consistent with the root meaning of the word "maritime" and consonant with the subsequent notion of the improvident expression "wet law" mentioned below. The Admiralty Court was reluctant to readily accept this limitation in practical terms and it continued to exercise jurisdiction over what it perceived to be matters of a maritime nature. As can well be imagined, rivalry ensued between the common law courts and the Admiralty Court which made for colourful legal history admirably depicted by Professor Wiswall in his book.[39] As noted by him, even a subject matter as obviously maritime as "wreck" featuring in the 1391 statute, was judicially construed in *Sir Henry Constable's Case*[40] in such a way that all cases involving wrecks were removed from the jurisdiction of the Admiralty Court into the domain of the common law courts. In that case, Sir Edward Coke, renowned for his antagonism against Admiralty jurisdiction, defined "wreck" as "that cast at ebb tide upon the shelf below the flood mark". It meant that only claims relating to occurrences seaward of the low watermark fell within the jurisdiction of the Admiralty Court. In other words, occurrences in the so-called foreshore, that is the space between the high and low watermarks, came under the purview of the common law courts. This was a major curtailment of the previous reach of the Admiralty Court which had jurisdiction in all matters relating to occurrences below the high watermark.[41]

The Ordinance of 1648 c. 112 settled the Admiralty Court's jurisdiction and subsequent Ordinances of 1651, c.3, 1654, c.21 and 1656, c.10 made it perpetual. It was the period when the Admiralty Court's clout soared to a peak but the legislative Restoration of 1660 resulted in their expiration. In the wake of this eventuality, the jurisdiction of the Admiralty Court waned into virtual oblivion although it was a gradual process that ended in the 1800s. Regrettably, it was a period of lull during which the Admiralty jurisdiction was limited to matters involving torts committed and contracts entered into on the high seas.[42] Interestingly enough, nowadays, very few contracts are entered into on the high seas except perhaps such things as salvage agreements, if they can at all be considered to be contractual arrangements as distinguished from agreements. Actions pertaining to the wages of seafarers or mariners also fell within the

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[39] *Ibid*.
[40] (1601), 5 Co. Rep. 106a.
[41] Wiswall, *supra* note 37, at 6.
[42] Mukherjee, *supra* note 2, at 36-37

purview of the Admiralty jurisdiction.[43] The period of the 1800s saw two distinctively different functions of the Admiralty Court. One was the matter of prize which was a part of the original jurisdiction of the Admiralty Court when it was first established; the other was civil maritime causes. This aspect of the Court's function was referred to as the instance jurisdiction. Actions in Admiralty could be brought either *in rem* or *in personam*; *in rem* actions being particularly frequent in proceedings involving seamen's wages, hypothecations, salvage, collisions and droits.[44] Also, suits in respect of charter-parties and freight in general average were cognizable by the Admiralty Court.

Even the physical location of the Admiralty Court is coloured by history. It is known that the earliest site of the Court recorded as the year 1410, was Horton's Quay near London Bridge, and from 1666 to 1860, it was located at the famous Doctors Commons, the bastion of the Admiralty practitioners and jurists.[45]

Two Admiralty Court Acts were enacted in 1854 and 1861, respectively. The former introduced a penalty for perjury in admiralty cases and under the latter, the Court was empowered to issue execution writs pertaining to judgments rendered, just as in the common law. The 1861 Act also ushered in jurisdictional reform whereby a claim for suffering damage done by a ship could be entertained. Incidentally, it was the great jurist Dr. Stephen Lushington who drafted much of that Act through which he enhanced the role of the Court by conferring on it a considerably expanded jurisdiction overall. On the downside, however, claims in general average were eliminated and jurisdiction with respect to cargo claims of English and Welsh shipowners were removed. While in some ways these reforms signaled a degree of jurisdictional retrogression, on the whole, the Admiralty Court gained more than it lost.

The reform of the Court in terms of gradual jurisdictional expansion eventually culminated in it rising to the prestige of being designated the "High Court of Admiralty". Numerous other matters were added to its jurisdictional reach including shipbuilding, equipping and repairing, life salvage claims and maritime liens over wages of masters and seamen, and claims with respect to bills of lading and damage suffered by cargo.[46] During the course of that formative period of acceleration, several stalwart judges presided over the Admiralty Court including Dr. Lushington mentioned above who was then succeeded by Sir Robert Phillimore. The maritime jurisprudence generated by the Court was extraordinary, to say the least. Sadly, the retirement of Dr. Lushington in 1857 marked the demise of Doctor's Commons. A landmark period of English legal history came to a virtual end. Following the retirement

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[43] Gold, *supra* note 36 at I-2 to I-3
[44] Mukherjee, *supra* note 42.
[45] See Steel, *supra* note 32, at vii.
[46] Gold, *supra* note 36, at I-6.

of Sir Robert, the last of the civilian Admiralty judges, the English Admiralty law establishment passed into the custody of the common law bar and bench. Notably significant in this regard is that the procedures incidental to Admiralty jurisdiction have remained much the same even to the present day.[47]

Without delving into the details of statutory developments impacting on English Admiralty law and jurisdiction of the subsequent times up to the era of international maritime conventions, suffice it to say that several pieces of legislation were enacted touching on matters maritime. Some of these were not quite consonant with common reason such as the jurisdictional merger of admiralty with such unrelated subject matters as probate and divorce, but that is a part of the history of the judiciary as inexplicable as it may be to the uninformed. Admiralty became a Division of the High Court of England. With the enactment of the Supreme Court of Judicature (Consolidation) Act 1928, it could entertain claims *in personam* in addition to actions *in rem*. The Merchant Shipping Act 1894 is worth mentioning as it stood the test of time for a good 101 years not only in the United Kingdom (UK) but also in almost all the former British colonial regimes until the relatively recent Merchant Shipping Act 1995 was enacted.

V. Admiralty Jurisdiction: The Attributes

The era of international maritime conventions heavily influenced not only the maritime law of the UK, both public and private but also the Admiralty jurisdiction.

Most importantly, the Arrest Convention of 1952[48] to which the UK became a party was given effect through the Administration of Justice Act 1956. The Convention created a uniform regime of claims in respect of which ships could be arrested in state parties, and was based on the premise that arrest was possible only if the claim in question was a maritime claim as defined in the Convention. The teleology of the convention was to provide the claimant with an instant security for his claim in the form of the arrested vessel as the subject asset. Notably, the Convention definition of "arrest" is "detention of a ship by judicial process to secure a maritime claim, but does not include the seizure of a ship in execution or satisfaction of a judgment". What this means in terms of UK law is that an unsatisfied judgment claimant cannot re-arrest a ship but must seek a writ of *fieri facias* or execution writ for enforcement of the judgment.[49]

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[47] For details on the rise and fall of Doctor's Commons see William Tetley, *Maritime Liens and Claims*, Montreal: International Shipping Publications, Yvon Blais Inc., 1989, at 22-25.

[48] International Convention for the Unification of Certain Rules of Law Relating to Arrest of Sea-Going Vessels, 1952, 439 *UNTS* 193

[49] See *The Alletta* [1974] 1 Lloyd's Rep 40

The corresponding legislation, rather than enumerating the maritime claims for which a ship could be arrested in the UK pursuant to the Convention, set out the "questions and claims" in respect of which the High Court could exercise its Admiralty jurisdiction.[50] The legislation also provided the impetus for the clarification of jurisdictional questions regarding the extension of *in rem* and *in personam* actions under the domestic law.[51] Furthermore, it addressed a number of new and expanded causes actionable in Admiralty including the notion of the sister-ship arrest.[52] Most importantly, as mentioned above, it served as the vehicle for the judicial founding of Admiralty jurisdiction although it is recognized that commencing an action *in rem* is equally valid and sufficient to found such jurisdiction. Indeed, where *in rem* proceedings have been brought against a ship, its arrest provides interim relief.[53] In practice, however, often a ship is arrested at the same time when a writ *in rem* is issued and served signifying the commencement of the action.

The Administration of Justice Act 1956 was succeeded by the Supreme Court Act 1981 in which the judicial placement of the Admiralty Court as a part of the Queen's Bench Division of the High Court continued. The Act reaffirmed the statutory basis for Admiralty jurisdiction in the modern milieu but went beyond the provisions of the Arrest Convention, 1952 in several respects. Subsequently, on October 1, 2009, it was renamed Senior Courts Act 1981 with no change in substance and is the name by which it is known at the present time. A claimant can invoke Admiralty jurisdiction pursuant to the Act which the Court may assert subject to the cause of action being pursuant to a claim enumerated in the Act. As one great Admiralty judge of recent times has eloquently stated –

> The distinguishing feature of Admiralty jurisdiction, which is recognized by international convention, is that an action can be brought directly against an offending ship by arresting the ship. If the shipowner wants to contest the claim he can do so only by submitting to the jurisdiction of the Admiralty Court which has arrested his ship.[54]

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[50] Francesco Berlingieri, *Berlingieri on Arrest of Ships*, Fifth Edition, London: Informa, 2011, at 174-175.

[51] Incidentally, the corresponding Canadian legislation, that is, the Federal Court Act of Canada includes in its section 22(2)(r), claims arising in connection with a marine insurance contract. This head is absent in the Arrest Convention, 1952 and the United Kingdom Senior Courts Act 1981. Otherwise, the Canadian list of maritime claims is much the same as the one described above. See Edgar Gold, Aldo Chircop and Hugh Kindred, *Essentials of Canadian Maritime Law*, Toronto: Irwin Law, 2003, at 118-120.

[52] Wiswall, *supra* note 37, at 149-152.

[53] Berlingieri, *supra* note 50; see also David C. Jackson, *Enforcement of Maritime Claims*, Fourth Edition, London: Informa Law, 2005, at 99

[54] Barry Sheen, Foreword to the First Edition of Nigel Meeson and John A. Kimbell, *Admiralty Jurisdiction and Practice*, London: Informa, 2011, at xv.

In effect, the Senior Courts Act 1981 continues to provide the domestic legislative vehicle for giving effect to the Arrest Convention, 1952 in the UK, and through which a maritime claimant invokes Admiralty jurisdiction. The Act, in its section 20 (1) paragraphs (c) and (d) provides that the Admiralty jurisdiction which the Court possessed prior to its commencement, is to continue, along with any jurisdiction directed by the rules of the Court to be exercised by it. The specific items of questions and claims, namely, items of subject matter jurisdiction, are set out in section 20(2) which are in effect, the claims *ratione materiae*. It must be noted that Admiralty jurisdiction can be restricted in terms of its geographical scope of application (*ratione loci*) as well to nationalities of litigants (*ratione personae*) and to ships of certain flags. There are several notable modifications to the legislation that go beyond the convention provisions. Perhaps the most significant of these are the claims relating to pollution damage under the Civil Liability Convention (CLC) and the Fund Convention.[55]

In 1999 another convention on ship arrest was adopted under the joint auspices of IMO and the United Nations Conference on Trade and Development UNCTAD).[56] Unsurprisingly, the UK refrained from subscribing to this convention as it was dovetailed to the International Convention on Maritime Liens and Mortgages, 1993[57] which was not accepted by the UK; for various reasons, it preferred to retain its largely case law based jurisprudence on that subject. Article 1(1) of the 1999 Convention defines "maritime claim" by reference to a list of claims consisting of some items that were absent in the 1952 Convention. Among them are the ones mentioned in Article 1(1) paragraphs (c) and (d) as depicted below:

> (c) salvage operations or any salvage agreement, including, if applicable, special compensation relating to salvage operations in respect of a ship which by itself or its cargo threatened damage to the environment;
> (d) damage or threat of damage caused by the ship to the environment, coastline or related interests; measures taken to prevent, minimize, or remove such damage; compensation for such damage; costs of reasonable measures of reinstatement of the environment actually undertaken or to be undertaken; loss incurred or likely to be incurred by third parties in connection with such damage; and costs, or loss of a

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[55] International Convention on Civil Liability for Oil Pollution Damage, 1992 (CLC), 1956 *UNTS* 255; International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (FUND), 1992, 973 *UNTS* 3.

[56] International Convention on the Arrest of Ships, 1999, 2979 *UNTS* 3; U.N. Doc. A/CONF 188/6 (March 12, 1999)

[57] *UNTS*, Vol. 2276, at 39; Doc. A/CONF.162/7

similar nature to those identified in this subparagraph (d);

The provision relating to damage to the environment in paragraph (d) above is conspicuously absent in both the 1952 Convention as well as the Senior Courts Act 1981 although it is arguable that in the latter, the concept can be accommodated in the words "any claim for damage done by a ship", and in the former, at least partially, in the phrase "damage caused by any ship in collision or otherwise" by way of the words "or otherwise". That said, the specificity of the language used in the 1999 Convention is doubtlessly more desirable to ensure certainty. Furthermore, it is to be observed that in the 1999 Convention there is provision for claims pertaining to insurance premiums whereas there is no mention of that in the 1952 Convention or the Senior Courts Act 1981. Similarly, there is no mention of commissions, agency fees or brokerage fees in those two instruments but in the 1999 Convention, they are present. It is noteworthy, however, that dock charges and dues are in fact included in the Senior Courts Act 1981 as they are in the 1999 Convention but they are absent in the 1952 Convention. It can be summarily concluded that the 1999 Convention provides for more claims for which a ship can be arrested than does the 1952 Convention, and even with respect to the Senior Courts Act 1981 there are some claims which do not appear in the list of questions and claims in section 20(2) of that legislation.

VI. Admiralty Procedures

As alluded to above, the Admiralty jurisdiction of courts comprising substantive law matters including *ratione materiae*, is distinctively different from the common law jurisdiction of courts in the countries that follow that legal system. In view of that verity, it is important to know and understand the procedural peculiarities of Admiralty. In the prevailing practice of the UK, procedures for enabling efficiency and functionality are promulgated as Orders pursuant to the Rules of Court[58] made under principal legislation pertaining to Admiralty jurisdiction, namely, the Senior Courts Act 1981. The Rules include such matters as the issue and execution of warrants of arrest for ships, practical effectuation of arrests, service of writs *in rem* and *in personam* within and out of jurisdiction, and caveats against arrest and release of ships. The Rules also address such matters as preliminary acts, security and bail, the office, powers and duties of the Admiralty Marshall who is an all-important officer of the Court, procedures for interveners, orders for appraisement and sale of a ship and determination of priorities, orders for sales of other maritime property,

[58] See Rules of the Supreme Court, Order 75 (July 1, 2019)

forfeiture proceedings in relation to ships and other maritime property and actions pertaining to limitation of liability.[59]

The procedural elements mentioned above are relevant in countries that belong to the civil law system but not under the rubric of any specialized and distinctive Admiralty jurisdiction; rather by virtue of jurisdiction inherent in the courts. Admiralty is therefore not pertinent in these countries.

VII. Wet and Dry: Colloquialism and Confusion

In the present milieu of shipping, it seems to be fashionable in certain quarters to use the terms "wet law" and "dry law" to describe matters that fall under Admiralty and those that do not, but nonetheless possess a "maritime" character in that they involve ships in some shape or form such as in commercial ventures. This characterization is prevalent in the UK but not in Canada or the U.S. as elaborated below.

In the context of China, apart from the indisputable fact that "Admiralty" whether as a word in its ordinary sense or as a legal phenomenon has absolutely no relevance as previously mentioned, it is noted with dismay that the term is erroneously and indiscriminately used without any conceivable rationale, historical or otherwise, in university law school circles as well as in describing the mandates of the maritime courts. If in fact the descriptions "wet" and "dry" ("wet" to signify admiralty subject matters) are imported from English maritime law jargon as claimed by some in China, it must be stated emphatically that the expressions have no formal or official standing in England or Wales, and constitute nothing more than colloquial usage. Admittedly, the jargon is well understood by those in the know in the circle of maritime law practitioners and among students and teachers in some law schools. Recently, this author had occasion to read an advertisement for a lecturer's position in the Law Faculty of a renowned British University in which one requirement of the job was teaching experience in wet and dry maritime law subjects. In that context, it needs to be pointed out that under the Senior Courts Act 1981 which is the statutory source of Admiralty jurisdiction, the so-called "dry" subject matters with the exception of marine insurance do fall under Admiralty jurisdiction. Thus, without further ado, the "wet" and "dry" characterizations are anomalous insofar as Admiralty jurisdiction is concerned under UK law. A claimant who wishes to proceed *in rem* will invariably invoke Admiralty jurisdiction by issuing a writ *in rem* or by arresting the ship if the ship is the object of the action. Needless to say, even if a claimant has the option to proceed *in personam*, there are advantages to proceeding *in rem* which the claimant may

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[59] See Proshanto K. Mukherjee, "An Introduction to Maritime Law and Admiralty Jurisdiction", Chapter 1 in *Admiral: A Compendium*, Accra: Ghana Shippers' Authority, 2016, at 42-43.

not wish to forego. In the context of China, the terms "wet" and "dry" are utterly meaningless and inconsequential; there is no rationale for suggesting the institution of Admiralty jurisdiction as there is no such thing as *in rem* actions.

In Canada and the U.S., the Admiralty law and jurisdiction encompass both the so-called wet and dry aspects of maritime law. As such, both the *lex maritima* and *lex mercatoria* of Roman law are subsumed within Admiralty jurisdiction in those countries. In respect of marine insurance, Professor Tetley observes that where marine insurance is collateral or ancillary to some other contract over which the U.S. Admiralty Court does have jurisdiction, that jurisdiction should extend to the collateral marine insurance regardless of whether or not the Court has jurisdiction over marine insurance *per se* in a particular instance.[60] In the U.S., it has been held that a marine insurance contract being a maritime contract is subject to Admiralty jurisdiction.[61] In so far as Canadian maritime law is concerned, the Federal Court Act provides that the Court has jurisdiction to hear "any claim arising out of or in connection with a contract of marine insurance".[62] Incidentally, in Canada, it is the Federal Court that is vested with Admiralty jurisdiction.

VIII. Conclusion

To bring this thought-provoking discussion to conclusion, it is stated in summary that an attempt is made in this article to draw the attention of readers to the anomalous use of the word "Admiralty" in terms of the captioned law as well as the distinctive jurisdiction that it engenders. An overview of the historical roots of Admiralty and the chronological development of the jurisdiction and law in that field is presented stressing its significance that is often muddled and misunderstood. The phenomenon of Admiralty is entrenched in the common law legal system but is largely irrelevant to the civil law system because of the absence of any historical foundation in almost all the countries that are a part of that legal tradition. No doubt the present work provides only a synoptic bird's eye view of the subject, but it is aimed at instigating a re-think of the phenomenon of Admiralty and providing the impetus for consideration by scholars and practitioners alike in places where it is unfamiliar territory within the legal terrain.

While maritime law is steeped in tradition and antiquity, it is at once

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60 Tetley, *supra* note 47, at 380.

61 *DeLovio* v. *Boit*, Fed. Cas. 418 at 443-4 (case No. 3776) (D. Mass. 1815). See also *Insurance Co*. v. *Dunham*, 78 U.S. (11 Wall.) 1, at 35 (1871) in which the Court expressly distanced itself from the judicial view of the English courts in this matter. Both these cases are cited and briefly explained in Tetley, *ibid.* at 380-382.

62 R.S.C. 1970, 2nd Supp, c.10, s. 22(2)(r). See Tetley, *ibid*. at 389.

dynamic and organic in terms of growth and development. It is incumbent on makers of policy and law as well as jurists, practitioners and captains of industry in the maritime field, to fully appreciate the nuances of legal glossary such as the term "Admiralty" and the implications of the special kind of jurisdiction with which it is associated. All involved in this field of endeavour should pay sufficient heed and attention to avoid misapprehensions of specific terminology, precepts and practices in the maritime law sphere.

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This article is published in *The Asian Business Lawyer (ABL)* Vol. 26.

The publication of *ABL* Vol. 26 has been financially supported by KIM & CHANG

Introduction of the Carriage of Goods by Sea Act in Korea: (Article 791 to Article 816 of the Korean Maritime Law)

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ABSTRACT

The Maritime Law section in the Korean Commercial Code (KCC) was revised in 2008. It is deemed that KCC has systematically changed the structure to provide better understanding of the Maritime Law of KCC. A contract of the carriage of goods comes into effect when a carrier agrees to transport the goods and a consignor pays the freight in return. In this regard, the carrier has an obligation to carry the cargo as promised and should be liable for the cargo damages not only during transportation but also delay in delivery in Korea. In addition, on the one hand, KCC provides duty of care for seaworthiness to a carrier. On the other hand, the carrier can enjoy the exemption from liability for error of navigation and fire, and the legal exemption of KCC Article 796. The carrier shall be discharged from all liability unless suit is brought within one (1) year and it applies that the carrier's liability is based on amounts of 666.67 SDR[1] per package or unit, or 2 SDRs per kilogram of gross weight, whichever is the higher. Due to the Korean Supreme Court's decision, the independent contractor is entitled to claim the limitation of liability of the carrier in accordance with the Himalaya Clause on the bill of lading. Additionally, adopting network liability system, KCC provides a combined transport provision that is applicable only including sea carriage. This paper mainly focused on the introduction of the carriage of individual goods by sea under the Korean Maritime Law, which prescribes the rights and liabilities of the shipper, consignee and the carriers in light of Korea's legislation and the rulings of the Korean Supreme Court.

KEYWORDS: Carriage of Goods, Maritime Law, Hague Visby Rules, Shipper, Consignee, Carrier, Liability, Combined Transport, Seaworthiness, Liability Exemption, Package Limitation, Himalaya Clause

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[1] SDR (Special Drawing Rights), the exchange rate of USD1.42/SDR on the date of 12 March 2021 in Korea. 〈http://fx.kebhana.com/FER1501M.web〉

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I. Introduction

Amended Korean Maritime Law in 2007 has been effective since 2008. Because of KCC's unsystematic and unorganized contents, KCC had been criticized for not understanding easily. In this regard, the current KCC can be more user-friendly and it was an opportunity to upgrade Korea to a next level of maritime country.

Under current KCC, the provisions regarding the carriage of individual goods provide from Article 791 to Article 816 of KCC. Since KCC has adopted most of the provisions of the Hague-Visby Rules 1968,[2] the meaning is similar to that of the Hague-Visby Rules. According to Article 799(1), KCC shall be compulsorily applicable, and any agreement or contract between the parties to reduce or exclude any obligation or liability of a carrier contrary to KCC shall be null and void. Also, under Article 798(1), the provisions regarding the liability of carriers shall apply not only in contract but also in tort claim.

A shipper and/or a consignee may request the carrier to suspend, demand or return the goods, *etc.* (Article 815) while he/she also has duties to provide a carrier with cargo (Article 792), to deliver documents necessary for transportation (Article 793) and to accept the cargo once he/she has received a notice of arrival (Article 802).

According to Article 807(1), a carrier shall have a right to demand the payment of freight charges and, under Article 807(2), the shipmaster shall have a retention right until the payment is made. In addition, a carrier shall have the right to sell the cargo at auction (Article 808) and to deposit the cargo if a consignee has neglected the acceptance of cargo (Article 803). On the contrary, a carrier shall bear the overriding duty of seaworthiness (Article 794) and have the duty of care for the entrusted cargo (Article 795) including a combined

[2] Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading in 1968 (hereinafter referred to as the "Hague Visby Rules").

transportation (Article 816).

Under KCC, a carrier shall be discharged from all liability unless suit is brought within 1 year of delivery or of the date when the goods should have been delivered (Article 814(1)) and a carrier can enjoy certain grounds for exclusion of carriers' liability (Article 796) and limits on liability such as package limitation (Article 797).

This study intends to provide better understanding of Section I of Carriage of Individual Goods by Sea Act in Korea and to achieve more predictability (and foreseeability) under KCC with the interpretation of laws and Korea Supreme Court's decisions.

II. Legislative History and Contents of KCC

Korean Maritime Law was enacted on 20 January 1962. About 30 years later, on 31 December 1991, it was partly amended and 16 years thereafter, on 3 August 2007, it was substantially re-amended. The Amended Maritime Law Section (Book V- Maritime Commerce) is comprised of Chapter I (Marine Enterprise) and Chapter II (Carriage and Charter). The said Chapter II provides that Section I (Carriage of Individual Goods), Section II (Contract of Carriage of Passengers), Section III (Voyage Charter), Section IV (Time Charter), Section V (Bareboat Charter) and Section VI (Transport Document). None of the international instruments relating to the carriage of goods by sea, including the Hague Rules,[3] Hague-Visby Rules, Hamburg Rules[4] and Rotterdam Rules,[5] have been signed or ratified by Korea.

Nevertheless, Korea has adopted most provisions of the Hague Visby Rules in the Korean Maritime Law for carriage of individual goods.

III. Rights and Duties of Carrier

1. Rights of Carrier

1) Right to Demand the Freight Charge

The carrier is entitled to demand the freight charge from the shipper in

[3] International Convention for the Unification of Certain Rules of Law relating to Bills of Lading 1924 (hereinafter referred to as the "Hague Rules")

[4] United Nations Commission on the Carriage of Goods by Sea 1978 (hereinafter referred to as the "Hamburg Rules")

[5] United Nations Commission on Contracts for the International Carriage of Goods wholly or Partly by Sea 2008 (hereinafter referred to as the "Rotterdam Rules")

return for freight transportation.[6] The carrier may not demand the freight charge if the cargo has been damaged in part or in whole not by the shipper's fault, then the carrier shall return the charge he/she has received.[7] However, if the cargo damage is caused by its nature or inherent defects or the negligence of the shipper, then the carrier may demand the full amount of the freight charge.[8] KCC indicates that a consignee shall also pay the freight charge when he/she receives the cargo according to the carriage contract or the bill of lading.[9] The Korean Supreme Court held that the shipper is not immune from the duty to pay the freight charge under FOB(Free on Board[10]) terms.[11] But of course, the Korean Supreme Court confirmed in *case 94da27144* dated 9 February 1996 that the consignee or the holder of the bill of lading shall not have an obligation to pay the freight charge as long as he/she does not receive the cargo.[12]

2) Carrier's Retention Rights and Auction Rights

According to KCC Article 807(2), the payment of the freight charge and/or other incidental expenses, *etc.* is not made by the shipper nor the consignee, the carrier may not have the duty to deliver the cargo and he/she has a right to retain it until the payment is paid.[13]

If the payment is not received, the carrier has a right to sell the cargo at auction for preferential payment.[14] Even after the carrier delivered the cargo, he/she still may exercise the same right if the date of delivery has not passed more than 30 days or a third party has not possessed the cargo.[15]

3) One Year Time Bar

In the matter of the time bar of the claims and obligations between a carrier

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[6] Kisu Lee, Byeonggyu Choi, Inhyeon Kim, *Insurance and Maritime Law*, 9th (Parkyoungsa, 2015), at 611.

[7] KCC Article 815, 134(1).

[8] KCC Article 815, 134(2).

[9] KCC Article 807(1).

[10] Korea International Chamber of Commerce, *Incoterms 2020*, (KCCI, 2019), at 184.: FOB means that the shipper delivers the cargo on the vessel or at the named port of shipment, which is nominated by the buyer.

[11] Korean Supreme Court case *2011.5.26. Docket No.2011da14473:* The Court held that the carrier may demand the freight charge to the shipper if it is stipulated by bill of lading that the holder of the bill of lading shall pay the freight charge.

[12] Junsun Choi, *Insurance Law & Maritime Commercial Law & Air Transportation Law*, 9th (Samyoungsa, 2015), at 472.

[13] Kisu Lee, Byeonggyu Choi, Inhyeon kim, *Supra*, at 615.

[14] KCC Article 808(1).

[15] KCC Article 808(2).

and a shipper and/or a consignee, which shall be terminated unless whatever the causes for the judicial claim is brought within one year from the date the cargo is delivered or will be delivered, however, the said time bar can be extended by a mutual agreement between the parties.[16] The Hague Visby Rules Article 3(6) only indicates claims for the shipper against the carrier[17] while KCC applies to claims and obligations from both the carrier and the shipper and/or the consignee.

In terms of the meaning of *"judicial claim"*, Korean High Court holds that, under KCC's adoption of the Hague Visby Rules and KCC Article 814(2), it is not only interpreted as a narrow meaning of lawsuit itself but also interpreted as a broad meaning of applications or claims in legal proceedings such as lawsuit, arbitration, order for payment application, notice of arbitrator selection, civil mediation application, bankruptcy application, application for distribution under Civil Execution Act, notice of lawsuit, and participation of shipowner's limitation of liability procedures, *etc.*[18]

The Korean Supreme Court rendered that the liability of carriers shall also apply to liability for compensation damage due to unlawful acts of carriers under Article 798(1) and for that reason, the consignee's claim against the carrier shall be terminated within one year.[19] The mainstream opinion in academia is that *"unlawful acts"* include carrier or his or her employees' acting in bad faith[20] and the carrier's intention or gross negligence causing damage to the cargo such as the act of delivering the cargo to an unauthorized person who does not present the bill of lading.[21]

Therefore, the one year time bar is applied whatever the causes for the claims are, whether it is a demand for a claim based on breach of contract or a claim for damages based on tort, and the cause of claim is due to the carrier's reckless actions, gross negligence or even willful misconduct. Since Article 814 of KCC is a compulsory clause, the period may be extended by an agreement between the parties but any agreement shorter than one year time bar between the parties is not valid.

However, in relation to consolidated carriers' liability, the time bar clause for nine months in a bill of lading is valid if the accident occurred during inland

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16 KCC Article 814(1).

17 Hague Visby Article.3(6): *". . . Subject to paragraph 6bis the carrier and the ship shall in any event be discharged from all liability whatsoever in respect of the goods, unless suit is brought whining one year of their delivery or of the date when they should have been delivered. This period, may however, be extended if the parties so agree after the cause of action has arisen."*

18 Seoul High Court case *2012.4.3. Docket No. 2011na37553.*

19 Kijun Yoo, *Marine Insurance Case Study*, 1st (Doonam, 2002), at 260; Korean Supreme Court case *1997.4.11. Docket No.96da42246*.

20 Inhyeon Kim, *Maritime Law*, 6th (Beobmunsa, 2020), at 277.

21 Jonghyun Choi, *Maritime Law*, 2nd (Parkyoungsa, 2014), at 336.

transportation.[22]

Meanwhile, an action for indemnity to be brought by the contractual carrier against the actual carrier shall not be time barred until three months have passed from the date of settlement agreement between the contractual carrier and the shipper; or from the date of legal action brought against the contractual carrier.[23] This KCC Article is from the Hague Visby Rules and the Hamburg Rules.[24] In this case, under KCC Article 814(3), if the contractual carrier gives pre-suit notice to the third party such as the actual carrier, the three months period of time bar shall not run until the lawsuit is determined or terminated. As such, without bringing another indemnity claim against the third party (*i.e.* the actual carrier), the carrier (*i.e.* the contractual carrier) has full three months benefit of time bar once he/she has given notice. In my opinion, KCC Article 814(2)(3) would be highly appropriate to protect the contractual carrier because, in many cases, he/she would not know the cargo damage until a shipper or a consignee brings the claim against him/her.

4) Package Limitation

As regards the limitation of the carrier's liability,[25] KCC has adopted the Hague Visby Rules.[26] It provides that such limit shall be 666.67 SDR per package or shipping unit or 2 SDR per kilogram weight, whichever is the higher.[27] It seems that KCC use the expression of *"shipment unit"* from the literal translation of the Hamburg Rules.[28] The liability limitation of carrier in

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[22] Korean Supreme Court case *2009.8.20. Docket No.2008da58978.*

[23] KCC Article 814(2).

[24] Junsun Choi, *Supra,* at 476.

[25] The Hague Rules limits the carrier's liability to 100 pounds sterling per package or unit; the Hamburg Rules limits the carrier's liability to 835SDR per package or 2.5SDR per kilogram, whichever is higher; and the Rotterdam Rules limits the carrier's liability to 875SDR per package or 3SDR per kilogram, whichever is higher.

[26] The Hague Visby Article 4(5)(a): *"Unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading, neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the goods in an amount exceeding the equivalent of 666.67 units of account per package or unit or units of account per kilo of gross weight of the goods lost or damaged, whichever id the higher."*

[27] KCC Acticle 797(1).

[28] Hyeonkyun Lee, Sanghyup Lee, *A Study on the interpretation of the shipping unit in package limitation - Comparison and Analysis among Australian, English, and Korean court decisions* – The Korean Comparative Private Law Vol.27 No.2, The Korean Association of Comparative Private Law (2020. 8.), at 604.

China[29] and Japan[30] is the same as Korea.

However, the said package limitation shall not be applied if intention includes the gross negligence on the part of the carrier itself, or reckless behavior while recognizing the possibility of damage, which is considered as the carrier's willful misconduct from the view of common law.[31] This high standard of proof is so difficult to proof so that it is extremely rare to see the case in which the carrier's limitation of liability per package is denied.[32] [33] Nevertheless, the Korean Supreme Court held that the carrier's right to limit his/her liability is denied because the company's deputy director (who should have loaded the cargo in the hold of the vessel but he did it on deck) is within the scope of the carrier, and the deputy director's decision is related to the carrier's willful misconduct or other reckless act or omission while recognizing the concern about the incurrence of the cargo damage.[34] In my opinion, it is hardly acceptable that the carrier's decision to load the cargo on deck proves his intention to damage the cargo and/or him having recognized the damage occurrence. On the contrary, the carrier assumes that the cargo damage may not occur during the transit from the loading port to destination port.

Meanwhile, under KCC Article 797(3), limits of liability shall not be applied in the case when a shipper is notified and stated the kind and value of the cargo in the bill of the lading or other transport contracts at the time the shipper delivers cargo to a carrier.

With respect to the container transportation, KCC provides that when a bill of lading discloses on its face what is inside the container, and those contents shall be deemed one package or unit.[35] In this regard, the Korean Supreme Court held that "*package*" is designed for protection and easy handling of cargo, and the meaning of package shall be established according to society's understanding in general and customs in the shipping industry; as such, the Court ruled that the unknown clauses such as "*Said to Contain*" or "*Said to Be*" shall not be influenced to decide "*package*" and the smallest

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[29] Maritime Code of the People's Republic of China, Article 56, "*The carrier's liability for the loss of or damage to the goods shall be limited to an amount equivalent to 666.67 Units of Account per package or other shipping unit, or 2 Units of Account per kilogramme of the gross weight of the goods lost or damaged, whichever is the higher, . . .*"

[30] Law for International Carriage of Goods by Sea, Article 13, "*(1) The carrier's liability for a package or unit of the goods shall be the higher of the following: 1) An amount equivalent to 666.67 unit of account: 2) An amount equivalent to 2 units of account per kilo of goods weight of the goods lost, damaged or delayed."*

[31] Inhyeon Kim, *Footnote 20 Supra,* at 261.

[32] *Ibid*, at 262.

[33] Inhyeon Kim, *Maritime Case involving the Carrier's Rights to Limit its Liability Denied – Focused on the Korean Supreme Court case 2006.10.26. Docket No.2004da27082* - Human Rights and Justice Vol 370 (2007), at 168.

[34] Korean Supreme Court *case 2006.10.26. Docket No.2004da27082.*

[35] KCC Article 797(2)(i).

package unit is considered as a "*package*" in the bill of lading if what constitute a "*package*" is not expressly discloses in the said bill of lading.[36] In this regard, it is more likely that the Court would decide in favor of the shipper on the interpretation of the meaning of "*package*" in Korea.

5) Paramount Clause in Bill of Lading

In principle, Korean law applies to the bill of lading given that the carriage of goods was from Korea and the bill of lading was issued in Korea. Nevertheless, if the liability of paramount clause in the bill of lading is lower than the clause in the governing law (*i.e.* Korean law, English law, *etc.*), governing law applies.

However, Korean Supreme Court rendered that the parties' autonomy shall be considered when the bill of lading is issued with so-called paramount clause in which the liability matter should be governed by US Carriage of Goods by Sea Act (US COGSA) even if the bill of lading is subject to English governing law.[37] The Court's decision reveals that the paramount clause of US COGSA for liability issue in the bill of lading shall be choice of law and it is not a kind of incorporation of the law when referring the bill of lading.[38]

This ruling has caused many controversies. One of them is that whether the paramount clause of the Hague Rules, which is not a law of the country but a convention, should be applicable to the bill of lading. For that purpose, it is considered the carriers may allege that this paramount clause should be valid because it is a kind of choice of law, whereas the consignee may argue that it should be invalid because it is a violation of the compulsory limitation of liability provision (*i.e.* 666.67 SDR per package or unit or 2 SDR per kg, whichever is higher) in Korea.

Under the foregoing circumstances, although the above Supreme Court's ruling recognizes a particular country's liability limitation and in no event shall the carrier be liable for more than the amount of damage actually sustained in the bill of lading but I have doubt that the parties' autonomy in the form of paramount clause may rule out the compulsory rules of the English law in this case.

Meanwhile, as regard the Hague Rules incorporated into a bill of lading as a paramount clause (limits on liability to 100 pounds sterling per package or unit), the Korean Supreme Court held that the meaning of figure refers to the

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[36] Korean Supreme Court *case 2014.7.2. Docket No.2002da44267.*

[37] Korean Supreme Court *case 2018.3.29. Docket No.2014da41698;* Sunk Keuk Cho, "*Cargo News*" 2018. June Vol. 267, at 54.

[38] Inhyeon Kim, *The Effects of US COGSA Paramount Clause in the B/L -Focused on the KSC decision 2018.3.29. Docket No.2014da41469,* The Journal of Korea Maritime Law Association Volume 40, No.2, The Korea Institute of Maritime Law (2018. 1.), at 276.

gold value pound (about USD21,000) not to 100 pounds sterling (about USD170).[39]

2. Exemption for Carrier

A carrier shall be liable to pay compensate for any damage arising out of his/her failure in exercising duty of care for seaworthiness and cargo, but in the event of a loss due to certain reasons, the carrier's responsibility is exempted.

According to KCC Act 795(2), a carrier's liability shall be completely exempted in the cases of damages occurred by error of navigation and fire. In addition, KCC Act 796 specifies reasons for exclusion of carrier's liability in which the burden of proof is shifted from the carrier to the claimant.

1) Exemption on Error of Navigation

Error in navigation is one of the reasons for carrier's exemptions of liability. An error of navigation means failing to do the duty at a ship operation or management. An error of navigation only applies whilst the ship is on a voyage and when neglect or default in the management of the ship exists, and when a loss occurs due to the act of a shipmaster, a crewman, a pilot, or other employees navigating or managing the ship.[40]

Beneficiaries from the error of navigation are a carrier and any direct or indirect performance assistant being used by the carrier. Thus, the burden of proof shall be on the carrier. Accordingly, the carrier should be able to prove that he/she did not fail to provide the duty of care for seaworthiness and the accident occurred at the commencement of the voyage.

2) Exemption for Fire

Fire is another carrier's exemption defense of liability.[41] However, if the fire was caused by bad faith or negligence of the carrier, then the carrier shall not enjoy this exemption.

The reason for recognizing fire exemption is that fire on board usually incurs a huge amount of loss, and when it happens, it is very difficult for the carrier to provide evidence to prove that he/she has no fault or negligence.[42] Considering the Korean Supreme Court's decision, the Court held that the carrier is also fire exempted in the event of a fire which transferred from another

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[39] Korean Supreme Court *case 2014.6.12. Docket No.2012da106058.*
[40] KCC Article 795(2).
[41] *Id.*
[42] Inhyeon kim, *Footnote 20 Supra*, at 245.

vessel.[43]

3) Other reasons for Exemptions

According to Article 796 of KCC, a carrier shall be exempted from liability for compensation under certain circumstances. In these cases, the claimant should prove that the damage would not have occurred if the carrier had not failed to exercise due care. As such, the claimant has the burden of proving the unseaworthiness of the vessel in every aspect.

The details of Article 796 are as follow;

A. Peril or accidents on the sea or on other navigable waters;

The damage caused by the inherent risk of sea such as Heavy weather, storm, collision, sinking and stranding, *etc.* In Korea, heavy weather exemption is allowed at least Beaufour Scale 11.[44] [45]

B. Force majeure (Act of god);

Act of god is an instance of uncontrollable natural forces that cannot reasonably foresee or prevent (*e.g*. flood or earthquake, tsunami and lighting, *etc*.)

C. A war, riot, or civil war;

A cargo damage is occurred in the duration of the war or a cargo is taken by the mob or the loss arises the state of civil war, *etc.*

D. Piracy and other similar acts;

This is the case where the cargo (*i.e*. fruits or meats, *etc*.) is lost or damaged because of the long term voyage for the reason of the pirate plunder or activity.

E. Judicial seizure, quarantine restrictions and other restrictions by public authorities;

It means to say that the vessel arrest based on the law of the vessel's flag country without the carrier's fault or the seizure of the cargo due to the mandatory quarantine inspection or trade embargo by the public authority.

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[43] Korean Supreme Court case *2002.12.10. Docket No.2002da39364*: The Court ruled that a fire is not limited only the origin of fire occurred in the ship which was carrying the cargo or the fire directly took place the fire in the ship.

[44] Inhyeon kim, *Footnote 20 Supra*, at 250.

[45] *"a scale in which the force of the wind is indicated by numbers from 0 to 12"*〈https://www.merriam-webster.com/dictionary/Beaufort%20scale〉

F. Acts of the consignor or the owner of the cargo or his/her employee;

It represents that cargo loss or damage occurs because the shipper provides a wrongful instruction to handle the cargo or submits a false report in relation to the inherent nature of the cargo.

G. Strike, lockout or other acts of dispute of a ship;

Cargo loss or damage occurs due to the industrial actions (*i.e.* strikes, sabotage, lockout of a ship, *etc.*) of the seamen or dock workers, which obstruct the normal operation of a business.

H. Salvage of life or property at sea or a deviation by this reason or a deviation by other justifiable ground;

Deviation for saving life and property for other ships or for deliberately avoiding the capture or seizure of the ship by the pirate, *etc.*

I. Insufficient packing of the cargo or incomplete markings;

A carrier shall not be liable for any loss, damage or expense caused by insufficient packing or incomplete markings of cargo when such packing or markings has been performed not by the carrier.

J. Particular nature or latent defect of the cargo;

In the matter of discoloration of phenol, the Korean Supreme Court held that the cargo's particular nature means a unique characteristic nature that it contains compared with other cargo, whereas the latent defect of the cargo is a specific defect subject to the cargo's unique condition which cannot be easily detected by the normal procedure.[46]

K. Latent defect of a ship

While the Hague-Visby Art.4(1)[47] said that the carrier has the burden of proving that unseaworthiness has not caused the damage to the cargo (*i.e.* no causal relationship), but, on the contrary, the burden of proving is shifted to the clamant in KCC.[48]

4) Himalaya Clause

As long as the carrier's contract contains a Himalaya clause, in other words a Himalaya clause is incorporated into the bill of lading, the shipmaster, crew, stevedore, pilot, terminal operator, *etc.* will be able to avail themselves of the

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[46] Korean Supreme Court case *2006.5.16. Docket No.2005da21593.*

[47] *". . . Whenever loss or damage has resulted from unseaworthiness the burden of proving the exercise of due diligence shall be on the carrier . . ."*

[48] Inhyeon kim, *Transport Law in South Korea*, 3rd (Wolters Kluwer, 2017), at 112.

carrier's benefit including the limitation of liability.

Under KCC Article 798(2) and 798(4), only shipmaster, employee and an agent of a carrier enjoy as the beneficiaries for limitation of liability. Independent contractors such as warehouse keeper and terminal operator do not include in relation to the scope of the beneficiaries. In this regard, the issue was raised whether a Himalaya clause can be incorporated into the bill of lading, and thus a third party, who is not a party to the contract, is also entitled to enjoy the carrier's defense including limitation of liability.[49]

For that purpose, the Korean Supreme Court upheld that the Himalaya clause, which is the backside of a bill of lading, shall extend limitation of liability to independent contractors working in the carriage of cargo industry.[50] The Korean Supreme Court also identified applicable independent contractors in the carriage of cargo industry including direct and indirect subcontractors (*e.g*. truck, marine, and air carriers), loading and unloading workers, warehouse keeper,[51] terminal operators, and inspectors.[52]

Thus, it is deemed from the Court's ruling that, as long as the party (*i.e.* independent contractors, *etc.*) is identified in the clause on the bill of lading, the party is entitled to claim the limitation of liability of the carrier in accordance with the Himalaya Clause, which is proper and acceptable.

2. Duties of Carrier

1) Duty of Care for Seaworthiness

A carrier has the duty of care for seaworthiness.[53] According to KCC Article 794, a carrier shall be liable to compensate for damage if he/she cannot prove that the shipmaster, the crew, or other employees of a ship have not failed to exercise due care at the time of commencement of the voyage. The seaworthiness obligation shall be applied: (i) make sure the ship is safe to sail; (ii) on board the necessary crew; (iii) maintaining the ship refrigerator storage

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[49] Cheonsu Kim, *Legal Disputes Arising from Mis delivered Cargo in Korea and Korean Judicial Precedents for Import Marine Carriage of Goods*, The Journal of Korea Maritime Law Association Volume 30, No.1, The Korea Institute of Maritime Law (2008. 4.), at 201.

[50] Korean Supreme Court case *2007. 4. 27. Docket No.2007Da4943:* The Court rendered that terminal operator shall be regarded as an independent contractor.

[51] Korean Supreme Court case *2004. 2. 13. Docket No.2001Da75318:* The Court held that warehouse keeper shall be regarded as an independent contractor.

[52] Seryoun Choi, *A Comment on the Korean Supreme Court's Judgement of 27 April 2007, Case No.2007Da4943 on the Legal Status of a Freight Forwarder and Applying the Himalaya Clause*, The Journal of Korea Maritime Law Association Volume 30, No.1, The Korea Institute of Maritime Law (2008. 4.), at 134.

[53] Marine Insurance Act 1906 Article 39(4): *"A ship is deemed to be seaworthy when she is reasonably fit in all respects to encounter the ordinary perils of the seas of the adventure insured."*

room, and other parts of the ship to load the cargo in a suitable condition for reception, transportation and preservation of shipment.

2) Duty of Care for Cargo

Under KCC Article 795(1), a carrier has an obligation to carry the cargo as promised. In this regard, the carrier shall be liable for the cargo damages or late arrival of the cargo unless it is proved that the carrier and his or her crew or other employees of a ship have exercised due care during the receipt, loading, stowage, transportation, storage, unloading and delivery of cargo.

With respect to a consignee's negligence to receive cargo, a shipmaster shall deposit or deliver the cargo to a place authorized by a customs or other authorities and the shipmaster shall immediately issue a notice to the consignee, and then it is considered the cargo has been delivered to the bill of lading holder or another consignee (KCC Article 803).

The carrier's scope of the obligation under KCC is different from that the Hague-Visby Rules. KCC extends its scope of application from receipt of the cargo until discharging to delivery (port to port),[54] which is broader than the period of coverage of the Hague-Visby Rules (tackle to tackle).[55] In particular, KCC provide compensation not only loss or damage to the cargo during transportation but also delay in delivery, which is the same as Hamburg Rules[56] and Rotterdam Rules.[57]

IV. Rights and Duties of Shipper and Consignee

1. Rights of Shipper and Consignee

1) To Fulfill the Carriage Contract

A shipper executes a carriage contract with a carrier. In this regard, the shipper has a right to demand the carrier to proceed with that carriage contract accordingly and, if the carrier does breach the contract, the shipper may have a right to terminate it and/or to claim for damages against the carrier.[58] Also,

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[54] KCC Article 795(1) provides that the carrier has the obligation of due care in relation to the receipt, loading, stowage, transportation, storage, unloading and delivery of cargo.

[55] Hague Visby Article 2 describes that the carrier has the obligation of due care in relation to the loading, handling, stowage, carriage, custody, care and discharge of the cargo.

[56] Hamburg Rules Article 5(1) provides that "*The carrier is liable for loss resulting from loss of or damage to the goods, as well as from delay in delivery, . . .*"

[57] Rotterdam Rules Article 17(1) provides that "*The carrier is liable for loss of or damage to the goods, as well as for delay in delivery, . . .*"

[58] Inhyeon Kim, *Footnote 20 Supra*, at 280.

under KCC 815 and 139(1), the consignor has a right to request to the carrier to suspend the carriage or return the goods, *etc.*

2) To Receive Cargo

A consignee is a party who designated as the recipient of the cargo by a carriage contract. If a bill of the lading is issued, then the lawful holder of that bill of lading is considered as the consignee. As such, the consignee should have the same rights as that of the shipper upon arrival of the cargo at the destination. Moreover, the rights of the consignee shall prevail over that of the shipper when the consignee requests delivery of the cargo after it arriving at the destination (KCC 815 and 140).

3) Decision of Damage Amount and Consolidated Carrier's Responsibility

In Korea, if the accident occurred during the inland transportation stage, there shall be no limitation of liability applicable to the carrier. Further, Korea is not a signatory to International convention (such as CMR[59]) for inland transportation. According to KCC Article 815 and 137(1), the damage amount shall be determined by the price prevailing at the place of destination on the day the cargo should have been delivered in the case of total loss and, under KCC Article 815 and 137(2), the damage amount shall be determined by the price prevailing at the place of destination on the date of delivery in the case of a partial loss.

In addition, under KCC Article 816(2), in the case of unknown the section of damage occurrence, the carrier who takes the longest section shall be liable, but the carrier who takes the highest freight shall be liable if the distance of section is the same or it is difficult to determine the longest section.

2. Duties of Shipper and Consignee

1) Pay the Freight, *etc.*

According to KCC Article 807, based on a transportation contract or a bill of lading, a consignee shall pay the freight and any related expenses (*i.e.* incidental expenses, demurrage, general average, *etc.*) when he or she receives cargo. However, in such case, the payment duty of freight charges for a charterer or a shipper shall not become extinct and their duties should be

[59] Convention on the Contract for the International Carriage of Goods by Road (Geneva on 19 May 1956), which has been ratified by the majority of European states and it provides that the carrier's liability is calculated on the basis of 8.33 SDR per kilogram of gross weight of the cargo.

considered as the quasi- joint and severable obligation.[60]

Under FOB terms, the shipper shall pay all costs relating to the cargo until it has been delivered on board the vessel at the named port. Once the cargo has been loaded on board, the consignee bears all costs thereafter.

In the meantime, under CIF (Cost and Insurance & Freight) terms, a shipper shall pay the freight and all other applicable costs such as cost for export, unloading at the agreed port of discharge, insurance, *etc.*

In the case of whole or part of transported cargo's loss without the shipper's fault, the carrier shall refund such paid freight charges unless the said loss has not been caused by inherent defects or nature of the transported cargo or the breach of the due care of the shipper (KCC 815, 134).

2) Duty of Providing Necessary Document and Acceptance of Cargo

Based on the carriage contract, a shipper, who is entrusted to provide a carrier with cargo, shall also be responsible to deliver necessary document to the carrier within the period of loading.[61] Upon receipt of a notice of arrival of the cargo, the consignee or the lawful holder of the bill of lading shall receive the cargo without delay at the time and place by agreement between the parties or by usage of trade at the unloading port.[62]

3) Notice on Partial Loss of or Damage to Cargo

At the time a consignee discovers partial loss of or damage to cargo, he/she shall give a written notice on a summary to the carrier without delay, and if said partial loss of or damage to cargo is not immediately detectable, the notice shall be given within 3 days from the date of receipt.[63] It is assumed that the cargo has been delivered without loss or damage if the consignee does not issue such notice to the carrier.[64]

Generally, the above 3-day notice is included in the carrier's bill of lading. For example, HMM's Container Bill of Lading requires that a written notice be given in writing at the time of delivery of the Goods or, if the loss or damage is not apparent, within 3 days of delivery.[65]

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[60] Inhyeon Kim, *Footnote 21, Supra,* at 283.

[61] KCC Article 792, 793.

[62] KCC Article 802.

[63] KCC Article 804(1).

[64] KCC Article 804(2).

[65] HMM, Container Bill of Lading Article 24.(A) *"Unless notice of Loss of or Damage to the Goods and the general nature of such loss or damage is given in writing to the Carrier at the port of discharge or place of delivery before or at the time of delivery of the Goods or, if the loss or damage is not apparent, whining 3 days after delivery, the Goods shall be deemed to have been delivered as described on the face of this Bill of lading."*

4) Duty to Dangerous Cargo

Regarding the shipper's liability on dangerous cargo, the KCC does not provided a provision (nor a strict liability provision) that the shipper shall be liable for all damages and expenses directly or indirectly arising out of or resulting from such cargo, *etc.*

In contrast, Hague-Visby Rules[66] and Rotterdam Rules[67] contain articles regarding the shipper's liability to dangerous cargo. There are two different views in respect of the shipper's strict liability. One holds that the shipper is liable only when negligence occurs.[68] The other holds that the shipper should be strictly liable regardless of his/her negligence because of the unknown clauses such as 'Said to Contain' or 'Said to be' within the bill of lading and KCC's adopting of the Hague-Visby Rules.[69] In my opinion, whether or not the shipper's negligence exists, it is proper and reasonable that the shipper should be strictly liable for the damage of dangerous goods.

V. Conclusion

The current Carriage of Goods by Sea Act in Korea provides more clear understanding into Korea's maritime industry.

KCC extends the scope to which the carrier is liable for loss resulting from, loss of, or damage to goods during transportation as well as from delay in delivery, and KCC has limited the carrier's liability in accordance with the level within the Hague-Visby Rules. In addition, the Supreme Court of Korea held that the smallest package unit as a package on behalf of the shipper and one year time bar in favor of the shipper. Furthermore, the Supreme Court of Korea's decision expands the scope of beneficiaries for limitation of liability from shipmaster, employee and agent of a carrier to independent contractors in accordance with the Himalaya Clause for Bills of Lading.

However, I believe that it is necessary to re-amend KCC in relation to

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[66] Hague-Visby Rules Article 4(6):"*Goods of an inflammable, explosive or dangerous nature to the shipment whereof the carrier, master or agent of the carrier has not consented with knowledge of their nature and character, may at any time before discharge be landed at any place, or destroyed or rendered innocuous by the carrier without compensation and the shipper of such goods shall be liable for all damages and expenses directly or indirectly arising out of or resulting from such shipment.*"

[67] Rotterdam Rules Article 32(a):"*The shipper shall inform the carrier of the dangerous nature or character of the goods in a timely manner before they are delivered to the carrier or a performing party. If the shipper fails to do so and the carrier or performing party does not otherwise have knowledge of their dangerous nature or character, the shipper is liable to the carrier for loss or damage resulting from such failure to inform.*"

[68] Jonghyun Choi, *Supra*, at 350.

[69] Inhyeon Kim, *Footnote 20 Supra*, at 287.

dangerous cargo and combined transport provision in accordance with internationally recognized standards. The KCC should provide the strict liability provision regarding dangerous cargo against the shipper following the Hague-Visby Rules and Rotterdam Rules. In respect of combined transport provision, it should be provided on the section(s) regarding commercial activities in general (Book I & II) instead of on the Maritime Law section (Book V). If so, the provision would be applicable not only for a combined transport including sea carriage but also for strictly inland transportation.

In conclusion, the Maritime Law of KCC has international characteristics, and thus it is imperative to try to harmonize with international conventions and treaties such as CMR, Hamburg Rules Rotterdam Rules, *etc.* Only then can KCC provide predictability (and foreseeability) to Korea as a maritime country, in both domestic and international spheres.

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This article is published in *The Asian Business Lawyer (ABL)* Vol. 26.

The publication of *ABL* Vol. 26 has been financially supported by KIM & CHANG

CASES

Supreme Court en banc Decision 2016Da248998 Decided August 27, 2020【Damages, etc.】

【Main Issues and Holdings】

[1] Matters to be considered when determining whether a collective agreement shall be null and void pursuant to Article 103 of the Civil Act

Standard for determining whether a collective agreement including the content that the bereaved family, etc. of the union member may be recruited in a case where a particular reason such as death, etc. resulting from occupational accidents occurs is contrary to good morals and other social order

[2] In the case where whether the so-called "preferential employment clause for the family of workers dead in industrial accidents" regulating that a person among the bereaved family members of a union member may be specially employed in a case where the union member is dead due to occupational accidents in each collective agreement which Stock Company A and others conclude with trade unions is null and void in accordance with Article 103 of the Civil Act comes into question, the case holding that it is difficult to recognize special circumstances to see that the preferential employment clause for the family of workers dead in industrial accidents comes to the extent of excessively constraining the freedom of the employment of Stock Company A and others or ends up disrupting the fairness of employment opportunities, and thus the said clause cannot be seen to be null and void in violation of good morals and other social order

【Summary of Decision】

[1] [Majority Opinion] A collective agreement cannot be excluded from the subject of application of Article 103 of the Civil Act, and thus the legal effect thereof ought to be ruled out if the collective agreement is contrary to good morals and other social order; *Provided,* That when determining whether the collective agreement violates good morals and other social order, the court's paternalistic intervention needs to be more careful, considering that a collective agreement is based on the exercise of collective bargaining, which is a fundamental right directly guaranteed by the Constitution of Republic of Korea, and the result of collective autonomy between management and unions institutionally guaranteed by the Constitution of Republic of Korea and its performance is specially forced by the Trade Union and Labor Relations Adjustment Act.

An employer has the freedom to decide who to hire by what criteria and manners on the basis of the freedom of occupation stipulated in Article 15 of

the Constitution of the Republic of Korea and the right of property stipulated in Article 23(1) of the Constitution of the Republic of Korea; *Provided*, That the employer may restrict such freedom by himself/herself, and thus may make a collective agreement with a trade union through arbitrary collective bargaining regarding the recruitment of workers and the effect, as a collective agreement, is recognized unless the content thereof is contrary to compulsory rules or good moral and other social order.

If an employer concluded a collective agreement including the content that the bereaved family, etc. of a union member may be recruited in a case where a particular reason, such as death, etc. resulting from occupational accidents occurs according to collective bargaining with a trade union, unless there are special circumstances that such collective agreement comes to the extent of excessively constraining the employer's freedom of the employment or ends up noticeably disrupting the fairness of employment opportunities, it is difficult to readily conclude that the said collective agreement is contrary to good morals and other social order. Whether such collective agreement comes to the extent of excessively constraining the employer's freedom of the employment or ends up noticeably disrupting impartial employment opportunities ought to be determined after comprehensively considering various circumstances: the reason for, and background leading up to, the conclusion of the collective agreement; the purpose of accomplishing through such collective agreement and the suitability of means thereof; whether the requirements that a person who is subject to the recruitment ought to fulfill exist and the content thereof; whether the employment rules identical to the same industry exist in a workplace; the period of the collective agreement and compliance therewith; and an employer's influence on general employment and the degree of disadvantage of job seekers which can be revealed through the type of employment as prescribed in the collective agreement and the number of workers employed in accordance with the collective agreement.

[Dissenting Opinion by Justice Lee Ki-taik and Justice Min You-sook] It ought to be encouraged for management and unions to prepare a countermeasure to protect the family of a worker dead due to occupational accidents, but such countermeasure ought to be practically fair, and thus consistent with law and order. Such countermeasure should not be the way of sacrificing job seekers who desperately look for a job in the same place as the bereaved families of union workers or protecting only some of the bereaved families of dead workers and excluding other bereaved families from its protection.

In a case where management and unions agreed to adopt the employment standards irrelevant to the company's necessity or business ability to achieve a certain purpose, and such standard deviates from a sense of justice and law and order regarding fair recruitment as it leads to the discrimination against job seekers of the corresponding company or other union workers without

reasonable grounds in light of the volume and the number of workers of the company; the general way in which the corresponding company hires workers; the suitability of the employment standard for accomplishing a particular goal; the regulations of the related statute; and social awareness of the fairness of recruitment opportunities, it can be deemed as a legal act which is inconsistent with social order stipulated in Article 103 of the Civil Act.

[2] In the case where whether the so-called "preferential employment clause for the family of workers dead in industrial accidents" regulating that a person among the bereaved family members of a union member may be specially employed in a case where the union member is dead due to occupational accidents in each collective agreement which Stock Company A and others conclude with trade unions is null and void in accordance with Article 103 of the Civil Act comes into question, the case holding that fully considering that: ① what kinds and level of compensation may be offered to workers for occupational accidents corresponds to a significant working condition *per se*, and Stock Company A and others can be seen to conclude a collective agreement including the preferential employment clause for the family of workers dead in industrial accidents with a trade union in accordance with their interests; ② the preferential employment clause for the family of workers dead in industrial accidents can be seen to contribute to achieving substantial fairness by considering the socially weak and can be regarded as effective and adequate means to accomplish ends such as compensation and protection; ③ the agreement of Stock Company A and others to the preferential employment clause for the family of workers dead in industrial accidents is the result of the active exercise of the freedom of employment, and, if the court declares that this is null and void, this may bring about unfair limitation on the freedom of employment of Stock Company A and others; ④ it is difficult to determine that the freedom of employment is excessively limited in that management and unions appear to have performed it, sharing their view for a long time with respect to efficiency thereof, not to mention the preferential employment clause for the family of workers dead in industrial accidents in the workplace of Stock Company A and others; ⑤ it is difficult to readily conclude that the freedom that Stock Company A and others may recruit other workers is considerably restricted due to the preferential employment clause for the family of workers dead in industrial accidents, and the actual disadvantages to job seekers cannot be seen to be great; ⑥ it is obvious that the preferential employment clause for the family of workers dead in industrial accidents ought to be deemed to be valid even from the perspective of collective autonomy, although it is difficult to recognize special circumstances to see that the preferential employment clause for the family of workers dead in industrial accidents comes to the extent of excessively constraining the freedom of the employment of Stock Company A and others

or ends up noticeably disrupting the fairness of employment opportunities, and thus it cannot be seen to be null and void in violation of good morals and other social order, the lower court which determined unlike the above, erred by misapprehending the legal doctrine

【Reference Provisions】 [1] Articles 11(1), 15, 23(1), 32(6), and 33(1) of the Constitution of the Republic of Korea; Article 103 of the Civil Act; Articles 31, 33, and 92 Subparag. 2 Item (d) of the Trade Union and Labor Relations Adjustment Act / [2] Articles 11(1), 15, 23(1), 32(6), and 33(1) of the Constitution of the Republic of Korea; Article 103 of the Civil Act; Articles 31, 33, and 92 Subparag. 2 Item (d) of the Trade Union and Labor Relations Adjustment Act

Article 11 of the Constitution of the Republic of Korea

(A) All citizens shall be equal before the law, and there shall be no discrimination in political, economic, social or cultural life on account of sex, religion or social status.

Article 15 of the Constitution of the Republic of Korea

All citizens shall enjoy freedom of occupation.

Article 23 of the Constitution of the Republic of Korea

(1) The right of property of all citizens shall be guaranteed. The contents and limitations thereof shall be determined by Act.

Article 32 of the Constitution of the Republic of Korea

(6) The opportunity to work shall be accorded preferentially, under the conditions as prescribed by Act, to those who have given distinguished service to the State, wounded veterans and police officers, and members of the bereaved families of military service members and police officers killed in action.

Article 33 of the Constitution of the Republic of Korea

(1) To enhance working conditions, workers shall have the right to independent association, collective bargaining and collective action.

Article 103 of the Civil Act (Juristic Acts Contrary to Social Order)

A juristic act which has for its object such matters as are contrary to good morals and other social order shall be null and void.

Article 31 of the Trade Union and Labor Relations Adjustment Act (Preparing of Collective Agreement)

(1) A collective agreement shall be prepared in writing, and both of the parties shall affix their signatures or their seals thereto. <Amended by Act No. 8158, Dec. 30, 2006>

(2) The parties to a collective agreement shall make a report of the collective agreement to the administrative agencies within 15 days from the date of its conclusion. <Amended by Act No. 5511, Feb. 20, 1998>

(3) When a collective agreement has any unlawful contents, the administrative agencies may, with the resolution of the Labor Relations

Commission, order to correct them. <Amended by Act No. 5511, Feb. 20, 1998>

Article 33 of the Trade Union and Labor Relations Adjustment Act (Validity of Standards)

(1) Any part of rules of employment or a labor contract that violate standards concerning working conditions and other treatment of workers as prescribed in a collective agreement shall be null and void.

(2) Matters not covered in a labor contract and the part which is null and void under paragraph (1) shall be governed by those standards of a collective agreement.

Article 92 of the Trade Union and Labor Relations Adjustment Act (Penalty Provisions)

A person who falls under any of the following subparagraphs shall be punished by a fine not exceeding ten million won: <Amended by Act No. 6456, Mar. 28, 2001; Act No. 9930, Jan. 1, 2010>

2. A person who violates the matters falling under any of the following items from among the contents of a collective agreement concluded pursuant to Article 31 (1):

(d) Matters on safety and health and disaster relief;

【**Plaintiff- Appellant**】 Plaintiff and one other (Attorneys Kim Cha-gon et al., Counsel for the plaintiff-appellant)

【**Defendant-Appellee**】 KIA Motors Corp. and one other (Bae, Kim & Lee LCC. et al., Counsel for the defendant-appellee)

【**Judgment of the court below**】 Seoul High Court Decision 2015Na2067268 decided August 18, 2016

【**Disposition**】 The part of the lower judgment against Plaintiff 1 relating to a claim for the declaration of intention of the consent to the Defendants shall be reversed, and that part of the case shall be remanded to the Seoul High Court. The remaining final appeal of Plaintiff 1 and the final appeal of Plaintiff 2 shall be dismissed in entirety. The cost arising from the final appeal of Plaintiff 2 is borne by Plaintiff 2.

【**Reasoning**】 The grounds of appeal are examined (to the extent of supplement in case of supplemental appellate briefs not timely filed).

1. Case overview

A. The deceased Nonparty (hereinafter “the deceased”), hired by KIA Motors Corp., the Defendant, (hereinafter “Defendant KIA Motors”) on February 1, 1985, worked at Soha-ri Plant of Defendant KIA Motors and in the part of Quick Delivery Mold (QDM) at Sihwa Institute, and then worked at Namyang Institute of the Hyundai Motors Corp., the Defendant, (hereinafter “Defendant Hyundai Motors”) by transferring his/her domicile around February 2008.

B. The deceased was diagnosed as acute myeloid leukemia (hereinafter "instant disease") on August 25, 2008 and then died due to the instant disease on July 19, 2010.

C. The spouse of the deceased filed an application with the Korea Workers' Compensation Welfare Service for the survivors' benefits under the Industrial Accident Compensation Insurance Act (hereinafter "Industrial Accident Insurance Act"). The Seoul Occupational Disease Adjudication Committee under the Korea Workers' Compensation Welfare Service, on October 11, 2013, determined that "the deceased had been exposed to benzene for at least 15 years while working for Defendant KIA Motors and the casual relationship between the instant disease and benzene is clear, and thus the injury or disease in relation to which the spouse of the deceased filed a request for the survivors' benefits is recognized as the disease caused by occupational reasons under the Industrial Accident Insurance Act." According to the determination, the family of the deceased received various benefits stipulated in the Industrial Accident Insurance Act.

D. Article 27(1) of the collective agreement concluded between Defendant KIA Motors and the trade union, which is viewed to be applied to this case by the lower court, stipulated that "a company ought to preferentially employ them in principle in a case where temporary employees within the company, one person of the bereaved family members of an union worker who died of disease in office, or children of retired persons and long-term employed persons for more than 25 years are eligible under recruitment regulations when recruiting new employees in accordance with a manpower supply and demand plan; *Provided*, That the details ought to be determined separately under the agreement with the trade union"; Article 2 prescribed that "one person among the lineal family members of a union member who died due to occupational accidents and has a disability higher than the Level 6 ought to be specially employed within 6 months from the date of request unless there are grounds for disqualification"; and Article 97 of the collective agreement concluded between Defendant Hyundai Motors and the trade union regulated that "the company ought to preferentially employ him/her within 6 months from the date of request unless one person among the bereaved family members or the spouse thereof is unqualified when a union worker is dead due to occupational accidents or retires due to disability. (The provision regarding preferential employment of each collective agreement regulating that a person among the bereaved family members of a union member may be specially employed where a union member is dead due to occupational accidents is referred to as "the instant preferential employment clause for the family of workers dead in industrial accidents.")

The Defendants have repeatedly included the provision containing the content similar to the instant preferential employment clause for the family of workers dead in industrial accidents into each collective agreement since the mid-1990s. Moreover, the personnel regulations of Defendant KIA Motors

regulated that a special recruitment may be conducted in "the case of employing the lineal family members of the corresponding union worker when a union worker is dead due to occupational accidents or retires from a job due to disability higher than the Level 6 ought to be specially employed" [Article 7(4)d]

E. The Plaintiffs are joint inheritors as children of the deceased. Plaintiff 1 claimed the declaration of intention of the consent regarding an offer of an employment contract against primarily Defendant KIA Motors and preliminarily Defendant Hyundai Motors based on the instant preferential employment clause for the family of workers dead in industrial accidents. Furthermore, the Plaintiffs, asserting that Defendant KIA Motors caused the deceased to become dead in violation of the duty of safety consideration, claimed damages the deceased suffered against Defendant KIA Motors.

2. Determination on the effect of the instant preferential employment clause for the family of workers dead in industrial accidents (Ground of appeal Nos. 2 & 3)

A. Main issue

The main issue of this part in accordance with the Plaintiff's allegation in the grounds of appeal is whether the instant preferential employment clause for the family of workers dead in industrial accidents is null and void under Article 103 of the Civil Act.

B. Lower court's determination

The lower court determined that the instant preferential employment clause for the family of workers dead in industrial accidents is null and void under the Article 103 of the Civil Act as the instant clause is contrary to a sense of justice of our society by noticeably limiting the employer's freedom of employment contract and causing the inheritance of a job and excessive benefits are granted to the bereaved family in the manner of uniformly imposing the duty to employ a person among the lineal family members on the employer without determining the need to guarantee the livelihood of the bereaved family or employment requirements.

D. Supreme Court's determination

1) Matters to be considered when determining whether a collective agreement is null and void under Article 103 of the Civil Act

A) Article 33(1) of the Constitution of the Republic of Korea guarantees constitutional rights by regulating that: workers may be independently united; a trade union, corresponding to such independent association, may negotiate freely with their employer with respect to matters necessary to maintain and improve working conditions, promote workers' welfare, and raise other social and economic status; and workers shall take a collective action to gain their demands. That the Constitution of the Republic of Korea guarantees the labor's three primary rights as fundamental rights means to realize substantial autonomy regarding working conditions by having workers and their employer

conclude a collective agreement astronomically through a collective bargaining on an equal footing. Thus, Article 33(1) of the Constitution the Republic of Korea can be seen to guarantee the so-called collective autonomy by vesting labor and management with the authority to reasonably regulate working conditions through collective consensus under their own responsibility.

The Trade Union and Labor Relations Adjustment Act, enacted to guarantee the labor's three primary rights more specifically under the Constitution of the Republic of Korea, (hereinafter "Trade Union Act") also sets out the framework of regulations for fulfilling the purpose to recognize and respect the agreement autonomy between management and unions by reflecting this. For example, the Trade Union Act ① enables management and unions to regulate the details of the collective agreement autonomically through collective bargaining by regulating various matters regarding collective bargaining and collective agreement but not regulating what should or should not be included in collective agreement; ② allows a person who violates specific matters such as "matters on safety and health and disaster relief" to be punished among the contents of a collective agreement duly concluded pursuant thereto while stipulating several provisions regarding the main agents who can conclude a collective agreement and the procedures therefor (Article 92(2)), thereby reinforcing the power of rule of the collective agreement which is formed autonomously between labor and management.

B) A collective agreement cannot be excluded from the subject of application of Article 103 of the Civil Act, and thus the legal effect thereof ought to be ruled out if the collective agreement is contrary to good morals and other social order; Provided, That when determining whether the collective agreement violates good morals and other social order, the court's paternalistic intervention needs to be more careful, considering that a collective agreement is based on the exercise of collective bargaining, which is a fundamental right directly guaranteed by the Constitution of Republic of Korea, and the result of collective autonomy between management and unions institutionally guaranteed by the Constitution of Republic of Korea and its performance is specially forced by the Trade Union and Labor Relations Adjustment Act.

C) An employer has the freedom to decide who to hire by what criteria and manners on the basis of the freedom of occupation stipulated in Article 15 of the Constitution of the Republic of Korea and the right of property stipulated in Article 23(1) of the Constitution of the Republic of Korea; Provided, That the employer may restrict such freedom by himself/herself, and thus may make a collective agreement with a trade union through arbitrary collective bargaining regarding the recruitment of workers and the effect, as a collective agreement, is recognized unless the content thereof is contrary to compulsory rules or good moral and other social order.

If an employer concluded a collective agreement including the content that the bereaved family, etc. of a union member may be recruited in a case where a particular reason, such as death, etc. resulting from occupational accidents occurs according to collective bargaining with a trade union, unless there are special circumstances that such collective agreement comes to the extent of excessively constraining the employer's freedom of the employment or ends up noticeably disrupting the fairness of employment opportunities, it is difficult to readily conclude that the said collective agreement is contrary to good morals and other social order. Whether such collective agreement comes to the extent of excessively constraining the employer's freedom of the employment or ends up noticeably disrupting impartial employment opportunities ought to be determined after comprehensively considering various circumstances: the reason for, and background leading up to, the conclusion of the collective agreement; the purpose of accomplishing through such collective agreement and the suitability of means thereof; whether the requirements that a person who is subject to the recruitment ought to fulfill exist and the content thereof; whether the employment rules identical to the same industry exist in a workplace; the period of the collective agreement and compliance therewith; and an employer's influence on general employment and the degree of disadvantage of job seekers which can be revealed through the type of employment as prescribed in the collective agreement and the number of workers employed in accordance with the collective agreement.

2) Determination on the instant case

A) Examining the following circumstances revealed by the aforementioned facts and record in light of the aforesaid legal doctrine, special circumstances in which the instant preferential employment clause for the family of workers dead in industrial accidents comes to the extent of excessively constraining the freedom of the employment of the Defendants or ends up remarkably undermining the fairness of employment opportunities are difficult to be recognized, and thus the clause cannot be seen to be null and void in violation of good morals and other social order.

(1) The Labor Standards Act enacted for the purpose of determining the standards for working conditions under the Constitution of the Republic of Korea stipulates the details of the liability for compensation that an employer ought to assume in relation to occupational accidents. The employer's liability for compensation is largely performed pursuant to the Industrial Accident Insurance Act, but the compensation for occupational accidents does not need to be limited to the content provided by the law. Matters regarding the details and level of compensation for occupational accidents correspond to important working conditions *per se*. It is understood that the trade unions of the Defendants maintained and improved working conditions by deciding to receive additional compensation as well as the compensation provided by the law with respect to occupational accidents and demanded the conclusion of a

collective agreement including the instant preferential employment clause for the family of workers dead in industrial accidents for the purpose of improving workers' social and economic status. Furthermore, the Defendants seem to obtain an advantage inducing the devotion to duties of the workers, who are union members, by accepting such demands of the trade unions and concluding a collective agreement including the instant preferential employment clause for the family of workers dead in industrial accidents, and maintaining an amicable relationship with the trade unions.

(2) (A) Unlike the agreement specially or preferentially employing the children of retired persons and long-term employed persons, the purpose of the instant preferential employment clause for the family of workers dead in industrial accidents is to provide compensation equivalent to extraordinary sacrifice of a worker who lost his/her life, which is more precious than anything else, and to protect and consider the socially weak to let them solve their difficulty in living by providing a job for the family of workers dead due to occupational accidents.

The compensation pursuant to the Labor Standards Act and the Industrial Accident Insurance Act is nothing more than minimum but is difficult to be deemed as sufficient protection or consideration. In a case where a worker who is responsible for the family's livelihood is dead, it can be easily expected that the bereaved family of the worker has difficulty in earning a living. Considering such difficulty, the instant preferential employment clause for the family of workers dead in industrial accidents including the contents of supplementing or extending the liability of accident compensation borne by an employer can be assessed to contribute to considering the socially weak and accomplishing the actual process.

(B) Article 32(6) of the Constitution of the Republic of Korea prescribes that the opportunity to work shall be accorded preferentially, under the conditions as prescribed by Act, to "those who have given distinguished service to the State," "wounded veterans and police officers," and "members of the bereaved families of military service members and police officers killed in action," who specially made sacrifices for the State and all citizens. On the basis of such constitutional regulations and legislative policy-based discretion on the basis of the need for the compensation to persons, etc. who have rendered distinguished service to the State or the social protection, the Acts including the provisions regulating the duty of employment with respect to members of the bereaved families of military service members and police officers killed in action, persons who have rendered distinguished service to the State and their families, etc. or supporting employment thereof (Act on the Honorable Treatment of and Support for Persons, etc. of Distinguished Service to the State, Act on the Honorable Treatment of Persons of Distinguished Service to Independence, Act on the Honorable Treatment of Persons of Distinguished Service to the May 18 Democratization Movement, Act on Support for Persons

Eligible for Veteran's Compensation, and Act on Honorable Treatment of Persons of Distinguished Service During Special Missions and Establishment of Related Organizations) have been enacted. As such, providing the opportunity to be employed for those within certain scope for the purpose of compensation and protection corresponds to the means intended by the law and order.

The instant preferential employment clause for the family of workers dead in industrial accidents is to autonomically implement the purpose and spirit of Article 32(6) of the Constitution of the Republic of Korea and the Acts as seen earlier at the enterprise level. The bereaved family members are enabled to lead a life at a similar level to before the worker's death by providing an employment opportunity for one person among the bereaved family members of a deceased worker. Thus, the instant preferential employment clause for the family of workers dead in industrial can be can be regarded as effective and adequate means to accomplish ends such as compensation and protection.

(3) In that the instant preferential employment clause for the family of workers dead in industrial, which can be seen to make a self-enforcing promise that management and unions autonomously determine "who" an employer employs under "what conditions" in advance, is of quite diverse character compared with limiting the freedom of employment guaranteed by the Constitution of the Republic of Korea as the State forces an employer to hire a certain person, the two cannot be equated with each other.

The lower court determined that the instant preferential employment clause for the family of workers dead in industrial accidents is null and void under Article 103 of the Civil Act and presented, as a ground thereof, that forcing an employer to conclude an employment contract with an unspecified person at unspecified point of time in the future noticeably limits the employer's freedom of employment. However, the right of freedom has essentially passive nature in that it is not infringed by the power of the State in principle, while the instant preferential employment clause for the family of workers dead in industrial accidents is not enforced by the State, but is concluded according to their own will under the agreement between the Defendants and their trade unions, and thus the above lower judgment can be seen to misapprehend the nature of the right of freedom. In such a case, the Defendants' agreement on the instant preferential employment clause for the family of workers dead in industrial accidents is the result of the active exercise of their own freedom of employment to which they are entitled. If the court declares that the instant preferential employment clause for the family of workers dead in industrial accidents is null and void without fully considering the Defendants' intention at the time of the conclusion of the collective agreement, the court may lead to unfair restriction on the Defendants' freedom of employment, not the instant preferential employment clause for the family of workers dead in industrial accidents, according to circumstances.

Furthermore, the instant preferential employment clause for the family of workers dead in industrial accidents is applied only in the case of death resulting from occupational accidents rarely caused in the Defendants' workplaces, and limits the subject of employment to workers who are not unqualified, and thus those within certain scope who have no minimum ability in performing their duties cannot be employed. Therefore, the instant preferential employment clause for the family of workers dead in industrial accidents cannot be seen to excessively limit an employer's freedom of employment by fully, uniformly, and unconditionally forcing an employer to make a special employment.

(4) Since the Defendants first concluded a collective agreement including the instant preferential employment clause for the family of workers dead in industrial accidents in the 1990s, they, concluding a new collective agreement through the bargaining with the trade unions biennially, have consistently included the instant preferential employment clause for the family of workers dead in industrial accidents in the new agreement. The personnel regulations of Defendant KIA Motors, the rules of employment, contain regulations with the same purpose as that of the instant preferential employment clause for the family of workers dead in industrial accidents.

In accordance with the instant preferential employment clause for the family of workers dead in industrial accidents, Defendant KIA Motors has specially employed 9 persons among the bereaved families of its workers and Defendant Hyundai Motors has specially employed 52 persons among the bereaved families of its workers. Defendant KIA Motors specially employed 2 persons among the bereaved families even in 2016 when the instant case was in progress.

As such, it is difficult to determine that the freedom of employment is excessively limited in that management and unions, holding the same view with respect to usefulness as well as effectiveness of the instant preferential employment clause for the family of workers dead in industrial accidents in the Defendants' workplaces for a long period of time, have performed the clause.

(5) As for the end of 2019, the sales of Defendant KIA Motors was approximately KRW 33 trillion and the number of workers was roughly more than 35,600 persons, while the sales of Defendant Hyundai Motors was approximately KRW 49 trillion and the number of workers was roughly more than 70,000 persons. The number of workers newly employed by Defendant KIA Motors from 2013 to 2019 was 5,281 persons, and among them, the number of employment pursuant to the instant preferential employment clause for the family of workers dead in industrial accidents was 5 persons, the ratio of which was roughly 0.094%. The number of workers newly hired by Defendant Hyundai Motors for the same period of time was approximately 18,000 persons and the number of employment pursuant to the instant preferential employment clause for the family of workers dead in industrial accidents was 11 persons, the ratio of which was roughly 0.061%.

Considering: the Defendants' business scale; the ratio of employment of the bereaved families in accordance with the instant preferential employment clause for the family of workers dead in industrial accidents compared with the number of workers newly hired by the Defendants; and that the instant preferential employment clause for the family of workers dead in industrial accidents plans a separate special employment procedure, not forcing the Defendants to preferentially employ the bereaved families in the process of open competitive employment implemented by the Defendants, it is difficult to view that the employment in accordance with the instant preferential employment clause for the family of workers dead in industrial accidents has an important impact on the job seekers' opportunities to be employed by the Defendants.

It is difficult to readily conclude that the Defendants' freedom to employ other workers is considerably limited by the instant preferential employment clause for the family of workers dead in industrial accidents and it cannot also be seen that job seekers have realistically great disadvantages.

(6) Considering the circumstances where the Defendants and each trade union, concluding a collective agreement through collective bargaining on a regular basis for a long period of time, have consistently included the instant preferential employment clause for the family of workers dead in industrial accidents in the collective agreement, and have continuously made a special employment based thereon, it is evident that the instant preferential employment clause for the family of workers dead in industrial accidents ought to be seen to be valid even from the perspective of agreement autonomy.

B) Nevertheless, the lower court, on the ground same as indicated in its reasoning, determined that the instant preferential employment clause for the family of workers dead in industrial accidents is null and void in that the clause is contrary to good morals and other social order, and in so determining, it erred and adversely affected the conclusion of the judgement by misapprehending the legal doctrine regarding the principle of agreement autonomy and Article 103 of the Civil Act. The grounds of appeal assigning this error are therefore with merit.

3. Determination on the appropriateness of the comparative negligence or liability limitation (ground of appeal No. 1)

In cases pertaining to the compensation for damages arising from nonperformance of obligation, determining factfinding regarding the reasons for the comparative negligence or liability limitation and the ratio thereof is matters falling under the binding force of factfinding proceedings unless it is recognized as noticeably unreasonable in light of the principle of equity (*see* Supreme Court Decision 2016Da249557, Jun. 8, 2017).

Examining the reasoning of the lower judgment in light of the record, the lower court judgment on finding of facts or the ratio thereof with regard to the reasons for comparative negligence or liability limitation is reasonable, and

thus can be accepted. In so doing, the lower court did not err by misapprehending the legal doctrine regarding comparative negligence or liability limitation.

4. Conclusion

Therefore, the part of the lower judgment against Plaintiff 1 relating to a claim for the declaration of intention of the consent to the Defendants shall be reversed; that part of the case shall be remanded to the Seoul High Court for further proceedings consistent with this Opinion; the remaining final appeal of Plaintiff 1 and the final appeal of Plaintiff 2 shall be dismissed in entirety; and the cost arising from the final appeal of Plaintiff 2 is borne by Plaintiff 2. It is so decided as per Disposition by the assent of all participating Justices except: a Dissenting Opinion by Justice Lee Ki-taik and Justice Min You-sook with respect to the effect of the instant preferential employment clause for the family of workers dead in industrial accidents (2. *supra*); an Opinion concurring with the Majority Opinion by Justice Kim Jae-hyung; and an Opinion concurring with the Majority Opinion by Justice Kim Seon-soo and Justice Kim Sang-hwan.

5. Dissenting Opinion by Justice Lee Ki-taik and Justice Min You-sook with respect to the effect of the instant preferential employment clause for the family of workers dead in industrial accidents

A. The reason why the Dissenting Opinion views the preferential employment clause for the family of workers dead in industrial accidents as invalid is not because almost fully returning damages arising from occupational accidents to original state is seen to be undesirable or the need to protect workers, their families, etc. who suffer from the accidents is regarded as being of no importance. It is right that our society as well as an employer ought to put their utmost efforts to enable the deceased workers and their bereaved family who have been extraordinarily sacrificed due to occupational accidents to recover from and heal damage caused by the accidents. Furthermore, in the instant case, the bereaved family members of the deceased cannot be blamed for that they claimed employment to the Defendants to realize the said rights as they deemed the said claim as their rights in accordance with the express provision of the collective agreement.

It ought to be encouraged for management and unions to prepare a countermeasure to protect the family of a worker dead due to occupational accidents, but such countermeasure ought to be practically fair, and thus consistent with law and order. Such countermeasure should not be the way of sacrificing job seekers who desperately look for a job in the same place as the bereaved families of union workers or protecting only some of the bereaved families of dead workers and excluding other bereaved families from its protection.

B. The Majority Opinion determined that the court needs to be careful about its sponsored intervention, considering that the Constitution of the

Republic of Korea and Trade Union Act guarantee collective autonomy when determining whether the collective agreement is null and void in accordance with Article 103 of the Civil Act. However, as the purpose of the labor's three primary rights under the Constitution of the Republic of Korea lies in guaranteeing substantial autonomy between management and labor regarding working conditions by achieving a social balance in forming the relationship between management and unions, it cannot be seen that even the agreement between management and labor concerning matters irrelevant to the maintenance and improvement of working conditions, improvement in the welfare of the workers, and improvement of other social and economic status is specially protected by the Constitution of the Republic of Korea.

The Majority Opinion argues that the said clause *per se* is an important working condition in that the preferential employment clause for the family of workers dead in industrial accidents regulates compensation for occupational accidents

Working conditions refer to all conditions for the work provided by labors and presuppose labor relationship already formed including wages, working hours, labor content, working environment, welfare benefits, the reason or procedure for termination of labor relationship, etc. The question of deciding the other party with whom an employer creates a new labor relationship does not correspond to working conditions. In that the instant preferential employment clause for the family of workers dead in industrial accidents does not apply to a member of a trade union and is intended to create a labor relationship between the family of a deceased union member and an employer, it cannot be seen to be related to the conditions for the work provided by union members, even allowing for the purpose such as compensation. The instant preferential employment clause for the family of workers dead in industrial accidents is out of the range specially protected by Article 33 of the Constitution of the Republic of Korea or the Trade Union Act.

C. The lower court, determining that the instant preferential employment clause for the family of workers dead in industrial accidents is invalid in accordance with Article 103 of the Civil Act, cited an encroachment on an employer's freedom of employment as one of the grounds. In response, the Majority Opinion determined that the agreement between management and labor which excessively restricts the freedom of employment can become null and void under Article 103 of the Civil Act, but the instant preferential employment clause for the family of workers dead in industrial accidents cannot be seen to excessively limit the Defendants' freedom of employment. The principle that a person is legally bound by the promise he/she made is based on the principle of self-responsibility, and cannot be deemed to infringe on the freedom of one party unless there are exceptional circumstances. The Majority Opinion agrees on the part which viewed that the instant preferential

employment clause for the family of workers dead in industrial accidents does not violate the Defendants' freedom of employment.

However, the Majority Opinion overlooked that the instant preferential employment clause for the family of workers dead in industrial accidents discriminates against job seekers without any reasonable ground and is inappropriate and unfair as a means of compensation or protection for occupational accidents.

D. 1) A corporation, in principle, may decide a person subject to employment according to the standards it sets. Therefore, it cannot be considered illegal that a corporation eliminates or selects someone pursuant to certain standards *per se*, especially in the case of a private company.

However, even if it is a private company, the employment standards cannot be set freely without any limitations. The fundamental right under the Constitution of the Republic of Korea corresponds to a defensive right to primarily protect an individual's liberated area from the infringement of public power, but affects all realms of law including private law as an embodiment of subjective value order, which is a basic decision of the Constitution, and thus a private legal relationship between private persons ought to be regulated in a manner appropriate for the provision of the fundamental right under the Constitution: *Provided*, That the provision regarding the fundamental right has an indirect effect on judicial relationships by formulating the content of Articles 2, 103, 750, 751, etc. of the Civil Act, setting out general principles under the private law except for the exceptions directly applicable to judicial relationships from the very nature thereof, and becoming the interpretation standard for the above Articles (*see* Supreme Court en banc Decision 2008Da38288, Apr. 22, 2010). Article 11(1) of the Constitution of the Republic of Korea guarantees the right of equality to all citizens, declaring the principle of equality, by stipulating that "all citizens shall be equal before the law, and there shall be no discrimination in political, economic, social or cultural life on account of sex, religion or social status." Carrying on social and economic activities at his/her won wish and taste without being unreasonably discriminated within the social community correspond to a substantial part of the realization of an individual's personal rights, and thus a company's infringement on the fundamental rights such as the right of equality can be discussed by being embodied in the form of a breach of social order through Article 103 of the Civil Act (*see* Supreme Court Decision 2009Da19864, Jan. 27, 2011).

Thus, in a case where management and unions agreed to adopt the employment standards irrelevant to the company's necessity or business ability to achieve a certain purpose, and such standard deviates from a sense of justice and law and order regarding fair recruitment as it leads to the discrimination against job seekers of the corresponding company or other union workers without reasonable grounds in light of the volume and the number of workers of the company; the general way in which the corresponding company hires

workers; the suitability of the employment standard for accomplishing a particular goal; the regulations of the related statute; and social awareness of the fairness of recruitment opportunities, it can be deemed as a legal act which is inconsistent with social order stipulated in Article 103 of the Civil Act.

2) The instant preferential employment clause for the family of workers dead in industrial accidents is against a sense of justice and the law and order concerning fair employment by discriminating against job seekers without any reasonable ground.

A) The instant preferential employment clause for the family of workers dead in industrial accidents corresponds to the case where management and unions agreed to adopt the discriminative employment standards irrelevant to the Defendants' individual necessity or business ability of a person subject to employment.

B) The Defendants, as conglomerates affiliated with Hyundai Motor Group, are listed corporations which represent the car industry of the Republic of Korea. Considering the volume and the number of workers, the Defendants can be seen to assume social responsibility to undertake the recruitment process in an equitable manner

C) The Defendants have executed large-scale open competitive employment at certain times depending on the circumstances such as the need for manpower, etc., while they have chosen the way of employing workers as occasion demands or special employment. In either way, the principle is the way of deciding whether to employ through the interviewing or examination for job seekers meeting qualification requirements after basically confirming the conditions for manpower or the number of workers required by the Defendants, i.e. the way of assuring job seekers of fair employment opportunities based on the Defendants' need.

As such, in light of the way in which the Defendants recruit in principle and the volume of the Defendants' companies, job seekers can be seen to have fair confidence that the Defendants will execute employment depending on the qualifications, business ability, or their companies' necessity, and can employ them through fair procedures if they hold the ability or qualifications necessary for the Defendants.

D) Of individual laws, there are regulations which expressly prohibit discriminatory treatment when employing workers. Article 7(1) of the Framework Act on Employment Policy stipulates that "in recruiting and employing workers, business owners shall not discriminate against them on grounds of gender, religion, age, physical conditions, social status, place of birth, level of education, educational background, marriage, pregnancy, medical history, etc. (hereinafter referred to as "gender, etc.") without reasonable grounds and shall guarantee equal employment opportunities," and Article 2 of the Employment Security Act prescribes that "no person shall be treated discriminately in job placement, vocational guidance, or decision on

employment relations, on account of gender, age, religion, physical conditions, social status, marital status, or any other relevant factor." These provisions are to declare a legal principle that employment opportunities ought to be equally given in the Republic of Korea, and thus become the content of the law and order stipulated in Article 103 of the Civil Act. In that the instant preferential employment clause for the family of workers dead in industrial accidents allows the Defendants, who are business owners, to discriminate against workers when employing them, it is seen to violate the purpose of the above each provision of the law.

Meanwhile, the Majority Opinion, citing the laws which have the provisions supporting the employment of persons of distinguished service or their families as examples, argues that offering employment opportunities for the purpose of compensation or protection is a means planned by the law and order. However, as the lower court pointed out, the provisions regarding the support for employment by the law, cited by the Majority Opinion, were regulated in the form of law by social agreement, and are different from the instant preferential employment clause for the family of workers dead in industrial accidents which forces to employ, unless there are reasons for disqualification, in that a certain level of competition including giving extra points on an employment examination is presupposed.

E) Social awareness of the instant preferential employment clause for the family of workers dead in industrial accidents ought to be also considered.

The trade unions of top-ranking companies by which many young people hope to be hired are more likely to be attracted to introduce the collective agreement which has the same content as the instant preferential employment clause for the family of workers dead in industrial accidents, and, in reality, top-ranking companies have high possibility of having the bereaved families who demand its application. However, under the circumstance where the extended unemployment rate among young people in accordance with the "Labor Underutilization Indicator 3" released by Statistics Korea amounts to 22.9% as of 2019, such preferential employment clause may discourage the expectations and hope for fair employment opportunities of young people who hope for employment by giving a signal that the job of the children thereof may be determined depending on the parents' job. Individual companies or trade unions do not bear the direct responsibility to solve the unemployment problem, but the Defendants can be deemed as the social subject responsible for undertaking employment procedures at least in an equitable manner. The instant preferential employment clause for the family of workers dead in industrial accidents does not differ much from regarding the status of job seekers, which management and unions cannot arbitrarily dispose of, as the object of a transaction by breaking such responsibility.

F) Modifying the statutes related to labor-management relations and various systems in accordance with international standards is not only a

national task that our country is facing, but also a constant demand of the labor world. However, the way of handing down the jobs of union members to their bereaved family members, as mentioned in the instant preferential employment clause for the family of workers dead in industrial accidents, seems to be far from international standards. Even though it is not much different from our accident compensation system in that many nations secure certain benefits for the bereaved family in a way of social insurance with respect to occupational accidents, it is difficult to find cases of a collective agreement having a provision, whose purpose is identical or similar to that of the instant preferential employment clause for the family of workers dead in industrial accidents. The Ministry of Employment and Labor (MOEL) has also expressed a negative view of the instant preferential employment clause for the family of workers dead in industrial accidents.

Such circumstance reveals that the instant preferential employment clause for the family of workers dead in industrial accidents is out of touch with universal international standards or our country's policy direction.

G) The instant preferential employment clause for the family of workers dead in industrial accidents does not stipulate that the bereaved family members are preferentially employed or extra points are given to them in the process of open competition employment, but prescribes that a special employment is separately made where the required conditions are satisfied. For such a reason, it is true that it is difficult to seek the confirmation of the workers' status or to claim damages against the Defendants as "a person who are not employed due to the instant preferential employment clause for the family of workers dead in industrial accidents" is not specified.

However, the circumstance where job seekers have difficulty in proceeding with specific disputes settlement procedures has no essential link with whether the instant preferential employment clause for the family of workers dead in industrial accidents is in violation of the social order. As examined earlier, the instant preferential employment clause for the family of workers dead in industrial accidents is consistent with the social order, not because the specific right to claim employment of job seekers is infringed, but because they are unfairly treated without any justifiable ground.

In such case where any party to the collective agreement argues that the collective agreement is null and void because it is rather difficult for job seekers unfairly treated to exercise the judicial right, there is a greater need for judicial intervention.

3) The Majority Opinion argues that the purpose of the instant preferential employment clause for the family of workers dead in industrial accidents is to compensate for the special sacrifice of workers who died due to occupational accidents and to protect livelihoods of their bereaved family, and thus the said clause is not in breach of the social order. However, from the perspective of another value of fairness, which is not fully examined by the Majority Opinion,

it is fairly inappropriate and unfair for the instant preferential employment clause for the family of workers dead in industrial accidents to be viewed as a way of having an employer assume responsibility for occupational accidents or a means for compensating for deceased workers or protecting their families.

A) (1) A loss which the bereaved family has suffered due to occupational accidents can be estimated to the extent of the amount of money that "the amount compensated for the accident" is deducted from "the amount of wages in the case where the deceased worker would have worked until reaching the age of retirement." However, the instant preferential employment clause for the family of workers dead in industrial accidents makes the age of retirement and the amount of wage be newly set on the basis of the age of the bereaved family member who is newly employed regardless of the remaining working hours and the amount of wage before death of the deceased worker. As a result, the degree of compensation is determined based on the bereaved family member who is newly hired, not based on the deceased worker.

(2) If the deceased worker has only lineal ascendants, they have high chance to be impossible to be employed or to work only for short period of time after employment in terms of age, career, etc. The same goes for the spouse of the deceased worker (in the case of Defendant Hyundai Motors) to a greater or lesser extent. These bereaved family members are seen to be barely protected in accordance with the instant preferential employment clause for the family of workers dead in industrial accidents despite the need for protection. Furthermore, the instant preferential employment clause for the family of workers dead in industrial accidents stipulates that a special employment can be made only where there are no reasons for disqualification. Even though the need for protection can be seen to be greater in the case where there are reasons for disqualifications such as the extent to which a physical examination cannot be passed, the instant preferential employment clause for the family of workers dead in industrial accidents protects only the case where there is "a family member who is in good health and thus can normally work."

The fact that the bereaved family members employed by Defendant KIA Motors does not fall short of one third of workers dead due to occupational accidents and two persons among the bereaved family members have not been employed by failing the physical examination since the instant preferential employment clause for the family of workers dead in industrial accidents was included in the collective agreement reveals that the benefits of the instant preferential employment clause for the family of workers dead in industrial accidents are unfairly granted to the families of workers dead as a result of occupational accidents even under the same collective agreement.

B) The Majority Opinion argues to the effect that a special employment is reasonable on the grounds that the Defendants have concluded the collective agreement including the instant preferential employment clause for the family

of workers dead in industrial accidents for a long period of time and have actually employed the bereaved family members, but we cannot agree thereto.

Good morals and other social order is constantly changing value idea, and if it becomes contradictory of the whole legal order as a conviction about the legality of such practice is shaken or dampened with the times even if there was a repeated practice heretofore, its effect has no choice but to be negated. Even if the compensation and protection, premising the structure of the traditional family unit that a single head of household supports his family, have maintained in workplaces of the Defendants for a long period of time, they cannot be allowed if there are no justification and rationality in light of whole legal order.

In the past, our country's family was made up of a married couple with children, and a male spouse, as a breadwinner, was responsible for the care and support of his family. However, current family forms tend to be diversified. There are many cases of choosing the so-called single-person household who is not married after being separated from his/her parents or not having children by choice even after establishing a marital relation through marriage.

Although, even in 2010 when the deceased was dead, cases where workers dead in workplaces of the Defendants were not a head of household or have no lineal descendants had greatly increased, the Defendants and the trade unions viewed that, on the premise that a deceased worker shall be "a head of household with lineal descendants," employing his/her lineal descendant is the compensation for the deceased worker and the protection for the bereaved family of the deceased worker, and thereby causing conspicuous inequality even among workers dead due to occupational accidents and their families.

C) A huge portion of income of a household with minor children is spent on child rearing expenses and educational expenses until children begin economic activities after completing their studies. That is why there is an urgent need for guaranteeing a livelihood during the above time period if parents with minor children died from occupational accidents. However, the instant preferential employment clause for the family of workers dead in industrial accidents plays a role of securing their livelihoods from the time when children can make their own money as the said time period has passed to their retirement age. In this case, Plaintiff 1 who was a minor child when the deceased was dead is also seen not to claim employment against the Defendants until graduating from university. If so, viewing that the substantial purpose of the instant preferential employment clause for the family of workers dead in industrial accidents is not to guarantee the livelihood of the bereaved family but to hand down a job is reasonable.

E. Taking into account the following circumstances, the Majority Opinion, viewing that the instant preferential employment for the family of workers dead in industrial accidents is valid, is more difficult to be accepted.

1) The Majority Opinion is seen to the effect that the instant preferential employment clause for the family of workers dead in industrial accidents is

different from cases of specially or preferentially employing the family, etc. of a retired person or long-term employed person. However, examining in terms of the grounds for the Majority Opinion, it is logical to view that such special or preferential employment is also valid.

The Majority Opinion cites collective autonomy as a significant ground, and thus the collective agreement which specially or preferentially employs the family, etc. of a retired person or long-term employed person ought to also be respected as much as possible under the pretext of collective autonomy. Furthermore, it can be seen as the purpose of compensating the workers who have contributed to the Defendants for a long period of time through their long service and caring for their families, and thus it is not much different from the purpose of the instant preferential employment clause for the family of workers dead in industrial accidents.

According to the Defendants' allegation, Defendant KIA Motors still has the preferential employment clause for a long-term employed person, etc. The Majority Opinion results in protecting even the clause which can be criticized as the inheritance of a job by being too preoccupied with good intention.

Considering the circumstance that our country has a high death rate caused by occupational accidents or disease, the criticism that the sentencing guidelines for a person who violates the Occupational Safety and Health Act are excessively generous or the Industrial Accident Insurance Act is not sufficient enough to protect the injured workers and their families ought to be accepted with humility by all national institutes including the judiciary.

According to statistics on "a lawsuit seeking compensation for civil damages" included in the judicial yearbook annually issued by the court, an action seeking compensation for damages related to industrial accidents brought during the last ten-year period as of 2018 amounts to approximately 1,000 cases except for small claim suits. Such considerable number of lawsuits reveal that damages which cannot be made up by such insurance benefits still exist even in the case where workers or their bereaved families can receive industrial accident insurance benefits, and there are many cases of claiming compensation for civil damages against an employer to be recompensed therefor. In this case, the Plaintiffs also had no choice but to claim compensation for damages to be recompensed for damages which cannot be made up by insurance benefits, and the amount claimed was affirmed in part. The same is true of insurance benefits in accordance with the Industrial Accident Insurance Act, and thus, there are many cases where workers or their bereaved families ought to file a lawsuit for a long period of time to be approved by the Korea Workers' Compensation and Welfare Service.

The system is in need of reform for the purpose of tightening on-site safety measures in order to improve such reality; having a person in charge assume statutory responsibilities for the wrong he/she did; and enabling workers suffering from accidents or their bereaved families to receive fair and proper

compensation without going through difficult procedures. However, it is difficult to see that the instant preferential employment clause for the family of workers dead in industrial accidents is specially related to such system improvement.

The representative of the Plaintiffs argued that "management and labor tried to enjoy the exemption from criminal liabilities or the interests in the examination of an offense by submitting a petition, etc. of the bereaved family in a criminal case, while solving the civil problems caused by serious disaster accidents in a way of giving an employment opportunity to one person among the bereaved family members after concluding the instant collective agreement" in the process of the instant public pleading and trial. As such, we are concerned that offering benefits by employing the bereaved family may rather prevent the management and labor from discussing proper compensation or investigating the liability for occupational accidents and the cause thereof.

F. It is desirable for management and labor to delete the instant preferential employment clause for the family of workers dead in industrial accidents by amending the collective agreement autonomically and to prepare a new measure to provide adequate compensation through the agreement between management and unions. However, the court has no choice but to make a normative decision denying the effect of the instant clause not to destroy the value of law and order since any effort has been made autonomically to abolish the preferential employment clause even though the Defendants and their trade unions have repeatedly concluded the collective agreement for a long period of time.

G. We emphasize again that the Dissenting Opinion just determined that the employer's method of compensation for occupational accidents should not be based on the sacrifice of the third party such as job seekers, but does not take a stand that the employer's responsibility for occupational accidents ought to be reduced. The Defendants are also seen to take a position agreeing to assume compensation responsibility in a different way by expressing their intention to come up with a measure to provide adequate compensation corresponding thereto if the Supreme Court proclaims that the instant preferential employment clause for the family of workers dead in industrial accidents is null and void in the process of pleadings.

H. In conclusion, the lower court determined that the instant preferential employment clause for the family of workers dead in industrial accidents is null and void pursuant to Article 103 of the Civil Act. In so doing, the lower court, as otherwise alleged in the grounds of appeal, did not err by exceeding the bounds of the principle of free evaluation of evidence inconsistent with logical and empirical rules or misapprehending the principle of collective autonomy and the legal principles regarding Article 103 of the Civil Act, thereby failing to exhaust all necessary deliberations.

As above, we respectfully express our dissent against the Majority Opinion with respect to the above part.

6. Concurrence by Justice Kim Jae-hyung with the Majority Opinion

A. The instant basic structure of judgment is examined first.

In the instant case, whether the instant preferential employment clause for the family of workers dead in industrial accidents among the collective agreement violates the 103 of the Criminal Act, which stipulates that a juristic act which has for its object such matters as are contrary to good morals and other social order shall be null and void, is an issue. What the relationship between private autonomy and collective autonomy is, whether collective agreement can be seen as a justice act, and whether the provision on juristic acts is likewise applicable to collective agreement ought to be examined in order to determine whether Article 103 of the Criminal Act regulating the limit of private autonomy can be applied to collective agreement.

1) Every human being shall not be interfered by the state as an equal subject having dignity and can establish personal living relationships through autonomous decisions. The principle of private autonomy, which is the basis of judicial order, means that an individual can establish legal relationships in accordance with his/her own free will as such. The full text of Article 10 of the Constitution of the Republic of Korea, prescribing that all citizens shall be assured of human worth and dignity and have the right to pursuit of happiness, and Article 119(1) of the Constitution of the Republic of Korea, stipulating that the economic order of the Republic of Korea shall be based on a respect for the freedom and creative initiative of enterprises and individuals in economic affairs, are the constitutional grounds for the principle of private autonomy.

However, in a case where there are economic and social unequal relations between the parties who establish legal relations, the party who is in an inferior status cannot make decisions freely based on his/her own intention in an equal status to the other party. This is prominently featured in the contract of employment, under which workers are in subordinate relationships where working conditions, etc. are laid down by their employer's unilateral decision. Article 33 of the Constitution of the Republic of Korea guarantees the labor's three primary rights to enable workers to recover the equal status to their employer through the collective power of worker. The purpose of collective autonomy based on such labor's three primary rights is to substantially implement private autonomy between workers and their employer as workers organize a trade union, collectively negotiate with their employer, and conclude a collective agreement therewith.

2) A juristic act is a legal means to realize the principle of private autonomy. A juristic act is to cause a certain legal effect to occur as a doer wishes, and judicial order is a system that helps an individual determine and freely establish legal relationships as he/she wants. However, this cannot be unlimitedly recognized. The effect cannot be recognized when a juristic act is

in violation of good morals and other social order, i.e., general norms that must be obeyed by the general public. Details of the social order play a role in drawing a limit of private autonomy by being provided through the trial in an individual case.

As seen above, in that collective autonomy guaranteed in accordance with the labor's three primary rights is a principle aiming at substantial private autonomy, it is natural that there is also a limit to collective autonomy as with private autonomy. Concluding collective agreement which contains the contents violating compulsory provisions or social order in the name of realizing collective autonomy cannot be allowed. With respect to a contract of employment which is clearly a juristic act, the contents can be controlled on the grounds of violation of compulsory provisions or social order, while collective agreement which determines main contents of a contract of employment cannot be controlled, which leads to an undue result.

3) Article 103 of the Criminal Act stipulates that a juristic act which has for its object such matters as are contrary to good morals and other social order shall be null and void, and thus whether a collective agreement constitutes a juristic act ought to be examined first.

A collective agreement refers to an agreement concluded between a trade union which has the ability to enter into an agreement and an employer or employers' association with regard to working conditions, other standards for the treatment of workers, and various matters regarding labor-management relations. A collective agreement is not different from general contracts in that it is established in the same form as the conclusion of a contract in accordance with the agreement between the parties and the parties are bound by such agreement.

Nevertheless, there are features that a collective agreement cannot be considered as general contracts. The contents of an agreement concluded by the representative of a trade union have the effect of directly creating the rights and duties of union members who belong to the trade union. Article 33 of the Trade Union Act recognizes a compulsory effect by stipulating that any part of rules of employment or a labor contract that violate standards concerning working conditions and other treatment of workers as prescribed in a collective agreement shall be null and void (Paragraph (1)) and a direct effect by prescribing that matters not covered in a labor contract and the part which is null and void under paragraph (1) shall be governed by those standards of a collective agreement (Paragraph (2)). A worker, who is a member of a trade union, is constrained by freedom of a separate agreement including the contents below the standard of the collective agreement in relation to the treatment of workers. There is also a view that arguing that a collective agreement is not a contract but the rule of law *per se* on the ground of such special effect of the collective agreement.

Article 35 of the Trade Union Act admits the so-called general binding force within a certain scope by prescribing that when a collective agreement applies to a majority of workers of the same kind of job employed under ordinary circumstances in a business or workplace, it shall apply to the other workers of the same kind of job employed in the same business or workplace. The general biding force incurring direct rights and duties to a non-union member who does not join a trade union also shows that a collective agreement has very different characteristics from general contracts.

However, it cannot be denied that a collective agreement has a characteristic as a juristic act in that a collective agreement is just special in terms of its effect and is a legal requirement regarding the declaration of intention aiming to incur a certain legal effect as an essential element. It is difficult to view a collective agreement as fundamentally different from contracts in that it determines the rights and duties of each party through an agreement between the parties who are adversarial. The Trade Union Act does not regulate all specific matters with regard to the conclusion of a collective agreement and contents thereof: *Provided*, That there are cases where the provisions regarding juristic acts or declaration of intention as prescribed in the Criminal Act are not applied or ought to be applied after revision thereof as a collective agreement is concluded through collective bargaining, sometimes industrial actions and the effect has special characteristics unlike contracts as seen earlier. Accordingly, the key point of this entire discussion is to what extent the provisions on juristic acts stipulated in the Criminal Act are applied on the basis of the specialty a collective agreement has and which part ought to be revised and then applied.

The Supreme Court viewed the existing collective agreement or the act of concluding a collective agreement as juristic acts (*see e.g.*, Supreme Court Decisions 2003Du896, Sep. 9, 2005; 2016Da26532, Mar. 22, 2017). Furthermore, the Supreme Court developed legal principles on the premise that the case of corresponding to the requirements regulated by the Criminal Act can be included in juristic acts contrary to the social order prescribed in Article 103 of the Criminal Act or unfair juristic acts stipulated in Article 104 of the Criminal Act (*see e.g.*, Supreme Court Decisions 92Da14786, Jul. 28, 1992; 2007Da18584, Dec. 14, 2007).

In general, if an example of juristic acts considered to be null and void on the ground of the violation of social order is put into a collective agreement, it can be recognized that a collective agreement also needs to be regulated in accordance with Article 103 of the Criminal Act. For instance, the cases where one of the parties decides to commit a criminal act; union members have a provision that they never resign; the discrimination against union members offering equal labor is made without any justifiable ground; or a union member decides to retire when getting married can be assumed. When determining the validity of these provisions of a collective agreement, I may think of the way in

which the provisions regarding the fundamental rights under the Constitution of the Republic of Korea are considered through the medium of Articles 2, 103, etc. of the Criminal Act (*see* Supreme Court en banc Decision 2008Da38288, Apr. 22, 2010), but this way cannot solve the case where the infringement on fundamental rights does not come into question, and thus may be more limited than the way of determining whether the social order is violated in accordance with Article 103 of the Criminal Act.

Therefore, even if a collective agreement has specialty in terms of its validity, it has a characteristic as a juristic act, and thus determining the validity after examining the violation of social order stipulated in Article 103 of the Criminal Act in relation to the instant preferential employment clause for the family of workers dead in industrial accidents, which corresponds to the part of the collective agreement, is desirable: *Provided*, That it should be careful when determining whether a collective agreement is in violation of social order as a collective agreement has a different characteristic from a juristic act.

B. The contents of the instant preferential employment clause for the family of workers dead in industrial accidents ought to be confirmed first to determine whether the instant preferential employment clause for the family of workers dead in industrial accidents is null and void pursuant to Article 103 of the Criminal Act.

1) Article 103 of the Criminal Act stipulates cases where “the contents” of juristic acts violate social order. Therefore, whether details of the instant preferential employment clause for the family of workers dead in industrial accidents are contrary to the social order cannot be determined until they are ascertained.

The contents of juristic acts refer to the legal effect which a doer aims to incur through a juristic act, and the generation of the effect depends on the details of the declaration of intention, i.e., the details of the intention of the effect. In the case where a certain fact that a union member was dead due to occupational accidents occurred in accordance with the instant preferential employment clause for the family of workers dead in industrial accidents, an employer ought to preferentially employ one person among the lineal family members, etc. of the union member dead unless there is a reason for disqualification. As the preferential employment is to employ an employee through a separate selection process restraining competition, the employer is placed under a duty to proceed with the special employment procedure in the case of occurring a fact as above.

In that the instant preferential employment clause for the family of workers dead in industrial accidents regulates an employer’s duty responding to the case where grave consequences such as the death due to occupational accidents are caused regardless of the cause for which an employer is responsible, it can be seen to prescribe additional compensation except for the compensation in accordance with the Labor Standards Act in a way other than money based on

an employer's liability for an accident compensation under the Labor Standards Act.

2) The accident compensation system under the Labor Standards Act, aiming to have an employer, who puts workers offering labor under his/her order and operates a business which has its own occupational risk, compensate for a loss a worker suffers from accidents without determining whether he/she is at negligence, is a kind of no-fault compensation system for damages (*see* Supreme Court en banc Decision 81Daka351, Oct. 13, 1981). The instant preferential employment clause for the family of workers dead in industrial accidents is that management and unions agreed to additional compensation in the manner of preferential employment in advance in preparation for the death of union members arising from occupational accidents.

Article 394 of the Criminal Act stipulates that "unless otherwise agreed by the parties, the damages shall be recovered in money" with respect to the method of compensation for damages, which shall apply *mutatis mutandis* to the compensation for damages caused by juristic acts (Article 763). Accordingly, the damages arising from the non-fulfillment of the obligation or juristic acts, in principle, shall be recovered in money, but an agreement that damages can be recovered in a different way is also allowed. This is likewise applicable to the case of agreeing to the method of an accident compensation. Cases stipulating the compensation for damages or indemnification for loss in other ways than money between the parties are rare, but this is also a way which is planned by the Criminal Act. The stipulation that is intended to undo damages in a non-money way such as the instant preferential employment clause for the family of workers dead in industrial accidents can be also seen to fall within such category.

In this sense, the instant preferential employment clause for the family of workers dead in industrial accidents is clearly distinct from the clause which is introduced to employ children of a retired person or long-term employed person specially or preferentially. If they are uniformly deemed as the inheritance of a job with such differentiation, this may oversimplify the matter or fall into the fallacy of generalization with no regard to the difference on and importance of the matter.

C. Whether the instant preferential employment clause for the family of workers dead in industrial accidents may be null and void on the ground of the violation of social order is examined.

1) An act contrary to social order which become null and void pursuant to Article 103 of the Criminal Act contains cases where: the contents of the rights and duties, the object of a juristic act, are contrary to good morals and other social order; even if the contents *per se* are not contrary to social order, they are legally enforced or become contrary to social order as a juristic act is connected with the condition or monetary price contrary to social order; and the motives of a juristic act indicated or known to the other party are contrary to social order

(*see e.g.*, Supreme Court Decision 2005Da23858, Jul. 28, 2005). These types do not embrace all acts violating social order, but the contents thereof can be seen to be not against social order if most juristic acts do not correspond to the above types.

The instant preferential employment clause for the family of workers dead in industrial accidents regulates an additional compensation method other than money to supplement an employer's obligation to compensate for accidents and the key contents are to conclude an employment contract with one person among the lineal family members, etc. of a worker dead due to occupational accidents unless there is a reason for disqualification. The duty assumed by the employer is to conclude a labor contract when a reason satisfying the above requirements occurs in times to come, and thus it is difficult to readily conclude that the contents *per se* are contrary to social order. In addition to that, there are no circumstances to see that the contents of the rights and duties stipulated in the instant preferential employment clause for the family of workers dead in industrial accidents are contrary to social order for the purpose of other compensation for accidents. Any price or condition is not also connected with the implementation of the instant preferential employment clause for the family of workers dead in industrial accidents. The motive for including the instant preferential employment clause for the family of workers dead in industrial accidents in a collective agreement is an accident compensation, and thus the motive cannot also be seen to be contrary to social order.

2) The principle of our legal order is private autonomy or collective autonomy. It is only admitted in the case of exceeding the bounds which cannot be generally accepted by social community in light of the whole legal order unless such restrictions violate compulsory provisions. Whether such limits are exceeded ought to be determined by balancing conflicting legal interests with respect to a certain juristic act in an individual case.

A) Whether the instant preferential employment clause for the family of workers dead in industrial accidents infringes an employer's right of freedom becomes an issue. An employer, in principle, has the freedom of employment. An employer may freely decide when, how, and who to hire unless statutes are violated. Especially is this so in case of private companies, not public companies.

While the Defendants, who are employers, entered into collective agreements with trade unions on their own will, they agreed to the instant preferential employment clause for the family of workers dead in industrial accidents, and thus recognizing the effect of the instant preferential employment clause for the family of workers dead in industrial accidents is in accord with the employers' will. The instant preferential employment clause for the family of workers dead in industrial accidents can be seen not to infringe but rather to realize an employer's freedom of employment, and does not also invade the freedom not to conclude an employment contract, which is the so-

called freedom not to employ. It cannot be deemed that he principle of freedom of contract is infringed due to the binding force of the contract after the parties conclude a contract on their own will.

A contract aiming at excessive restrictions of an individual's freedom can be null and void on the ground of the violation of social order. Take a worker who agreed not to run a certain business without any restrictions after retirement as an example. In such a case, the agreement unfavorable to the worker becomes a main issue, and it ought to be careful about whether the violation of social order on the ground that the agreement excessively restricts the employer's freedom may be recognized. The instant preferential employment clause for the family of workers dead in industrial accidents is to preferentially employ one person among the bereaved family members of a worker dead unless there is a reason for disqualification as compensation for occupational accidents. As the employer's authority not to employ is reserved where the bereaved family members are disqualified, it is difficult to readily conclude that such clause excessively restricts the employer's freedom.

B) A question is raised with regard to whether the instant preferential employment clause for the family of workers dead in industrial accidents can be seen to violate the social order on the ground that the said clause infringes the interests or rights of the third parties including job seekers, etc.

It is difficult to expressly specify whether the interests or rights of the third party is infringed in case of employing one person among the bereaved family members in accordance with the instant preferential employment clause for the family of workers dead in industrial accidents. It is also difficult to know when and what kind of job seeker was not employed due to the instant preferential employment procedure. Such clause cannot be deemed identical to an agreement which excludes those falling under a certain scope from the employment on the grounds of gender, race, religion, origin, etc. This is because such agreement has a direct impact on the interests or rights of such persons, while the instant preferential employment clause for the family of workers dead in industrial accidents only applies to the case where a worker was dead due to occupational accidents and the effect thereof on the third party is limited in that the bereaved family member thereof is employed instead of the person who died.

When determining whether a juristic act violates the social order, the interests or rights of the third party as well as public interests or social norms can be considered, but an act can be deemed to violate social order in terms of the interests or rights of the third party only where a juristic act directly affects the interests or rights of a specified third party or has a distinct possibility of affecting them in times to come. As with this case, where it is unclear whether the third party exists, it is difficult to see that a juristic act is contrary to social order on the grounds of the infringement on the interests or rights of the third party.

C) As mentioned by the Majority Opinion, the instant preferential employment clause for the family of workers dead in industrial accidents is a means of protecting livelihood of the bereaved family as the compensation for special sacrifice such as death due to occupational accidents. Viewing the instant preferential employment clause for the family of workers dead in industrial accidents as invalid can be seen to be contrary to expectations and rights of employment of the bereaved family of a person who died as a result of occupational accidents. As the bereaved family has never been involved in the establishment of the instant preferential employment clause for the family of workers dead in industrial accidents, there should be a justifiable ground in order to deprive the bereaved family of such expectations and rights. The bereaved family would have drawn up a life plan based thereon in reliance on the instant preferential employment clause for the family of workers dead in industrial accidents, and thus such faith deserves to be protected.

D) Expectations for fairness in our society have been raised high day by day. As the unemployment of young people becomes serious, the fairness of employment is now recognized as an important value. Thus, it is desirable for both employers and trade unions to make efforts for fair employment. However, whether the stipulation, employing one person among the bereaved family members, who has no reason for disqualification, as the compensation for workers dead due to occupational accidents, is viewed as invalid on the ground of the violation of social order is another matter. The effect thereof cannot be negated on the ground that the contents of the clause of a collective agreement are undesirable.

The purpose of the instant preferential employment clause for the family of workers dead in industrial accidents is to employ one person of the bereaved family members of workers who died due to occupational accidents in a collective agreement concluded through negotiation between management and unions in accordance with the Trade Union Act. At this point, it can be viewed as undesirable in that the adherence to the instant preferential employment clause for the family of workers dead in industrial accidents may undermine the value such as fairness of employment. Sticking to such clause even though the compensation system for occupational accidents is established is definitely undesirable. However, viewing it as invalid without any distinct ground to prove that the instant preferential employment clause for the family of workers dead in industrial accidents is contrary to social order may result in an excessive reduction in the realm of autonomy guaranteed to management and labor.

As above, I express my concurrence with the grounds of the argument of the Majority Opinion.

7. Concurrence by Justice Kim Seon-soo and Justice Kim Sang-hwan with the Majority Opinion

A. Preface

The Majority Opinion emphasizes that the instant preferential employment clause for the family of workers dead in industrial accidents may be an unreasonable discrimination against job seekers and union members. In terms of the public nature of a job, the principle that the Defendants, private companies, also have social responsibility for realizing the fairness of employment, and thus ought to be bound by a certain legal principle with respect to the employment of workers is revealed, and, in this regard, it is believed that the Majority Opinion contains a significant meaning to be worth listening up. Nonetheless, we intend to express our concurrence with the Majority Opinion, additionally explaining that it is not enough to view the instant preferential employment clause for the family of workers dead in industrial accidents prepared as a countermeasure of "the case where a worker is dead arising from occupational accidents" according to an autonomous agreement between management and unions as invalid on the sole basis of the grounds presented by the Dissenting Opinion.

B. In relation to control over the contents of a collective agreement on the basis of Article 103 of the Criminal Act

1) It needs to bear in mind that a collective agreement functions as an autonomous norm of management and labor on the basis of the Constitution of the Republic of Korea when the court determines invalidity thereof by examining the contents of a collective agreement based on Article 103 of the Criminal Act.

The labor's three primary rights specified in Article 33 of the Constitution of the Republic of Korea not only have the nature of the passive right to defense against the infringement on the state power but also have the meaning as objective constitutional values which ought to be actively reflected in forming law and order of related areas. According thereto, a collective agreement as a result of the realization of the labor's three primary rights restricts both parties as a general agreement between the parties who have conflicting interests and, further, play a role as an autonomous norm in labor-management relations. Article 33(1) of the Trade Union Act recognizes a compulsory effect by stipulating that any part of rules of employment or a labor contract that violate standards concerning working conditions and other treatment of workers as prescribed in a collective agreement shall be null and void, while Article 33(2) recognizes a direct effect by prescribing that matters not covered in a labor contract and the part which is null and void under Paragraph (1) shall be governed by those standards of a collective agreement, which can be understood as the provision based on the normative status of a collective agreement planned by the Constitution of the Republic of Korea.

As such, if a collective agreement pays attention to playing a role as an autonomous norm within a subgroup of society (a corporation) in accordance with the Constitution and laws embodying the Constitution, the court needs to take a position fundamentally respecting the labor's three primary rights and

collective autonomy as law and order formed by the Constitution of the Republic of Korea when restricting the content of the collective agreement on the basis of Article 103 of the Criminal Act.

In particular, the court's paternalistic intervention ought to be also more restrained in that it is apprehended that the court's denial of the effect of the matters agreed by conceding a certain part for the promotion of welfare and other social or economic status of workers through negotiation with a trade union even though an employer is in economically or socially superior position on the basis of Article 103, which is the general provision of the Criminal Act, is contrary to the purpose of the Constitution and Act related to labor which intends to accomplish substantial equality through the protection of the economically or socially weak.

Therefore, to completely exclude the effect thereof pursuant to Article 103 of the Criminal Act by viewing the contents of a collective agreement regarding working conditions, etc. to be contrary to "good morals and other social order," a special circumstance that the contents of the collective agreement in question can be seen to excessively restrict the fundamental rights of those related under the Constitution or other constitutional legal interests or values beyond an acceptable level under social norms even if the constitutional significance of the labor's three primary rights as above is considered ought to be presented.

2) The Majority Opinion is also a conclusion, considering the meaning and function of Article 103 of the Criminal Act.

It is not easy to determine whether a collective agreement having the nature of an autonomous rule the parties made on a basis of their own will is contrary to "good morals and other social order" stipulated in Article 103 of the Criminal Act. This is because the concept "good morals and other social order" *per se* can be changed with the times and is a fairly indeterminate and abstract value concept with no option but to be construed in various ways according to social experience, perspective, interests, etc. of the members of our society.

Under the circumstance as above, the court need to have more objective and normative viewpoint to make the judgment of the court regarding Article 103 of the Criminal Act stable enough to ensure the predictability of the parties. This is because, if the court minutely determines whether a juristic act has a desirable contents and direction in the light of social situation, etc. of the time through the medium of Article 103 of the Criminal Act, not only is it difficult to draw a universally received conclusion in relation thereto, but it is also feared that the court's excessive paternalistic involvement in the parties' freedom to establish their legal relations according to their own will and interests, i.e., the principle of private autonomy may be caused.

Therefore, it is reasonable for the court to construe and apply Article 103 of the Criminal Act in terms of whether a juristic act is contrary to objective value order sought or planned by the Constitution of the Republic of Korea through the regulations, etc. concerning fundamental rights. This is consistent

with legislative intent of Article 103 of the Criminal Act which intends to realize at least fundamental value of whole legal order even in legal relations based on the private law.

C. Counterargument to the grounds for an argument of the Dissenting Opinion

1) The Dissenting Opinion viewed that the instant preferential employment for the family of workers dead in industrial accidents is designed to create legal relations between the bereaved family and an employer and is not the contents related to working conditions between union members and their employer, and thus it is difficult to see that the said clause is within the scope of special protection based on the labor's three primary rights.

However, this cannot be agreed in that working conditions are understood in a very narrow way by paying too much attention to the point that a new legal relation is created. The instant preferential employment clause for the family of workers dead in industrial accidents is regulated as a part of the compensation for union workers who died as a result of occupational accidents and there can be no disagreement on the point that the regulations on the compensation for accidents correspond to working conditions.

Even if the contents of the instant preferential employment clause for the family of workers dead in industrial accidents are seen not to be included in working conditions by taking the strictest view on the scope of working conditions, it is difficult to accept the viewpoint of the Dissenting Opinion. This is because the instant preferential employment clause for the family of workers dead in industrial accidents corresponds at least to the debt part of the collective agreement as an agreement with a trade union through negotiation regarding matters in disposition of the Defendants, employers, to promote workers' welfare, and raise other social and economic status, and the debt part of a collective agreement also falls within the range of the protection of Article 33 of the Constitution of the Republic of Korea and the Trade Union Act.

2) The Dissenting Opinion viewed that the instant preferential employment clause for the family of workers dead in industrial accidents corresponds to the case of adopting the standards for employment irrelevant to a corporate need for employment or business ability.

Of course, it is true that the instant preferential employment clause for the family of workers dead in industrial accidents requires the subject of application thereof to be the bereaved family of a worker dead. However, it is too much to see that the above requirement is a standard for employment, not considering the corporate need for employment or business ability. From the viewpoint of making up for vacancy caused by a worker's death, the corporate need for employment exists. Furthermore, there should be no "reason for disqualification" to be employed in accordance with the instant preferential employment clause for the family of workers dead in industrial accidents, and it cannot be seen to correspond to the employment unrelated to business ability

in that the newly hired bereaved family member is assigned to the duty suitable therefor by the Defendants after he/she is employed.

3) We have a lot of sympathy with the part of the Dissenting Opinion, emphasizing real difficulties, etc. which job seekers are faced with, but, even if it were so, it is difficult to see that it is directly related to the effect of the instant preferential employment clause for the family of workers dead in industrial accidents.

A) Before raising an objection to the grounds of an argument of the Dissenting Opinion, we intend to stress that the instant preferential employment clause for the family of workers dead in industrial accidents has meaning and value which cannot be simply disregarded. The meaning of the instant preferential employment clause for the family of workers dead in industrial accidents, prepared as management and labor have a common realization regarding "the circumstance where a worker is dead by any cause for which the employer is responsible or for occupational reasons, ought to be accepted seriously *per se*. This is the underlying reason why the doubt that "a job is simply inherited without any justification" is seen to be unreasonable.

Even though the death of a worker resulting from occupational accidents should never happen, it is common knowledge that the death rate of our country caused by occupational accidents or diseases remains considerably high even at the global level. Countless occupational accidents have happened in recent years, and have lost precious lives. This can be seen to be resulted from the fact that our society, laws, and institutions ignore, pay no attention to, and neglect working environment and safety of workers.

The state and social community all ought to keep workplaces safely. However, it is natural that the most important and primary responsibility lies with an employer. In a case where the employer does not fulfill such responsibility, thereby causing accidents, particularly, irrevocable results such as the death of a worker, going the extra mile to enable workers specially sacrificed and their bereaved families to recover and heal damage arising from accidents, not to mention identifying whose fault caused such damage by investigating the cause thoroughly and distinguishing between right and wrong is perfectly reasonable.

The Labor Standards Act stipulates an employer's duty to compensate for occupational accidents and Industrial Accident Insurance Act allows workers and their bereaved families to receive various benefits, but it is difficult to readily conclude that the guarantee and compensation regulated by law are the complete recovery of damage resulting from occupational accidents. Accordingly, an employer who is basically responsible for accident compensation ought to be encouraged to seek additional methods except those guaranteed by law and to replenish or extend responsibility for accident compensation he/she ought to bear in accordance with an agreement between

management and labor, while taking a dim view thereof on the ground that a method is not guaranteed by law should be discouraged.

Allowing one of his/her bereaved family members to succeed a job carried out by a worker dead in occupational accidents to maintain a dependent community such as a family can also be deemed as the closest method to the recovery to the original state from damage.

B) In conditions where the right to work, corresponding to the fundamental rights, cannot be properly realized as the question of youth unemployment in our society reaches a serious level, all our energy of society ought to be put into the solution of this problem. The state has a constitutional duty to make efforts to promote employment of workers in order to solve the problem of youth employment, and in that the Defendants also correspond to the so-called national companies grown through the contribution of the state and social members in our society, the responsibility to make efforts to resolve such social problems as youth employment cannot be denied.

However, no reason can be found to see that the instant preferential employment clause for the family of workers dead in industrial accidents prepared for the compensation and support for the family of a worker dead due to occupational accidents may be any obstacle to the establishment of fundamental countermeasures against, and the right solution of, the problem of youth employment, which is revealed by the volume and actual condition of employment in accordance with the instant preferential employment clause for the family of workers dead in industrial accident and the following circumstances.

In principle, the Defendants conduct public recruitment to provide a large number of applicants with equal opportunities when employing workers, but they allow special employment through special selection where there are certain circumstances. Article 7(4) of the Regulations for Personnel Management of Defendant KIA Motors stipulates that special employment can be allowed in the case of: corresponding to the instant preferential employment clause for the family of workers dead in industrial accidents; employing a small number of employees with abundant experience and capacity for the position to which they are scheduled to be assigned; employment order in accordance with laws and regulations; employing small number of workers to urgently supplement the personnel; and hiring a person who is deemed difficult to employ through other open competitive employment.

Like this, various special employments distinguished from public recruitment are admitted, and thus the Dissenting Opinion that the special employment based on the instant preferential employment clause for the family of workers dead in industrial accidents can be an unreasonable discrimination against job seekers is difficult to be accepted.

C) The Defendants mainly provide “job seekers’ rights to be fairly employed” as the main ground of their argument, which is accepted by the

Dissenting Opinion. However, it is doubtful whether the Defendants recognize "specific rights of job seekers for fair employment" required "to them."

Where job seekers demanded fair employment to the Defendants or claimed the confirmation of the workers' status, damages, etc. against the Defendants on the ground that they were not employed due to unfair standards, procedures, etc. for employment, whether the Defendants meet such claims and whether the court can admit this where the Defendants deny such claims and, in response, the job seekers file a lawsuit against the Defendants are very difficult problems.

It is unfair that the instant preferential employment clause for the family of workers dead in industrial accidents which can be evaluated as legal rights through an agreement between labor and management based on "job seekers' expectations of, and hopes for, fair employment" which seem to be desperate but difficult to recognize even specific legal rights is invalidated.

4) The Dissenting Opinion, criticizing that the instant preferential employment clause for the family of workers dead in industrial accidents does not provide adequate compensation in all cases including many different types of families and does not keep up with the trend of society, is the part worth listening to.

However, the provision of different compensation depending on the situation of each bereaved family are hardly viewed as inappropriate if the compensation for the death resulting from occupational accidents presupposes the purpose of guaranteeing livelihood of the bereaved family. In light of the fact that Industrial Accident Insurance Act also differently estimates a survivors' compensation annuity depending on the number of persons eligible for a compensation annuity among survivors whose livelihood had been supported by a worker dead due to occupational accidents, it cannot be seen that it is wrong that compensation between the bereaved family of a worker who has lineal descendants and that of a worker who does not is differently provided.

Moreover, other problems that the instant preferential employment clause for the family of workers dead in industrial accidents contains are those which can be solved by fully considering various circumstances and appropriately supplementing in response to changes in society. Denying the effect of the instant preferential employment clause for the family of workers dead in industrial accidents cannot be deemed as a solution. All social welfare and assistance programs may not be perfect and adequate. For such a reason, removing all benefits on the ground that some may recieve no or unfair benefits is the conclusion putting the cart before the horse.

D. As to candid advice of the Dissenting Opinion

1) We strongly sympathize with candid advice of the Dissenting Opinion that all national institutions including the judiciary ought to come to terms with criticisms: that the sentencing guidelines for a violator of the Occupational Safety and Health Act are excessively generous compared with high death rate

from industrial accidents of our country; and that the Industrial Accident Insurance Act is not adequate for the protection of workers who suffer from accidents and their bereaved families. Furthermore, we agree with the Dissenting Opinion that the improvement of a system, such as strengthening field safety measures, having the person in charge to take legal responsibility equivalent to his/her fault, enabling workers suffering from accidents and their bereaved families to receive fair and adequate compensation without undergoing difficult procedures, is definitely required to improve such reality.

However, it is difficult to agree with the point of view that the instant preferential employment clause for the family of workers dead in industrial accidents has a negative effect on the awareness of problems and improvement of a system as mentioned above. The Dissenting Opinion's concern over whether the instant preferential employment clause for the family of workers dead in industrial accidents induces us to stop discussing proper compensation or investigating the liability for occupational accidents and the cause thereof is seen to be utterly groundless. This is an issue to be solved by strictly executing the related laws and ordinances to thoroughly determine the cause and punish the person in charge, and, if not enough, executing after enactment and amendment thereof. The opinion that the instant preferential employment clause for the family of workers dead in industrial accidents may be the cause or effect of the problem that occupational accidents are not handled properly is difficult to be accepted.

2) The Dissenting Opinion asserts that it is out of touch with the international standards on the ground that a collective agreement such as the instant preferential employment clause for the family of workers dead in industrial accidents is rare in other countries. However, it is natural that the contents of a collective agreement vary depending on nations, regions, industries, and workplaces according to the influence of the tradition of labor-management relations or various legal systems. It is difficult to readily conclude that the existence and inexistence of certain contents corresponds to international standards. Considering that it is problematical whether the case of denying the effect of a collective agreement autonomically concluded between labor and management on the ground of the violation of public order and good morals also exists in other countries, denying the effect of the instant preferential employment clause for the family of workers dead in industrial accidents by citing Article 103 of the Criminal Act can be seen to be rather in violation of international standards.

3) The reason why the Defendants and their trade unions have kept the instant preferential employment clause for the family of workers dead in industrial accidents for a long period of time is because they agreed on the necessity or efficiency of the said clause. If there is an irrationality in the instant preferential employment clause for the family of workers dead in industrial accidents, it can be improved by labor and management. In reality, Defendant

Hyundai Motors and their trade union deleted the provision to the effect that the children of retired persons and long-term employed union members are preferentially employed, amending their collective agreement. This shows that labor and management are capable of improving their collective agreement in consideration of social responsibility. Even if there is no the court's paternalistic intervention, the Defendants and their trade unions are thought to operate related systems, paying due regard to various problems raised to them.

As above, we express our concurrence with the Majority Opinion.

Chief Justice Kim Myeongsu (Presiding Justice)
Justices Kwon Soon-il
Park Sang-ok
Lee Ki-taik
Kim Jae-hyung
Park Jung-hwa
Ahn Chul-sang
Min You-sook
Kim Seon-soo
Lee Dong-won
Noh Jeong-hee
Kim Sang-hwan (Justice in charge)
Rho Tae-ak

Supreme Court Decision 2018Da290436 Decided April 9, 2020【Claim for Restitution of Unjust Enrichment】

【Main Issues and Holdings】

[1] In a case where the articles of incorporation stipulates that the amount of remuneration to be received by directors shall be determined by a resolution of a general meeting of shareholders, whether the directors may exercise the right to demand remuneration without a resolution of a general meeting of shareholders (negative)

Whether, in such case, the consideration paid as a reward for the performance of the directors' duties may be all included in "remuneration of directors" (affirmative) and whether the amount of money that a company pays directors, contingent on their management performance in the name of performance-based bonus, special bonus, etc., or for the purpose of motivating directors to achieve results may also be included in "remuneration of directors" (affirmative)

[2] In the case where the articles of Stock Company A regulates that the amount of remuneration to be received by directors shall be determined in accordance with a resolution of a general meeting of shareholders, and Representative Director B of Stock Company A received money in the name of "special bonus" form Stock Company A without a resolution of a general meeting of shareholders, the case holding that the lower court determined that the amount of money Representative Director B received in the name of "special bonus" constitutes unjust enrichment derived without any legal ground as the remuneration paid as a reward for the performance of his/her duties

【Summary of Decision】

[1] Article 388 of the Commercial Act prescribes that if the amount of remuneration to be received by directors has not been determined by the articles of incorporation, such amount shall be determined by a resolution of a general meeting of shareholders. This is a mandatory provision stipulated in order to protect the interests of a company and its shareholders and creditors by preventing a director from promoting his/her own interests with respect to his/her remuneration. Thus, in a case where the articles of incorporation stipulates that the amount of remuneration to be received by directors shall be determined by a resolution of a general meeting of shareholders, the directors cannot exercise the right to demand remuneration unless there is evidence to admit that there was a resolution of a general meeting of shareholders regarding the amount, methods and date for the payment, etc. On this occasion, the

consideration paid as a reward for the performance of the directors' duties regardless of the names such as monthly pay, bonus, etc. is all included in "remuneration of directors," and the same goes for the amount of money that a company pays directors, contingent on their management performance in the name of performance-based bonus, special bonus, etc., or for the purpose of motivating them to achieve results.

[2] In the case where the articles of Stock Company A stipulates that the amount of remuneration to be received by directors shall be determined by a resolution of a general meeting of shareholders, Representative Director B of Stock Company A received money in the name of "special bonus" from Stock Company A without a resolution of a general meeting of shareholders, the Court held: the money which Representative Director B received in the name of "special bonus" constitutes the remuneration paid as a reward for the performance of his/her duties; if there was just the decision-making of the major shareholder of Stock Company A without a resolution of a general meeting of shareholders when Representative Director B received the special bonus, it cannot be seen to be like the resolution was made on the sole basis that it is expected that the resolution would have been made if the general meeting of shareholders had been held; the payment of the part cannot be seen to be valid solely based on the circumstance the part of the special bonus is within the maximum amount of the director's numeration determined by the general meeting of shareholders; and thus the lower court determined that the special bonus paid to Representative Director B constitutes unjust enrichment derived without any legal ground.

【Reference Provisions】 [1] Article 388 of the Commercial Act / [2] Article 388 of the Commercial Act; Article 741 of the Civil Act

Article 388 of the Commercial Act (Remuneration for Directors)

If the amount of remuneration to be received by directors has not been determined by the articles of incorporation, such amount shall be determined by a resolution of a general meeting of shareholders.

Article 741 of the Civil Act (Definition of Unjust Enrichment)

A person who without any legal ground derives a benefit from the property or services of another and thereby causes loss to the latter shall be bound to return such benefit.

【Reference Cases】 [1] Supreme Court Decision 2012Da98720 decided May 29, 2014; 2015Da51968 decided May 30, 2018 (Gong2018Ha, 1164); 2017Da17436 decided July 4, 2019 (Gong2019Ha, 1517)

【Plaintiff-Appellee-Appellant】 SIFLEX Co., Ltd. (Law Firm Yoon & Yang (IP) LLC, Attorneys Kim Jong-bin et al., Counsel for the plaintiff-appellee-appellant)

【Defendant-Appellant-Appellee】 Defendant (Law Firm JO & KIM, Attorneys Jo Cheol-gi et al., Counsel for the defendant-appellant-appellee)

【Judgment of the court below】 Seoul High Court Decision 2018Na2004916 decided October 17, 2018

【Disposition】 The final appeals are all dismissed. Of the final appeal costs, the cost arising from the Plaintiff's final appeal is born by the Plaintiff and the cost arising from the Defendant's final appeal is borne by the Defendant.

【Reasoning】 The grounds of final appeal are examined.

1. As to ground of appeal Nos. 1 and 4

A. Article 388 of the Commercial Act prescribes that if the amount of remuneration to be received by directors has not been determined by the articles of incorporation, such amount shall be determined by a resolution of a general meeting of shareholders. This is a mandatory provision stipulated in order to protect the interests of a company and its shareholders and creditors by preventing a director from promoting his/her own interests with respect to his/her remuneration. Thus, in a case where the articles of incorporation stipulates that the amount of remuneration to be received by directors shall be determined by a resolution of a general meeting of shareholders, the directors cannot exercise the right to demand remuneration unless there is evidence to admit that there was a resolution of a general meeting of shareholders regarding the amount, methods and date for the payment, etc. (*see, e.g.*, Supreme Court Decision 2012Da98720 decided May 29, 2014 and Supreme Court Decision 2017Da17436 decided July 4, 2019) On this occasion, the consideration paid as a reward for the performance of the directors' duties regardless of the names such as monthly pay, bonus, etc. is all included in "remuneration of directors" (*see, e.g.*, Supreme Court Decision 2015Da51968 decided May 30, 2018), and the same goes for the amount of money that a company pays directors, contingent on their management performance in the name of performance-based bonus, special bonus, etc., or for the purpose of motivating them to achieve results.

B. The lower court, on the grounds the same as indicated in its reasoning, determined as follows.

(1) The articles of the Plaintiff stipulates that the amount of remuneration to be received by directors shall be determined by a resolution of a general meeting of shareholders, the money which the Defendant received in the name of "special bonus" from 2013 to 2014 as a representative director of the Plaintiff (hereinafter referred to as "instant special bonus") also constitutes the remuneration paid as a reward for the performance of the directors' duties.

(2) If there was just the decision-making of the Nonparty, an inside director, who was just a major shareholder of the company, without a resolution of a general meeting of shareholders when the Defendant received the instant special bonus, it cannot be seen to be like the resolution was made on the sole basis that it is expected that the resolution would have been made even if the general meeting of shareholders had been held. if the decision-making regarding the payment of the instant special bonus is invalid on the grounds that the bonus was paid without a resolution of a general meeting of shareholders, the part of the instant special bonus cannot also be seen to be valid on the basis of the circumstance that the part was within the maximum amount of a director's numeration determined by the general meeting of shareholders.

(3) Therefore, the instant special bonus paid to the Defendant constitutes unjust enrichment made without any legal ground.

C. In light of the foregoing legal principles, with respect to the judgment of the lower court as above, there were no errors of misapprehension of the legal doctrine regarding remuneration of directors, a resolution of a general meeting of shareholders, the maximum amount of remuneration to be received by directors, etc. prescribed in Article 388 of the Commercial Act.

2. As to the Defendant's ground of appeal No. 5 and the Plaintiff's ground of appeal

The lower court, on the grounds the same as indicated in its reasoning, determined that in the case where the Plaintiff paid the instant special bonus except the withheld amount of tax including income tax, etc., the Defendant is obliged to restitute the amount of money he/she actually received except the withheld amount of tax as unjust enrichment. Moreover, the Defendant, as a person enriched in bad faith, is obliged to restitute unjust enrichment including legal interest as from the day on which the instant special bonus has been received.

In light of the relevant legal principles and records, the judgment of the lower court, contrary to the alleged ground of appeal, there were no errors of misapprehension of the legal doctrine concerning attribution of the right to demand the restitution of the withheld amount of tax or a person enriched in bad faith.

3. Conclusion

Therefore, the final appeals are all dismissed. Of the final appeal costs, the cost arising from the Plaintiff's final appeal is born by the Plaintiff and the cost arising from the Defendant's final appeal is borne by the Defendant. 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 (Justice in charge)
Lee Ki-taik
Kim Seon-soo

Source: SUPREME COURT LIBRARY REPUBLIC OF KOREA