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| ARTICLES |

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□ARTICLES□

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(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).

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

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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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Critical problems of the some provisions of the Special Act on Prevention of Insurance Fraud in Korea:
- Scope of an insurance fraud action and the commencement of the execution of crime of insurance fraud -* **

*Semin Park****

ABSTRACT

The Korean government enacted the Special Act on Insurance Fraud Prevention to prevent, investigate, detect and punish insurance fraud. This act was enacted on September 30, 2016. The examination of its articles indicates that the purpose of the Special Act cannot be effectively achieved. It can be interpreted that the commencement of the execution of crime of insurance fraud and the scope of insurance fraud became narrower than that of the traditional crime of fraud under the Korean criminal law. In particular, since the Special Act stipulated the time of commencement of the execution of insurance fraud at the time of claiming insurance money, it became practically impossible to prevent insurance fraud before the claim of insurance money is made. If the Special Act was enacted to prevent and detect insurance fraud, this should have been brought into agreement with the conventional interpretation and judicial precedents related to crime of fraud under the criminal law in Korea.

It is wrong to define the subject of insurance fraud action in a way that limits the occurrence, cause, and contents of insurance accidents. The requirements and components for establishing crime of insurance fraud should have included hard and soft insurance fraud that may occur in a series of processes, including signing an insurance contract, maintaining insurance contracts, and claiming insurance money. However, the Special Act failed. The crime of insurance fraud can be established even before the claim for insurance money is made. Signing an insurance contract by malicious breach of the duty of disclosure or falsifying insurance accidents should be a

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** This paper discusses only Korea's special act, criminal law, judicial precedents and academic theories.

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crime of insurance fraud. However, under the current Special Act, these fraudulent actions cannot be regarded as the crime of insurance fraud. In terms of preventing insurance fraud, the definition and scope of insurance fraud action in the Special Act should be revised. Also amendments regarding the commencement of execution of the crime of insurance fraud are required so that the crime of insurance fraud even in the subscription stage of insurance contract can be established – before the fraudulent action against insurance accidents or claiming insurance money -.

KEYWORDS: Special Law on Insurance Fraud Prevention, Scope of Insurance Fraud Action, Commencement of the Execution of Crime of Insurance Fraud, Breach of the Duty of Disclosure, Preparatory Crime of the Insurance Fraud, Soft Insurance Fraud

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I. Introduction

1. Characteristics of insurance fraud

An insurance system protects individuals and businesses by transferring and distributing the risk of insurance accidents. In the event of an insurance accident, much more insurance money is paid to the cutomers from the insurance company than the insurance premium paid. Insurance contracts essentially have a characteristic of gambling. The temptation to commit insurance fraud or insurance crime is an inevitable side effect of the insurance system. In order to maintain a principle of good faith that governs insurance contracts, the insurance law in Korea (Part IV of Korean Commercial Law)

includes various systems such as the duty of disclosure of material facts, the duty to notify an increased risk, the insurer's exceptions or exclusions, policyholder or insured's duty to sue and labour, reduction of insurance money in case of over insurance contract by a good faith and void of over insurane contract by fraud *etc*.

Insurance fraud crime is linked to moral hazards or adverse selection. Insurance fraud is any illegal act committed on purpose by policyholders, the insured, or beneficiaries in order to acquire benefits of insurance contract wrongly, or to obtain a high amount of insurance money in the way of misusing insurance system.[1]Hard insurance fraud refers to signing a deceitful insurance contract to illegally acquire insurance money, intentionally causing an accident, or disguising an insurance accident *etc*. On the other hand, although insurance accidents occurred normally, exaggerating the size of an insurance accident or receiving over-treatment in a hospital to defraud an insurance money[2] *etc* is described as soft insurance fraud. The Korean criminal law academia has applied the crime of fraud under criminal law to insurance fraud crime.[3]

The seriousness of insurance fraud is not sufficiently recognized in a society because the damage caused by insurance fraud is distributed in a small amount to numerous insurance consumers. In addition, people are not guilty because they think that they signed insurance contract normally and they paid insurance premium to the insurance company. Insurance fraudsters transfer damage to lawful policyholders and create a negative image of the insurance industry. Various systems or legislative attempts to prevent or detect insurance fraud are not intended to benefit insurance companies. Insurance fraud prevention blocks unnecessary leakage of insurance payments, maintaining an appropriate loss rate in an insurance organization. Insurance fraud prevention can protect many insurance policyholders by preventing unnecessary increases in their insurance premiums. The victim of insurance fraud is not only insurance companies but also good and lawful policyholders.

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[1] Semin Park, "A Study on the Analysis on the Current Countermeasure for the Insurance Fraud and Its Reform", The Justice, 111, 2009, p. 142.

[2] Depending on the insurance product, there is a product that pays a fixed daily hospitalization fee, apart from paying for surgery, medical examination or consultation with a doctor, *etc.*

[3] Jun-Hyuk Choi, "Meaning of the Insurance Fraud Crime and the Number of Crime", Lawyers Association journal, 68(3), 2019, p.685; Kyoung-Ok Ahn, "The criminal nature of insurance fraud and its punishment", Korean Journal of Criminology, 15(2), 2003, p.241; Seul-ki Kim, "A Study on the Criminal Issues about "Special Act on Insurance Fraud Prevention", Yonsei Law Journal, 27, 2016.6, p.69.

2. Status of insurance fraud in Korea

In Korea, insurance fraud behavior is organized and sophisticated, and the insurance fraud situation has deteriorated. Before the enactment of the Special Act on Prevention of Insurance Fraud(hereinafter Special Act), the amount of insurance frauds detected in 2014 was 599.7 billion KRW(around USD 499,750,000).[4] Since the Special Act was enacted, it has been on the rise to 730.2 billion KRW(around USD 608,500,000) in 2017, to 798.2 billion KRW (around USD 658,166,000) in 2018, and to 880.9 billion KRW (around USD 734,083,000) in 2019. The number of fraud criminals detected was 83,535 in 2017, and increased to 92,538 in 2019.[5]

In 2020, the amount of insurance fraud detected was 898.6 billion KRW (around USD 768,000,000), and the number of people caught[6] was 98,826, an increase of 2.0% and 6.8%, respectively, from 2019.[7] Insurance fraud accounts for 91.1% of non-life insurance claims, and 67.9% of the detected people are men.[8] About 25% of those involved in insurance fraud are in their 50s. In recent years, insurance fraud crimes in teens and 20s have increased by 18.8% in 2020 compared to 2019. Insurance fraud among older adults is also on the rise.[9] Sorted by type of insurance fraud, 65.8% of total insurance fraud was exaggeration of accidents, 15.4% was intentional accidents, and 9.8% was exaggerated by hospitals and car maintenance service companies.[10] Accident insurance and disease insurance fraud decreased due to the decline in hospitalizations during the COVID-19 pandemic, but auto insurance fraud increased.[11]

According to the joint research conducted by Korea Insurance Research Institute and Seoul National University in 2019, the estimated amount of leaked insurance money of the private insurance sector and the public insurance sector (National Health Insurance) reached 6.15 trillion KRW (around USD 5,125,000,000) and 1 trillion KRW (around USD 833,333,333) respectively. The ratio of loss that non-life insurance industries in Korea had in 2020 was 130.5%. It means that if 100 dollars are received by an insurance company as a premium, 130 dollars are spent as insurance money to the customers.[12]

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4 Around 1 USD = 1,200 KRW (2022.3.3)
5 Korean Financial Supervisory Service Press Release, 2020.4.9.
6 Here, the meaning of 'caught' includes detection by an investigative agency and detection by an insurance company. Not all of them were subject to criminal penalties such as fines.
7 Korean Financial Supervisory Service Press Release, 2021.4.28.
8 Korean Financial Supervisory Service Press Release, 2021.4.28.
9 Korean Financial Supervisory Service Press Release, 2021.4.28.
10 Korean Financial Supervisory Service Press Release, 2021.4.28.
11 Korean Financial Supervisory Service Press Release, 2021.4.28.
12 http://www.hankyung.com/economy/article/2022011619691.

In insurance fraud detected in 2020, the proportion of related professionals such as insurance planners (insurance salespeople), medical personnel, and automobile maintenance workers *etc* was 3.6%; full-time homemakers 10.8%; and unemployed or casual workers 10.5%.[13] Due to professional and complex insurance terms and conditions, insurance planners (insurance salespeople) and others sometimes conspire or assist in insurance fraud. In addition, insurance fraud is often carried out by accomplices, and other crimes such as murder or arson *etc* are often committed to defraud insurance companies of money.

Insurance fraud became more severe than before, but its prevention and detection did not improve. Since it takes a considerable amount of time to claim insurance money after a fraudulent action in the stage of signing a contract, an intentional insurance accident, fabrication of accidents, and exaggeration of damage, most of the evidence is destroyed, and it is difficult to prove the crime. In addition, insurance fraud tends to be punished with fines instead of imprisonment. Above all, the problem is that the perception of insurance fraud as a crime is relatively low compared to other crimes.

3. Enactment of the 'Special Act on the Prevention of Insurance Fraud' in 2016

The Korean government recognized that it was no longer effective to prevent and detect insurance fraud within the framework of criminal law's fraud and enacted a special law(Special Act on the Prevention of Insurance Fraud) on September 30, 2016.[14] In addition, to control the factors causing insurance fraud at each business stage of an insurance company, the 'Best Standards for Preventing Insurance Fraud' were established and implemented by the Korean Financial Services Commission.[15] This new Special Act consists of 16 articles as follows. Articles 2 and 8 define a fraudulent insurance act and insurance fraud crime. Article 4 stipulates that insurance companies can report to the Korean Financial Services Commission if they have reasonable grounds to suspect insurance fraud by a policyholder, insured, beneficiary, and other persons who had an interest in an insurance contract or payments.

Article 6 stipulates that the Financial Services Commission, the Financial Supervisory Service, and the insurance company have to report or request an investigation with the investigative agency if there is a reasonable basis for

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[13] Korean Financial Supervisory Service Press Release, 2021.4.28.

[14] Regarding the details of enactment from the 17th National Assembly of Korea to the enactment of the 2016 Special Act and the agenda proposed so far, see, Byung-Doo Oh, "A Study on the Criminal Provisions in "Special Act on Insurance Fraud"", Korean Journal of Criminology, 28(3), 2016.12, pp.299-301; Yoon-A Song, "Limitations of Legislative Efforts to Prevent Insurance Fraud and Future Considerations", KiRi Weekly, 2014.2.24., Korea Insurance Research Institute, p.4

[15] This has been implemented since 30th of June, 2020.

suspecting the act of insurance fraud. Article 7 allows the Korean Health Insurance Review and Assessment Service to review the appropriateness of hospitalization of the insured. Fines are raised (article 8). Also, the aggravated punishment of habitual offenders (article 9), criminal attempts (article 10), and aggravated punishment based on the amount of insurance fraud benefit (article 11) are stipulated.

4. Raising questions

From the time the Speical Act was enacted, criticism was raised on the ambiguity of some articles.[16] However, to properly evaluate whether this Special Act positively affected the prevention and detection of insurance fraud, it was necessary to wait for a certain period of time after its enforcement. Based on various insurance fraud statistics since 2016, however, the effect of enacting the Special Act does not seem to be very significant.[17] Most of the insurance fraud statistics showed worse results after the enactment of Special Act. In 2022, which is five and half years after the Special Act came into force, the Special Act needs to be critically analyzed, and the direction of revision about its incomplete and insufficient parts needs to be discussed. This paper particularly analyzes the issues such as the definition of insurance fraudulent act, the scope of insurance fraud, and the commencement of execution of insurance fraud crime.[18]

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[16] Ji-yun Jun, "Critical Review and Proposal of Special Act to Prevent Insurance Fraud", Korean Journal of Comparative Criminal Law, 19(3), 2017. 10, pp51-55; Byung-Doo Oh, *ibid.,* p.317; Seul-ki Kim, *op. cit.*, p.81; Eun-Kyung Kim, "The application of breach of Duty to Disclosure from the Insurance Fraud Prevention Act", Korean Commercial Law Association, 35(2), 2016, p.160.

[17] Korean Financial Supervisory Service Press Release, 2021.4.28.; Korean Financial Supervisory Service Press Release, 2020.12.22; Korean Financial Supervisory Service Press Release, 2020.4.9; Korean Financial Supervisory Service Press Release, 2019.10.31; Korean Financial Supervisory Service Press Release, 2019.4.23; Korean Financial Supervisory Service Press Release, 2018.4.17; Korean Financial Supervisory Service Press Release, 2017.10.19, ; Korean Financial Supervisory Service Press Release, 2017.5.22

[18] Article 8-11, 14 and 16 also expose a number of problems, and in practice, there is a need to revise the contents related to hospitalization adequacy and the compulsory redemption of the defrauded amount, but this paper will not deal with this issues.

II. Scope of recognition of fraudulent insurance act and crime of insurance fraud in Korea

1. Signing a fraudulent insurance contract and Civil liability

When the policyholder enters into an insurance contract in violation of the duty of disclosure, fraud on the policyholder's side or the insurer's mistake is often accompanied. Article 146 of the Korean Civil Law recognizes one party(A)'s right to revoke the contract when it is concluded on the grounds of the other party(B)'s fraudulent act. The period of the excercising right to revoke is confined to 3 years from the date A can confirm it and 10 years from the date of legal act. On the other hand, article 651 of the Insurance Law (Part IV of Korean Commercial Law) stipulates that in the event of a breach of the duty of disclosure by the policyholder, the insurer may terminate the insurance contract within 1 month from the date of recognizing the fact of the breach and 3 years from the date of signing the contract.

Whether the Civil Law and Insurance Law could be applied together is questionable if an insurance contract is concluded due to a breach of the duty of disclosure by deception.

Recognizing the overlapping application of the Civil Law has practical benefits to hold the deception responsible for 10 years after 3 years. Korean judicial precedents recognize the duplicate application of Civil Law. As a result, the insurer can selectively exercise the right to terminate or revoke the contract.[19]

However, the Civil Law and Insurance Law provisions regarding a breach of the duty of disclosure by policyholder's deception are somewhat revised in practical application. For example, according to article 4 of the 'Standard Terms and Conditions of Life Insurance,' insurance companies cannot terminate the contract after 1 month from the date of the insurer's recognition of the fact of the policyholder's breach of the duty of disclosure and after 2 years from the insurance coverage commencement date without an occurrence of an event for insurance payouts. The termination period of the insurer is shortened compared to Insurance Law. In addition, article 15 of the 'Terms and Conditions of Life Insurance' stipulates that if the insurance company proves that the contract was established with the policyholder's clear intention to defraud, the contract can be canceled within 5 years from the insurance coverage commencement date and 1 month from the date of recognizing the fraud. For example, article 15 can be applied if the policyholder or the insured enters into an insurance contract by passing through a medical examination procedure, forging, or falsifying a medical certificate by proxy diagnosis. The exercise period of the right to

[19] Korean Supreme Court 2017.4.7., 2014Da234827; Korean Supreme Court 1998.6.12., 97Da53380.

revoke is shortened from that of the Civil Law, which is not disadvantageous to policyholders. Therefore, its change of the exercise period of the right to revoke is acknowledged to be valid by Article 663 of the Insurance Law (Part IV of Korean Commercial Law).[20] Exercising the right to revoke under the Civil Law has a retroactive effect to the time of signing the contract. Thus, the contract does not take effect from the beginning. In this case, the insurance premium should be returned to the policyholder in principle.

On the other hand, there is no need to return the premium when the insurer exercises the right to terminate pursuant to article 651 of the Insurance Law. Articles 669(4) and 672(3) of the Insurance Law stipulate that if an insurer signs an excess insurance contract or double insurance contract due to policyholder's fraud, the contract is void. The two articles also stipulate that the insurer can claim insurance premiums from the policyholder until the insurer finds out about the policyholder's fraud.[21] It reflects the punitive aspect of the policyholder's fraudulent action.

2. Elements of the crime of fraud under criminal law and the crime of insurance fraud under the Special Act

In order for the crime of fraud to be established under criminal law in Korea, the requirements of deception as an active or passive act contrary to the principle of good faith, the other party's mistake, the disposition of property by mistake, and the acquisition of property profits must be satisfied.[22] The crime of insurance fraud under the Special Act is no different from fraud under criminal law in its nature and elements. The Special Act defines an act of insurance fraud as an act of deceiving an insurer about the occurrence, cause, or content of an insurance accident and claiming insurance money. Also according to the Special Act, the crime of insurance fraud is established when the insured acquires insurance money by fraudulent insurance action, or the insured makes a third party to acquire insurance money (articles 2(1) and 8 of the Special Act). Unlike fraud under criminal law, the subject of deception under the Special Act is limited to insurance accidents, and the other party of deception is limited to insurers. Also, an insurance claim is required under the

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[20] Article 663 of Insurance Law (The provisions of insurance law shall not be changed to the disadvantage of the policyholder, the insured, or the beneficiary due to a special agreement between the insurance parties. However, this is not the case for reinsurance, marine insurance and other similar insurances.)

[21] Semin Park, 「Insurance Law」 6th ed. 2021, Parkyoungsa Publishing Co. pp.263-271; Deok-Jo Chang, 「Insurance Law」 2011, BubmunSa Publishing Co. p.181.; Ki-Jung Han, 「Insurance Law」 2nd. ed., 2018, Parkyoungsa Publishing Co. pp.403-404.

[22] Korean Supreme Court 2017.2.16., 2016Do13362; Korean Supreme Court 2009.10.15., 2009Do7459; Korean Supreme Court 2005.10.28., 2005Do5774.

Special Act as an act of executing insurance fraud crime.[23] By limiting the target of deception to insurance accidents in the Special Act, any fraudulent action in the process of signing a contract is not subject to the Special Act. Therefore, under the provisions of the Special Act, it is not a crime of insurance fraud in itself if the policyholders enter into a contract with a huge amount of insured money that does not suit their income and economic level or if they make multiple contracts with similar coverage without disclosure of it by the intention of deceiving.[24]

III. Subject of fraudulent action of an insurance fraud crime under the Special Act

The Special Act restricts the subject of deception to an insurance accident. It stipulates deception by categorizing the contents of deception as follows.

1. Deception about the occurrence of an insurance accident

Deceiving the insurer about the occurrence of an insurance accident refers to artificially causing an insurance accident after signing an insurance contract, or hiding it and signing an insurance contract in a situation where an insurance accident already occurred. Such an act falls under the insurer's exception (exclusion) (article 659 of the Insurance Law) or invalidates the insurance contract (article 644 of the Insurance Law). Deception also applies to notifying the insurance company of the accident under the guise that it occurred even though it did not.

2. Deception about the cause of an insurance accident

The deception about the cause of the insurance accident could be related to the circumstances of the insurance accident and whether the insurer is liable for payment of insurance money. The action of intentionally causing an insurance accident and presenting it as a contingent accident can be a deception about the occurrence of the insurance accident itself or the cause of it. However, if we focus more on the aspect of 'cause', for example, if an accident occurs within the scope of coverage in the contract, while the insurer's responsibility could not be recognized based on the cause of the accident, hiding the accident's cause would constitute a deception.[25]

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[23] Byung-Doo Oh, *op. cit.*, p.303; Jun-Hyuk Choi, *op. cit.*, p.687.

[24] Myung-Sun Roh, "A Proposal to Create a Separate Statute for Insurance Fraud in the Criminal Law", SungKyunKwan Law Review, 25(2), 2013.6, p.101.

[25] Byung-Doo Oh, *op. cit.*, p.303.

3. Deception about the contents of the insurance accident

Deception about the contents of an insurance accident refers to falsifying the appearance and nature of the accident. In general, this applies to excessive repairs at an auto repair shop in automobile insurance, over-treatment at a hospital in health insurance, and overdiagnosis of disability in casualty insurance.

4. Insurance fraud in excessive claims under the Special Act

(1) Expression deleted in the legislative process of Special Act

Article 2, subparagraph 1 of the Special Act defines insurance fraud as an act of deceiving the insurer about the occurrence, cause, or contents of an insurance accident and eventually claiming insurance money. However, in some cases, the crime of insurance fraud is not established when the Special Act is applied, even though the crime of fraud is established under the general criminal law.[26] In the legislative bill—the basis of this Special Act—submitted to the National Assembly in Korea, insurance fraud was defined as "an act of manipulating the cause, timing, and content of an insurance accident or claiming insurance money by exaggerating the degree of damage."[27] However, the expression "exaggerating the degree of damage" was deleted during the discussion at the National Assembly's Legislation and Judiciary Committee.

It is possible to say that exaggerating the degree of damage can be interpreted as a deception about the "contents" of insurance accidents. However, it is also possible to say that the legislators intended to exclude excessive claims from the scope of deception. According to this, even if the insurance money is unfairly overclaimed by manipulating the contents of an insurance accident that accidently happens, it should not be regarded as insurance fraud.[28] On the contrary, there is an opinion that exaggerating damage is an obvious deception about the contents of insurance accidents. Therefore, it should be interpreted as a crime of insurance fraud.[29]

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[26] Ji-yun Jun, *op. cit.,* p.40.

[27] Representative Dae-Dong Park's proposal, Special Act on the Prevention of Insurance Fraud (Draft No. 6548) Article 2 (1) (a) of August 27, 2013.

[28] Byung-Doo Oh, *op. cit.*, pp.304-305; Ji-yun Jun, *op. cit.,* p.40; Seung Jun Lee, "Evolution of insurance crime and criminal confrontation", Contemporary Review of Criminal Law, 34, 2012, p.219.

[29] Myung-Sun Roh, "The meaning of the Special Act on Insurance Fraud Prevention and its Operational Tasks", Monthly Non Life Insurance No. 569, 2016.4, p.15.

(2) Basic position of the Korean Supreme Court

When the contractual rights are exercised using deception as a means, the Korean Supreme Court observes the act of deception overall and clarifies that if the act of deception is unacceptable as a means of exercising rights according to social norms, it constitutes fraud.[30] Hospitalizing for treatment when outpatient treatment is necessary is an example of an act of deception.[31] According to the Korean Supreme Court, after a long-term hospitalization lasting longer than necessary, the insured's claim that the hospitalization period stipulated in the insurance policy was fully met is a fraud. In another case, the court ruled that it was a fraud when the insured suffered minor injuries due to an insurance accident but was hospitalized for longer than necessary by exaggerating the injury and receiving an excessive insurance payout compared to the actual damage.[32] Likewise, the Korean Supreme Court interprets deception in connection with social norms.

(3) Comments

The current Special Act raises questions about whether it can adequately cover soft insurance frauds such as excessive claims for insurance money. The act of claiming insurance money by exaggerating the degree of damage or by fraudulent or other improper means is a case where the crime of fraud is already applied under the criminal law in Korea. However, this action was omitted from the definition of insurance fraud under the Special Act in the process of discussing the Special Act enactment in the National Assembly. The website of the Financial Supervisory Service's Insurance Fraud Prevention Center in Korea also explains insurance fraud as "signing an insurance contract by deception, intentional induction of insurance accidents, disguising and fabricating of insurance accident such as unreasonably claiming insurance money for uncovered accidents, and action of fraudulent overcharging insurance money by exaggerating insurance accident."[33] Article 102-3 of the Insurance Business Act in Korea prohibits insurance business workers from participating insurance fraud with a policyholder, insured, beneficiary, or the persons concerned about the insurance contract by exaggerating the degree of damage and claiming insurance money. From this point of view, the insurance

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30 Korean Supreme Court 1997.10.14., 96Do1405.

31 Korean Supreme Court 2007.6.15., 2007Do2841.

32 Korean Supreme Court 2007.5.11., 2007Do2134; Korean Supreme Court 2009.5.28., 2008Do4665(Even if there is a reason for receiving insurance money, fraud is established for the entire insurance money paid if excessive insurance money is paid through long-term hospitalization, *etc*., with the intention of defrauding a larger amount of insurance money than the actual insurance money.)

33 insucop.fss.or.kr/fss/insucop/define02.jsp

fraud definition clause excluding "the act of claiming insurance money by exaggerating the degree of damage" in the Special Act contradicts the purpose of enacting the Special Act -prevention and detection of insurance fraud crime- from the beginning.

Obviously, under the current Special Act, it may be possible to interpret that soft insurance fraud is included in the definition of insurance fraud, although it is not clear in the expression of the clause. For example, soft insurance fraud such as exaggerating damage and claiming insurance money can be interpreted as being included in the "act of deceiving the insurer" in the provisions of the Special Act. People who commit soft insurance fraud are highly likely to feel no sense of guilt. Even if they claim insurance money excessively, they do not think they commit insurance fraud. They think they pay insurance premiums to the insurance company after insurance contract is concluded and, therefore, have a contractual right to claim insurance money. They may think there is no problem with claiming insurance money rather excessively when the insured accident occurs by accident. In this situation, the revision of the Special Act is required. The provisions stipulating that claiming excessive insurance money constitutes the crime of insurance fraud should be added to the Special Act. Until the revision of the Special Act is complete, courts' interpretation should be used to overcome its deficiencies. In other words, exaggerating personal and material damage caused by an insurance accident and claiming excessive insurance money should be interpreted as an act of deception under the current Special Act.

IV. Commencement of the execution of crime of insurance fraud

1. Crime of insurance fraud under criminal law in Korea

(1) Characteristics of the crime of insurance fraud

The crime of insurance fraud refers to a fraud in relation to insurance contract. In Korea, under the criminal law, the commencement of the execution of crime of fraud is when deception is initiated with the intention to defraud. If this principle is applied to insurance contracts, it is highly possible to commit crime of insurance fraud during the contracting process, which is long before the claim for insurance money is made.

Whether a violation of the duty to disclose material facts constitutes an act of deception is a matter to be judged according to the circumstance. In order to interpret the violation of the duty of disclosure in the process of signing an insurance contract as deception by the policyholder's nonfeasance, the policyholder's legal status not to make the insurer misunderstand must be

recognized. Article 651 of the Insurance Law may show that the policyholder's duty of disclosure can be the legal source for this policyholder's status.[34] The policyholder's intentional breach of the duty to disclose material facts that may affect the conclusion of an insurance contract through malicious concealment can be an act of deception by the policyholder's nonfeasance. In insurance practice, the questionnaire is used in subscription forms to help policyholders fulfill their duty of disclosure. The questionnaire asked in the subscription form is presumed to be important (Article 651-2 of the Insurance Law). Therefore, if the policyholder responds honestly to the list of questions created by the insurer, it will be considered that the duty of disclosure has been fulfilled. If the policyholder misrepresents or does not disclose material facts while answering the questionnaire in the subscription form, this could be interpreted as intentional deception by nonfeasance. That could also be interpreted as the commencement of the execution of crime of fraud.[35] If you receive insurance money from an insurance company after the breach of the duty of disclosure, the crime of fraud is completed.[36] The opinions are divided on whether the fraudulent crime requires damage to the deceived victim. In insurance fraud crime, deception may be related to an insurance accident after signing a contract in addition to the process of contract signing such as subscription, or may be related to an insurance claim. Deception may be a one-off event, but a series of fraudulent actions could also be linked to each other. All these actions should be included in the category of act of deception in relation to insurance contracts. As mentioned earlier, Article 2, subparagraph 1 of the Special Act defines insurance fraud as an act of deceiving the insurer about the occurrence, cause, or contents of an insurance accident and eventually claiming insurance money. The Special Act should be revised.

(2) Position of Supreme Court of Korea

The position of Supreme Court of Korea is that a simple violation of the duty of disclosure cannot be interpreted as an act of deception. The judicial precedent in Korea is that just because the policyholder entered into an insurance contract by breaching the duty of disclosure, it cannot be interpreted as an act of deception committed to defraud the insurance company under the principle of *dolus eventualis*.[37] However, the Supreme Court of Korea also

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[34] Jun-Hyuk Choi, *op. cit.,* p.691; Myung-Sun Roh, "A Proposal to Create a Separate Statute for Insurance Fraud in the Criminal Law", SungKyunKwan Law Review, 25(2), 2013.6, p.102.

[35] Myung-Sun Roh, *ibid.*, pp.103-104.

[36] Korean Supreme Court 2007.4.12., 2007Do967; Korean Supreme Court 2004.5.27., 2003Do4531. Byeong-Hee Lee, "The start and timing of execution in insurance fraud crimes", Journal of Criminal Law, 11, The Korean Criminal Law Association, 1999, p.224; Jun-Hyuk Choi, *op. cit.,* p.693 and p.695; Kyoung-Ok Ahn, *op. cit.,,* p.248.

[37] Korean Supreme Court 2012.11.15., 2010Do6910.

clearly states that the above principle can be interpreted differently in exceptional circumstances.

The Court's position is that, for example, knowing that an insurance accident already occurred but deliberately hiding it becomes a crime of fraud under the criminal law. Even in the absence of an insurance accident, it is a crime of fraud to sign an insurance contract after recognizing that the probability of an insurance accident occurrence is very high. In addition, the Court's position is that signing an insurance contract to manipulate insurance accidents arbitrarily is also an act that undermines the nature of insurance contract. When such an act is performed, an intentional deception to commit insurance fraud is recognized that becomes the crime of fraud under the Criminal Law in Korea.[38]

Examples of insurance fraud in the process of signing an insurance contract related to the breach of duty of disclosure include the following. First, risks that insurers cannot take over are taken over due to the policyholder's violations of the duty of disclosure of material facts. Second, the policyholder pays unfairly low premiums because insurance companies cannot accurately calculate the size of the risk due to the breach of duty of disclosure.[39]

Thus, the Court's position in Korea on the crime of fraud under the criminal law does not consider whether insurance money is claimed but whether an act of deception is performed.[40] The Court ruled that whether or not the nature of coincidence of an insurance accident is harmed will be used as a criterion for judging the recognition of deception and the commencement of execution of crime of fraud.[41]

2. Crime of insurance fraud under Special Act in Korea

(1) Provisions of Special Act

According to the article 8 of the Special Act, insurance fraud is established when the insured acquires insurance money or makes a third party acquire insurance money by fraudulent insurance action. Also, article 2, subparagraph 1 of the Special Act defines insurance fraud as an act of deceiving the insurer about the occurrence, cause, or content of an insurance accident and eventually

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38 Korean Supreme Court 2012.11.15., 2010Do6910.

39 Myung-Sun Roh, *op. cit.*,, p.101.

40 Korean Supreme Court 2019.4.3., 2014Do2754; Korean Supreme Court 2012.11.15., 2010Do6910; Korean Supreme Court 2013.11.14., 2013Do7494.;Semin Park, *op. cit.* (「Insurance Law」 6th ed.) pp.154-155.

41 Kim Jong Hwan, "The *actus reus* of an attempt in an insurance fraud case", Korean Lawyers Association, 692, 2014, p.252; Seul-ki Kim, *op. cit.*, p.69; Semin Park, "A Study on the Analysis on the Current Countermeasure for the Insurance Fraud and Its Reform", The Justice, 111, 2009. p.74.

claiming insurance money. This means that when insurance money is claimed, the commencement of the execution of act of deception can be recognized.

(2) Dissenting opinion on extending the timing of the commencement of execution of insurance fraud

In interpreting and applying the crime of insurance fraud under the Special Act, there is a view against extending the time of commencement of the execution of fraud to the stage before the conclusion of the insurance contract, such as the time of subscription. This dissenting opinion asserts that fraud or deception presupposes the actor's malice, where malice does not include the intention of the other contracting party's property damage. In the event of a policyholder's malicious breach of the duty of disclosure before signing the contract, the insurer can exercise the right to revoke or terminate the contract depending on the Civil Law or the Insurance Law om Korea. As a result, the effect of the insurance contract is denied. Also, since actual insurance accident does not occur, the insurer does not pay insurance money, and there is no actual property damage for the insurer. According to this dissenting opinion, a malicious breach of the duty of disclosure may constitute fraud under the civil law, but it should be interpreted that fraud under the criminal law or Special Act does not apply.[42] In the process of enacting the Special Act, legislators opposed to an excessive expansion of the scope of recognition of insurance fraud. Therefore, the legislators stipulated that in addition to deceiving about an insurance accident, there must be an act of claiming insurance money to commence the execution of crime of insurance fraud.

(3) Series of fraudulent action and the timing of the commencement of execution of fraud

In interpreting the crime of insurance fraud, the Supreme Court of Korea accepts the concept of a series of fraudulent action.[43] This is a characteristic of the crime of insurance fraud. However, the Special Act's provisions do not help determine the exact time of the commencement of execution of crime of insurance fraud in the event of a series of fraudulent actions. Article 10 of the Special Act deals with the punishment for criminal attempts. If there is no insurance money claim under the Special Act, a criminal attempt of insurance fraud cannot be established from the beginning. The commencement of execution of crime of insurance fraud is only recognized when the insurance money is claimed. After claiming the insurance money, when the insured or beneficiary fails to acquire the insurance money, it becomes a criminal attempt

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42 Eun-Kyung Kim, *op. cit*., pp.176-178.

43 Korean Supreme Court 2019.4.3., 2014Do2754.

of insurance fraud. Under the Special Act, even if the policyholder enters into an insurance contract to defraud the insurance company, the time of signing the contract cannot be recognized as the commencement of the execution of fraud.

Fraudulent actions include a policyholder signing an insurance contract intending to deceive, a malicious breach of the duty to disclose material facts with the intention to deceive, and intentionally causing insurance accidents. These acts constitute the crime of fraud under the criminal law in Korea. However, if insurance money is not finally claimed after such an act of deception under the Special Act, the crime of insurance fraud is not established. Under the Special Act, fraud at the insurance contract's signing stage is not a crime of insurance fraud. If an insurance accident is intentionally caused after signing an insurance contract, it can be judged based on the crime component of the criminal law for relevant action such as murder, arson and injuring a person *etc*. Only when the insurance money is claimed the commencement of the execution of crime of insurance fraud under the Special Act is recognized.

(4) Comments

The Special Act is aimed at preventing and detecting the crime of insurance fraud. However, this purpose is unattainable under the current provisions of the Special Act. According to the Special Act, if deception is unrelated to an insurance accident and if insurance money is not claimed, the crime of insurance fraud cannot be established. In other words, the Special Act does not apply to deception or any fraudulent actions in the process of signing insurance contracts. It is unclear whether excessive claims of insurance money can be regarded as insurance fraud under the Special Act. The Special Act provisions restrict the subject of deception to insurance accidents. In addition, the Special Act binds the commencement of the execution of the crime of insurance fraud to the act of claiming insurance money. These contents do not conform to the purpose of enacting the Special Act. A revision and reinterpretation of the scope of fraudulent action and commencement of the execution of crime of insurance fraud are strongly required.

In general, claiming insurance money is not necessarily required to establish insurance fraud. The International Association of Special Investigation Units (ASIU), an international organization to prevent insurance fraud, defines insurance fraud as "a deliberately planned false statement of material facts done with the intention of deceiving insurers."[44] In addition, the Penal Code 176.05 of the State of New York in the United States stipulates that submitting important information which is concealed or manipulated to deceive

[44] Hee-sung Tak, "Comparative Legal Review for the Introduction of Criminal Punishment Regulations for Insurance Crimes," Criminal Policy Research Volume 17, No. 3, 2006, p.277.

insurance company is insurance fraud.[45] In other words, according to Penal Code of the State of New York, the crime of insurance fraud is not linked to claims of insurance money.

In addition to the simple breach of the duty of disclosure in the process of signing an insurance contract, if deception enough to harm the nature of coincidence of the insurance accident is not accompanied at the same time or additionally, the crime of insurance fraud cannot be established. That is because a policyholder acting in good faith and who does not harm the nature of coincidence of insurance accidents must be protected. It is obvious not to admit an act of fraud just because there is a breach of duty of disclosure. The Special Act is not enacted with the purpose of pretecting insurance consumers who have committed acts that harm the nature of coincidence of insurance accidents before claiming insurance money.

In disease or life insurance, for example, if the insured suffers from severe disease, the probability of occurrence of insurance accidents siignificantly increases. If the policyholder or the insured intentionally concealed this important information, it obviously undermines the accidental nature of insurance accidents. It is reasonable to interpret intentional non-disclosure of such material facts as the commencement of the execution of the crime of insurance fraud by nonfeasance.[46] For example, if the insured has a history of chemotherapy, it would be reasonable to accept the occurrence of an insurance accident related to cancer as sufficiently predictable. If this history of illness or chemotherapy is not disclosed maliciously, the execution of crime of insurance fraud should be considered to be commenced at that point. However, if a policyholder believes the disease was completely cured and no treatment or medication was required for the same disease for several years, it is difficult to assume fraudulent malice even if a history of chemotherapy is not disclosed.[47] The crime of fraud or crime of insurance fraud does not punish criminal negligence in Korea.

The application of the crime of insurance fraud does not target a simple violation of the duty of disclosure. The target is intended for manipulation, disguise, or deception regarding the nature of coincidence of insurance accidents.[48] The act of concluding an insurance contract by deception and the subsequent act of claiming insurance money are a series of deceptions. Therefore, when an insurance contract is concluded by deception, it is the commencement of the execution of the crime of insurance fraud. If the

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[45] As regarding punishment of insurance fraud in the United States, see Seul-ki Kim, *op. cit*., p.76.

[46] Kyung-ok Ahn, *op. cit.*, p.248; Joon-hyuk Choi, *op. cit*., p.694.

[47] Joon-hyuk Choi,, *ibid.*, p.691)

[48] In-sung Woo, "Whether a violation of the obligation to notify when signing an insurance contract can be regarded as a deception for insurance fraud," Korean Supreme Court Judgment Commentary No. 94, Court Library, 2013, p.645; Joon-hyuk Choi, *op. cit,* p.687)

insurance money was not received, it is interpreted as a criminal attempt to commit an insurance fraud crime. If the insurance money was received, the crime of insurance fraud is completed.[49] Some of the legal precedents in Korea decided that if the insurance contract was signed due to the breach of duty of disclosure and the contractual rights of policyholder occurred by the payment of premium, the crime of insurance fraud is completed.[50] According to the court's interpretation, it is because the fraudulent action was performed at the subscription stage before concluding the contract. The courts interpreted that the policyholder or the insured legally or economically acquired property benefits from insurance contract at that time[51] That is the example case of not only extending the commencement of execution of the crime of insurance fraud but also extending the completion time of the crime of insurance fraud. However, the position of the Supreme Court of Korea is that a simple violation of the duty to disclose should not be interpreted as an act of deception.[52]

According to the traditional judicial precedents under the Criminal Law in Korea, if a policyholder intentionally causes an accident to defraud an insurance company, the crime of insurance fraud is established regardless of whether the insurance money was claimed.[53] If the insurance company was notified about the occurrence of insurance accident under the guise of an insurance accident, the timing of the accident notification was interpreted as the starting point of fraud.[54] This is the Korean courts' traditional tendency in Korea. In the same context, if the violation of the duty of disclosure at the time of signing the contract with other accompanying act can overall be interpreted as fraudulent act regarding the contract, the time of violation of the duty of disclosure should be regarded as the commencement of the execution of the crime of fraud. This interpretation can be applied to insurance fraud.

Even if the insurer's right to terminate or revoke due to deception by the policyholder under Insurance Law or Civil Law is terminated, it does not affect the establishment of fraud under the criminal law.[55]

Malicious violation of the duty of disclosing material facts at the time of subscription stage could result in the insurance contract covering the risks that cannot be covered under normal circumstances. It can also cause an error(mistake) in the insurer's calculations of insurance premiums. These actions certainly include the policyholder's inward intention to deceive insurance companies. All of these are related to the nature of coincidence of insurance accidents.

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[49] Joon-hyuk Choi, *ibid.,* p.698)
[50] Suwon District Court(Korea) 2014.2.6., 2013No3589.
[51] Suwon District Court(Korea) 2014.2.6., 2013No3589
[52] Korean Supreme Court 2012.11.15., 2010Do6910.
[53] Korean Supreme Court 2007.5.11., 2007Do2134.
[54] Daejeon District Court(Korea) 2018.8.30., 2018GoHap149.
[55] Korean Supreme Court 2007.4.12., 2007Do967.

The purpose of enacting the Special Act is to prevent and detect insurance fraud. However, as seen above, compared to the general crime of fraud under the Criminal Law in Korea, the Special Act narrowed the scope of deception or fraudlent action. Also, the articles about the commencement of the execution of crime of insurance fraud under the Special Act do not correspond to the purpose of the Special Act. In addition, it is unclear whether to apply the Special Act for soft insurance fraud or not. The provisions on these issues under the Special Act should be revised to meet the original purpose of the enactment of the Special Act. A simple violation of the duty of disclosure cannot immediately become a fraudulent action. However, if the breach of the duty of disclosure is malicious or accompanies an act that may harm the nature of coincidence of an insurance accident, the time when such act occurs should be interpreted as the time of intentional deception to defraud the insurer of insurance money and consequently the commencement of the execution of crime of insurance fraud.[56] This interpretation could have a preventive effect on insurance fraud and is consistent with the purpose of enacting the Special Act.

V. Issue of newly establishing a preparatory crime of insurance fraud

1. Background of the view for the establishment of a preparatory crime of insurance fraud

According to the Special Act, the commencement of the execution of crime of insurance fraud is recognized only when there is a claim for insurance money. Therefore, in most cases, the breach of the duty of disclosure by deception at the stage of signing the contract cannot be punished as a crime of insurance fraud. If the policyholder takes out car insurance or accident insurance with the deceitful intention or the policyholder intentionally causes or fakes an insurance accident, while the policyholder did not claim insurance money yet, the Special Act cannot be applied to prosecute the policyholder for a criminal attempt to commit crime of insurance fraud. According to the Special Act, the execution of crime of insurance fraud would not commence in that case. In addition, this is not subject to investigation by an investigative agency such as the police under the current Special Act.[57] There is a controversy about whether these deceitful actions should be left without any sanctions. These

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[56] Sang-won Lee, "The Legislative Direction for Insurance Crimes: Focusing on the legislation of the 18th National Assembly," Criminal Policy, Volume 24, No. 2, 2012, pp. 233-234; Joon-hyuk Choi, *op. cit.,* p.692 and p.699,; Kyung-ok Ahn, *op. cit*., pp.248-249 .

[57] Myung-Sun Roh, "A Proposal to Create a Separate Statute for Insurance Fraud in the Criminal Law", SungKyunKwan Law Review, 25(2), 2013.6, p.107.

fraudulent actions violate the principle of good faith in insurance contract. Also these deceitful actions are highly likely to affect the nature of coincidence of insurance accidents. There was an attempt to solve this problem by establishing a new crime—a preparatory crime of insurance fraud—while leaving the current provisions intact.[58]

2. Crime of abuse of insurance under the German criminal law

The old German criminal law stipulated the crime of fraud in article 263 and crime of insurance fraud in article 265. However, since the subject of article 265 was limited to fire insurance and ship insurance, article 265 only applied to fraudulent acts against these two insurances. The general crime of fraud under article 263 applied to fraud in other insurances. In order to solve this problem, the German criminal law was revised in 1998, leaving the fraudulent crime under article 263 intact. Under the new German criminal law, the title of insurance fraud under article 265 was changed to the 'insurance abuse crime'. The new article 265 of the German criminal law stipulates that a person who damages, destroys, hides, or transfers the object of insurance contract against sinking, damage, utility damage, loss, or theft to obtain insurance benefits or make a third party obtain insurance benefits is punished by imprisonment for not more than 3 years or fined. However, article 265 does not apply to the actions that are punished by article 263(Crime of fraud). This is a crime of insurance abuse crime. The Austrian criminal law also stipulates the crime of insurance abuse in article 151. The crime of insurance abuse in Austria applies to acts such as damage to the body or health of a policyholder or a third party, as well as property insurance. On the other hand, the crime of insurance abuse in Germany only applies to property insurance.[59] The purpose of introducing the crime of insurance abuse is to prevent insurance fraud in advance through the application of the crime of insurance abuse by detecting and punishing fraudulent actions caused at all stages, from the contract subscribing stage to the claim stage. The crime of insurance abuse is similar to condemning preparatory acts against insurance fraud.

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[58] Ji-yun Jun, *op. cit.,* p.51.

[59] 「Overseas cases related to insurance fraud」 National Assembly Legislative Investigation Service(Korea), January 24, 2013, p.3; Ju-Seon Yoo, "A Study about Prevention of Insurance Fraud in Germany and Special Act for Prevention of Insurance Fraud in Korea", Korea Insurance Law Journal, 10(1), 2016, pp.289-290.

3. Is it necessary to establish a new preparatory crime of insurance fraud in Korea?

(1) Necessity and the possibility of establishing a preparatory crime

Considering the characteristics of insurance fraud, there is a persuasive reason for introducing the preparatory crime of insurance fraud. Insurance fraud or deception can occur at all stages of the insurance contract—from subscription to maintenance, the occurrence of insurance accidents, and subsequent insurance claims. From an insurance policy perspective, it is important to block the crime of insurance fraud that occurs before insurance money is claimed. Considering that the primary purpose of enacting the Special Act was to prevent insurance fraud efficiently and that the Special Act distinguishes between the crime of insurance fraud and the crime of fraud under the criminal law, the establishment of a new preparatory crime of insurance fraud is said to be consistent with the purpose of the Special Act.[60] Stipulating the preparatory crime of insurance fraud will allow punishment for such acts as damaging one's body or health, destroying one's goods or property to defraud the insurer.

However, the current Korean Criminal Law does not punish the preparatory crime of fraud. Under the Korean Criminal Law, most of the punishment cases for preparatory crimes are related to the infringement of national or social legal. When it comes to personal legal interests, preparatory crime applies only and in a limited way to homicide (article 255 of Criminal Law), trafficking in persons (article 296 of Criminal Law), and robbery (article 343) *etc*, which are so called 'a violent crime'. Therefore, it is not easy to establish a preparatory crime for insurance fraud, which has the characteristic of property crime.[61] In the past, a revised bill of the Criminal Law in Korea to punish insurance fraud at the preparatory stage was submitted to the National Assembly in Korea.[62] But, enacting of such bill failed.

(2) Comments

Establishing a preparatory crime of insurance fraud is meaningful in discussing the premise that the requirements for establishing the crime of insurance fraud under the current Special Act remain the same. If the requirements for the establishment of crime of insurance fraud or the scope of

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[60] Myung-Sun Roh, "The meaning of the Special Act on Insurance Fraud Prevention and its Operational Tasks", Monthly Non Life Insurance No. 569, 2016.4, p.17.

[61] Seul-ki Kim, *op. cit.*, p.78.

[62] Repesentative Kim Hak-yong's proposal 'Criminal Act partially amended Article 352-2 (Draft No. 4517) , April 15, 2013.

its application are extended, most of the discussions on the preparatory crime of insurance fraud can be resolved without making new provisions. In other words, if article 2, the definition clause of the current Special Act on insurance fraud, is amended similarly to the requirements or components of the crime of fraud under the Korean criminal law, a different conclusion may be reached on the issue of establishing a preparatory crime of insurance fraud. In order to amend the provisions on the subject of insurance fraudulent action and the commencement of the execution of crime of insurance fraud, it is necessary to reflect on the trend of judicial precedents of the Supreme Court of Korea. The Supreme Court's position is that if the policyholders knew about their severe disease and deliberately concealed it during the stage of signing the contract, the crime of insurance fraud is established at the time of signing the insurance contract under the criminal law.[63] Also, the court ruled that if the policyholder intentionally caused the accident intending to defraud the insurance company, the crime of insurance fraud was established at that time under the criminal law.[64] There is no need to wait for the insurance money claim to establish the crime of insurance fraud under the criminal law. If the article on the commencement of the execution of crime of insurance fraud under the Special Act is abolished and the forementioned interpretation of the courts under the criminal law is legislated, the crime of insurance fraud under the Special Act can be applied before claiming insurane money. Fraudulent action during the signing of insurance contracts such as malicious violations of the duty to disclose, deception against the insurance accident itself, and failure to receive insurance money after claiming the insurance money can all be included in the boundary of the crime of insurance fraud. In this sense, the German-style crime of insurance abuse or a new introduction of the preparatory crime of insurance fraud is not required.

If the commencement of execution of the crime of insurance fraud and the scope of the insurance fraud are extended under the Special Act without introducing the concept of crime of insurance fraud, punishment needs to be different for each stage of deception. The crime of insurance abuse in the German criminal law is subject to damaging or destroying the object of insurance contract. It cannot be applied to defective insurance contracts. Therefore it is judged that the revision of the current provisions of the Special Act can reasonably adjust the scope of fraudulent action rather than the establishment of German-style crime of insurance abuse or new preparatory crime of insurance fraud.

Even if the preparatory crime of insurance fraud is introduced, it is not reasonable to interpret the simple violation of the duty of disclosure as a

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[63] Korean Supreme Court 2007.4.12., 2007 Do967; Korean Supreme Court 2004..27, 2003Do4531.

[64] Korean Supreme Court 2007.5.11., 2007Do2134.

deception by nonfeasance and apply the preparatory crime of insurance fraud to it. For the preparatory crime of insurance fraud to be applied to the breach of duty of disclosure, the scope of application should be limited to cases where there is a clear possibility of increasing the probability of occurrence of insurance accidents. Malicious non-disclosure of previous severe illness, or obvious fraudulent intention to defraud the insurer or other acts that harm the object of insurance contracts are examples. It is unreasonable to punish a simple breach of the duty of disclosure caused by an uncertainty of the object and the scope to be disclosed as a preparatory act of crime of insurance fraud. Also, it is not persuasive to interpret those actions as the commencement of the execution of insurance fraud.[65] The question of interpreting a violation of the duty of disclosure as the commencement of the execution of insurance fraud or punishing it as a preparatory crime of insurance fraud only targets cases where the violation of the duty of disclosure by malice or fraudulent intention harms the nature of coincidence of insurance accidents. It is by no means to punish all forms of violation of the duty of disclosure as the crime of insurance fraud or preparatory crime of insurance fraud.

VI. Proposal for amendment to the Special Act and its main content

Amendments of the Special Act were proposed multiple times in Korea. As soon as the Act was enacted, a total of eight amendments-two in 2016, two in 2017, one 2018, and three in 2019-of the Special Act were proposed in the 20th National Assembly of Korea. They were repealed automatically at the end of the 20th National Assembly. Since the opening of the 21st National Assembly (2020 to 2024), four amendments of the Special Act had been proposed in 2020. They are deliberated by the Legislation and Judiciary Committee in the National Assembly at present, but the progress and speed of the amendment review is very slow. In January 2022, another amendment was proposed.

The main points in each amendment are presented as follows: ① the establishment of an government-wide organization serving as a control tower for institutions related to insurance frauds, such as investigation agencies, financial authorities, health insurance corporation, and insurance companies; ② aggravated punishment for insurance fraud crimes committed by employees in insurance business, medical institutions, automobile management business; ③ restitution of insurance money paid to a person who has been convicted and termination of insurance contract)[66];④ the establishment of standards for the

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[65] Eun-kyung Kim, *op. cit.,* p.187.

[66] Under the current the Special Act, there is no provision of restitutions for the premium paid due to insurance fraud. Therefore, even if an insurance company wins a lawsuit of insurance fraud, it should bring a civil action of premium restitution separately in order to withdraw the

appropriateness of hospitalization examined by investigation agencies; ⑤ the grant of the right to request public or private insurance institutions to offer the materials necessary for insurance frauds investigation to Korean Financial Services Commission and Korean Financial Supervisory Service; ⑥ the installation of a special unit for detecting insurance frauds in an insurance company, and the establishment of process and standards for insurance frauds investigation; ⑦ insurance company's duty to explain the policyholder's damage[67]; ⑧ the increase of the upper limit of fine for the crime of insurance fraud from 50 million KRW (around USD 41,666) to 100 million KRW (around USD 83,333) and so on.[68]

The above contents included in the amendments may be considered effective for the control or prevention of insurance frauds. Nevertheless, if main issues regarding the scope of insurance fraud recognized as a crime and the commencement of the execution of insurance fraud crime fail to be amended, the ultimate objective of the enactment and amendments of the Special Act cannot be achived.

VII. Closing

With the primary purpose of preventing and detecting the crime of insurance fraud, the Special Act on Insurance Fraud Prevention was enacted on September 2016 in Korea. To achieve the goal of the Special Act, the contents of provisions under the Special Act should have been harmonized with the interpretation and the judicial precedents of crime of fraud in the criminal law. However, the Special Act failed. Under the Special Act, the scope of insurance fraudulent action and commencement of the execution of crime of insurance fraud became narrower than that of the traditional crime of fraud under the Korean criminal law. It is wrong to define the subject of insurance fraud action in the Special Act in a way that limits the occurrence, cause, and content of insurance accidents. By limiting the subject of deception to insurance accidents, deception in the process of signing a contract is not subject to the Special Act. Fraudulent action in the process of signing an insurance contract can affect the nature of coincidence of an insurance accident and therefore should be

already paid insurance money. In Korea, the restitution rate for insurance fraud falls short of 20%. Song, Ho Shin, "Revision of the Special Act on Insurance Fraud Prevention and Systematization of Insurance Act, Korean Insurance Law Journal 15(1), 2021, p. 58.

[67] For example, if an extra premium of compulsory third party liability insurance of automobile insurance is imposed due to insurance fraud, an insurance company should notify a policyholder of the fact and a follow-up procedure.

[68] Song, Ho Shin, "Revision of the Special Act on Insurance Fraud Prevention and Systematization of Insurance Act, Korean Insurance Law Journal 15(1), 2021, pp. 42-47.

punished as the crime of insurance fraud. The requirements and components for establishing the crime of insurance fraud should have been enacted to encompass hard insurance fraud and soft insurance fraud that may occur in a series of processes such as the stage of signing an insurance contract, maintaining insurance contracts, and claiming insurance money. In addition, it should have explicitly stipulated that the acts such as excessively claiming insurance money also become an insurance fraud crime. Since the Special Act stipulated the time of the commencement of the execution of insurance fraud at the time of claiming insurance money, it became practically impossible to prevent insurance fraud which was performed before the claim of insurance money. If there is an obvious act of deception, the commencement of execution of the crime of insurance fraud should be recognized even in the preceding stages regardless of whether the insurance money was claimed or not. Accoringly there is a strong need for amendment of related provisions. Through these revisions, the purpose of enacting the Special Act, which is to prevent and detect the crime of insurance fraud, can be more effectively achieved.

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Port states' responses to foreign cruise ships with COVID-19 or other epidemic risks

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ABSTRACT

The experience of various port states' responses to more than 40 foreign cruise ships during the pandemic of COVID-19 exposes seriously arguable issues of the obligations and rights of a port state. Based upon such experience, the public health theory, and the features of cruise ships, the authors put forward the principles to be followed in determining the obligations and rights of a port state in public health response to foreign cruise ships infected or suspected of being infected with COVID-19 or similar epidemic virus, i.e. the principles of national sovereignty, international protection of human rights, international cooperation, beneficiary pays and reasonable administration, and analyze the conflict between the principle of national sovereignty and that of international human rights protection and how to coordinate them. The authors expound in detail the obligations of a port state including allowing free pratique to foreign cruise ships and implementing surveillance, notification, verification and health measures. Also expounded are the rights of a port state, i.e. implementing public health measures on arrival and departure, requesting assistance and collaboration, and claiming compensation from shipowners and their liability insurers. Suggestions are put forward on improving International Health Regulation(IHR).

KEYWORDS: Cruise Ship; COVID-19; Port State; Response; Principle; Obligation; Right

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I. Introduction

On 30 January 2020, Dr. Tedros Adhanom Ghebreyesus, Director-General of World Health Organization (WHO) declared COVID-19 constituted a public health emergency of **international concern** (PHEIC). On 11 March 2020, he further declared COVID-19 constituted a pandemic. During the outbreak and spread of COVID-19, stricter border controls including those on foreign cruise ships were applied in many countries in order to prevent or control its spread in their territory. Various port states' responses to foreign cruise ships applying for calling at ports may be summarized as the following five types:[1]

(i) Port states that allowed foreign cruise ships to call at ports and promptly implemented public health measures. For instance, the Italian-flagged Costa Serena was allowed to call at Tianjin in China on 24 January and the Italian-flagged Costa Venezia was allowed to call at Shenzhen in China on 26 January 2020. All the passengers and crewmembers onboard (collectively as "persons") were allowed to disembark after going through health inspection by China Entry-Exit Inspection and Quarantine Bureau, but the passengers with flu-like symptoms were allowed to disembark only after COVID-19 testing result indicated negative and those passengers who had a history of Wuhan exposure were placed in hotel rooms for further observation.

(ii) Port states that refused foreign cruise ships to call at ports. For instance, the South Korean government issued a temporary order restraining the entry of foreign cruise ships on 10 February; the Ministry of Health and the Ministry of Transport of Malaysia jointly decided to prohibit entry of foreign cruise ships on 7 March. Besides, some individual cruise ships were refused to call at ports by various

[1] In this paper, the term "port state" means a costal country which allows or does not allow a foreign cruise ship to enter its port.

port states. In February, the Italian-flagged AIDA Perla with persons tested positive for COVID-19 was refused to call at Saint Lucia and in Dominica; the Dutch-flagged Westerdam with passengers suspected of being infected with COVID-19 virus onboard (hereinafter "suspect passengers" or "suspect persons") was refused to call at Manila in the Philippines, Kaohsiung in Taiwan, China, Ishigaki in Japan, Guam in the United States and Laem Chabang in Thailand; the Maltese-flagged MSC Meraviglia with suspected passengers was refused to call at Ocho Rios in Jamaica and George Town in Grand Cayman. In March, the Dutch-flagged Zaandam with passengers infected with COVID-19 virus onboard was refused to all at Punta Arenas in Chile; the Australian-flagged Breamar was refused to call at ports in Dominia, Barbados and Bahamas. Several cruise ships on which persons showed no symptom of COVID-19 were also refused to call at ports, e.g. in March, the Italian-flagged Costa Fortuna at Phuket in Thailand and Penang in Malaysia, the British-flagged Golden Princess at Acaroa in New Zealand and the Bahamian-flagged Norwegian Gem at Papeete in Polynesia and Lautoka in Fiji.

(iii) Port states that only allowed a foreign cruise ship with persons tested positive for COVID-19 to call at designated berths. For example, the Bermuda-flagged Grand Princess was ordered to call at a non-commercial berth in Oakland following her entry into the waters of the United States in March.

(iv) Port states that allowed foreign cruise ships to call at ports, but did not allow persons to timely disembark. For instance, the British-flagged Diamond Princess with more than 3,700 persons was allowed to call at Yokohama in Japan in February, but they were placed onboard for quarantine inspection for two weeks; the Bahamas-flagged Greg Mortimer was allowed to call at Montevideo in Uruguay in April, but persons were not allowed to disembark until two weeks later.

(v) Port states that allowed foreign cruise ships to call at ports, without prior testing for COVID-19 for persons. For instance, 23 passengers on the British-flagged Diamond Princess disembarked without receiving testing at Yokohama in Japan in February. More than 3,800 passengers on the Maltese-flagged MSC Meraviglia were allowed to disembark without receiving testing for COVID-19 at Miami in the United States in March, although a passenger in her previous voyage had been tested positive for COVID-19. In April, passengers on the Bahamas-flagged Voyager of the Seas and Ovation of the Seas, and the Maltese-flagged Celebrity Solstice were allowed to disembark at Sydney in Australia without receiving testing; among the 2,647

passengers and 1,148 crewmembers on the Bermuda-flagged Ruby Princess, 128 persons felt uncomfortable, but only 13 persons were tested before the passengers' embarkation at Sydney.

The experience of various port states' responses to foreign cruise ships during the spread of COVID-19 as described above demonstrated the importance and urgency of improving the international system of port states' responses to public health risks on foreign cruise ships. For this purpose, the following five arguable legal issues exposed during the spread of COVID-19 need to be solved:

- Whether a port state is obliged to grant free pratique[2] to a foreign cruise ship with affected or suspect persons and implement public health measures and medical treatment to the affected persons?
- What conditions shall be met for a port state to grant free pratique to such a cruise ship and to take public health measures?
- Whether a port state is entitled to implement health measures including quarantine for suspected persons and isolation of affected persons onboard a foreign cruise ship?[3]
- Whether a port state is entitled to seek collaboration or assistance of the flag state and other states concerned?
- Whether a port state can claim for compensation for the expenses of public health measures?

The above five issues imply the rights of a port state under international and domestic law with respect to the responses to the outbreak of infectious diseases onboard an international cruise ship, including the right to grant international cruise ships free pratique, to take health measures for infected passengers and crewmembers and to seek reimbursement of costs arising therefrom. Meanwhile, a port state is obliged to undertake its obligations under international and domestic law. In particular, taking health measures and seeking international cooperation are both rights and obligations a a port state.

Based upon the above experience of various port states' responses to the foreign cruise ships during the outbreak and spread of COVID-19, the public health theory, and the features of cruise ships, the authors put forward the principles to be followed in determining the obligations and rights of a port

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[2] So far as a ship in concern~~ed~~, Art.1 of IHR defines "free pratique" as permission for a ship to enter a port, embark or disembark, discharge or load cargo or stores.

[3] Art.1 of IHR defines "quarantine" as the restriction of activities and/or separation from others of suspect persons who are not ill, and "isolation" as separation of ill or contaminated persons from others in such a manner as to prevent the spread of infection or contamination.

state in public health response to foreign cruise ships with affected and/or suspect persons and analyze its main obligations and rights.

II. The principles to be followed

To analyze the obligations and rights of a port states in response to a foreign cruise ship with COVID-19 or other epidemic risks, it is essential to analyze what principles shall be followed. In the authors' view, the obligations and rights of a port states shall reflect following principles: -

2.1. The principle of state sovereignty

This principle means that, as a fundamental rule of international conducts, the sovereign States should mutually respect the international intercourses and recognize the supreme power of a State in independently handling its internal and external affairs in its own field according to its own will. Art.2(7) of the Charter of the United Nations (UN) generalizes this principle by directing the UN not to "intervene in matters which are essentially within the domestic jurisdiction of any state". As the cornerstone of international law, state sovereignty embodies internal sovereignty and external sovereignty. Internal sovereignty includes territorial supremacy and personal supremacy. State sovereignty first means the territorial supremacy of a state over all the people and things within its territory. By virtue of this principle, clearly a port state enjoys jurisdiction over foreign cruise ships and other ships in its internal waters. However, there was no universally accepted international law basis for a port state to enjoy jurisdiction over foreign ships within its territorial sea until Art.2 of the United Nations Convention on the Law of the Sea of 1982 (UNCLOS) confirms that "the sovereignty of a coastal state extends, … to an adjacent belt of sea, described as the territorial sea". Therefore, once a foreign ship enters into the territorial sea or internal waters of a costal state, both the ship and people onboard are subject to the port state's administrative jurisdiction and judicial jurisdiction, provided that she enjoys the right of innocent passage in the territorial sea.

The principle of state sovereignty is complied by the widely accepted International Health Regulations of 2005 (IHR) adopted by WHO which expressly provides in Art.3(4): "States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to legislate and to implement legislation in pursuance of their health policies."

The way a port state exercises its administrative jurisdiction over a foreign cruise ship during the outbreak and spread of COVID-19 or other epidemic is to grant or refuse free pratique to the cruise ship and, where free pratique is granted, to take public health measures in accordance with its

national law within the scope and limits determined under IHR, UNCLOS, and other related international treaties to which the port state is a party. Beside the administrative issues, civil disputes and criminal cases may be involved, such as cruise service disputes arising from the epidemic prevention and control, as well as epidemic-related crimes committed by persons onboard or shipping companies.[4] However, the civil and criminal jurisdiction is out of the scope of discussion in the paper.

One issue relating to the principle of state sovereignty is whether a port state has the right to interfere in the internal affairs of a foreign ship within its territory. No accurate answer can be found from UNCLOS and other international treaties; there are three different views on this issue. The first view is that a ship navigating on the high seas or in the territorial waters of a costal state other than her flag state shall be deemed as a floating territory of its flag state. Consequently, her internal affairs shall only be governed by the flag state and the port state has no right to interfere in these affairs. The second view is that the port state's jurisdiction over a foreign ship can be considered as the extension of its personal jurisdiction according to the theory of personification of a ship under maritime law (Gu Jingwei and Liu Qiang, 2013). Thus, the jurisdiction of a costal state over the ship within its internal waters or territorial sea shall be exercised by both the port state and the flag state (Zhao Jianwen, 1996). The third view is that a foreign ship is, in principle, within the sovereignty of the port state and consequently the port state may exercise its jurisdiction over the internal affairs of the ship.

In the authors' view, the theory of floating territory as mentioned above seems unreasonable as it is in contradiction with the excludability of territorial sovereignty. On the contrary, both the second and the third opinions affirm that a port state enjoys jurisdiction over a foreign ship within its territory. The difference between these two opinions is whether the flag state's jurisdiction over the ship is recognized at the same time. The significance of the flag state's jurisdiction lies in filling the "vacuum" in the field of jurisdiction when the ship is navigating on the high seas and divorced from sovereign territory (Yu Zhigang and Li Huaisheng, 2017), rather than solving the issue of parallel jurisdiction. Based upon the territorial supremacy of the principle of state sovereignty, the port state's jurisdiction over the internal affairs of a foreign ship cannot be denied, provided that such affairs affect or will affect the interests of the sovereignty of the port state. Such an understanding is useful in the study of the obligations and rights of a port state in response to foreign

[4] For example, among the 2,647 passengers and 1,148 crewmembers onboard the cruise ship Ruby Princess, only 13 persons received nucleic acid test. Except the 3 affected passengers, the other passengers were allowed to disembark, potentially becoming a major source of infection in Australia. The cruise ship and her operator, Carnival Australia, were under criminal investigation by New South Wales State Police.

cruise ship with COVID-19 or other epidemic risks.

2.2. The principle of international human rights protection

This principle requires a port state to protect persons onboard a foreign cruise ship. The theoretical bases of this principle are the theory of international protection of human rights and the principle of relativity of rights and obligations. Noticeably, this principle may be in contradiction to the principle of national sovereignty. Therefore, coordination between these two principles is an essential point in determining the obligations and rights of a port state in response to foreign cruise ships with COVID-19 or other epidemic risks.

2.2.1. The theory of international protection of human rights

International protection of human rights means that a sovereign state shall assume the international obligation to protect the fundamental human rights according to international treaties and practice. In this regard, cooperation, guarantee, and mutual supervision are necessary for preventing infringement upon the basic human rights and freedom, and achieving the aim of protecting them. International protection of human rights by a sovereign state can be divided into two categories: protection of foreign nationals within its territory and protection of foreign nationals outside its territory. The study in this paper of a port state's response to foreign cruise ships with COVID-19 or other epidemic risks relates to the first category.

The Universal Declaration of Human Rights of 1946 (UDHR) lists 28 basic human rights covering civil, political, economic, social and cultural rights. Human rights in the sector of public health are in the nature of social rights. UDHR provides in Art.25: "everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including … medical care and necessary social services." In addition, Art.12 of the International Covenant on Economic, Social and Cultural Rights of 1966 (ICESCR) requires states parties to "recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health", to achieve the realization of "the prevention, treatment and control of epidemic" and to create the conditions which will "assure to all medical service and medical attention in the event of sickness".

Therefore, a port state has an international obligation to provide health care and other necessary social services for the persons onboard a foreign cruise ship with COVID-19 or other epidemic risks for the purpose of their health and controlling the spread of COVID-19 or other infectious diseases.

2.2.2. The principle of relativity of obligations and rights

According to a universally recognized customary rule of international

law, each state has the right of protecting its own citizens abroad. Accordingly, each state has the obligation to give treatment to foreigners in its territory in compliance with certain legal rules and principles (Oppenheim, 1971). Therefore, a port state has the obligation of protecting the lives and securities of foreign nationals onboard a foreign cruise ship with COVID-19 or other epidemic risks within its territory.

2.2.3. Contradiction between the principle of state sovereignty and the principle of international human rights protection & their coordination

IHR complied with both principles. Besides Art.3(4) as cited *supra*, which well reflects the principle of state sovereignty, Art.3(1) provides: "The implementation of these Regulations shall be with full respect for the dignity, human rights and fundamental freedoms of persons".

Clearly, a port state is under an international obligation to protect the human rights of persons onboard foreign cruise ship based on the principle of international human rights protection and by virtue of Art.3(1) of IHR. In the experience of response to foreign cruise ships with COVID-19 risks, however, some port states refused to grant free pratique to the ships in order to prevent or control the imported cases of COVID infection by waters, especially after the Director-General of WHO declared COVID-19 as a pandemic on 11 March. As introduced in the first part of this paper, free pratique to the cruise ships such as Zaandan, Breamar, Westerdam, MSC Meraviglia, Costa Fortuna, and Golden Princess were refused by various port states. On one hand, such refusal may be understood to have been made based on the principle of state sovereignty. On the other hand, it seems such refusal may be deemed as non-compliance of these port states with the expressed principled provision of Art.28(1) of IHR that ships shall not be refused free pratique by the states parties for public health reasons. In essence, nevertheless, such refusal demonstrated the contradiction between the principle of state sovereignty and the principle of international human rights protection. Thus, a consequential issue is how to coordinate the two principles.

In this regard, noticeably, the independent International Commission on Intervention and State Sovereignty (ICISS), established by the Canadian government, made a report on the Responsible to Protect (R2P) in September 2000. The R2P report established the R2P theory and indicated that "sovereign states have a responsibility to protect their own citizens from avoidable catastrophe – from mass murder and rape, from starvation – but that when they are unwilling or unable to do so, that responsibility must be borne by the broader community of states" (ICISS, 2001). The protection provided by the international community may come from international organizations or other States.

According to the R2P theory, the nationality states of persons onboard a cruise ship bear the primary responsibility of protecting their nationals during the spread of COVID-19. When the cruise ship is within the territory of a port state, if these nationality states are unwilling or unable to bear the responsibility, the port state shall assume the supplementary responsibility of protecting their lives and health. In the scope and degree of responsibility, supplementary responsibility shall not exceed the primary responsibility. If the port state does not have the capability to protect the persons onboard a foreign cruise ship, it shall not be required to assume such supplementary responsibility. This implies that the principle of state sovereignty takes precedence over the principle of international human rights protection in the case of contradiction between the two principles. However, such precedence shall not ignore the application of principle of international human rights protection.

2.3. The principle of international cooperation

COVID-19 or other highly infectious diseases spread among states without geographical restrictions. COVID-19 spreads through droplets and contacts. It became a pandemic in early March in the end of January 2020. It is impracticable for a single State to prevent and control the spread of COVID-19 or highly infectious disease independently due to its limited technical and economic capacity, or the lack of sufficient information. Therefore, the implementation of the principle of international cooperation that emphasizes the common interests and responsibilities of mankind is essential. For this purpose, Art.44 of IHR emphasizes the international cooperation by means of comprehensive collaboration and assistance among the States and between WHO and its State Parties.

International cooperation is also very important in response to foreign cruise ships with COVID-19 or other epidemic risks, especially due to the multi-national characters of international cruise ships. Where a port state responds to a foreign cruise ship with COVID risks, first, it is necessary to give full play to the role of WHO by providing advice and assistance because WHO has a function to provide each state party with technical support in the prevention and control of infectious diseases. Secondly, the port state, the flag state of cruise ship, the nationality states of persons onboard, and the nationality states of shipowners or operators other than the ship's flag state in case of ship's flag of convenience[5] or otherwise shall cooperate with each

[5] The term "flag of convenience" refers to registering a ship in a sovereign state or region different from that of the shipowners which carries out an open registry or allows registration of ships owned by foreign entities for the purpose of taking advantages of reduced regulation, lower taxes and administrative fees, greater numbers of friendly ports and/or other benefits.

other. Particularly, the port state may seek collaboration and assistance from the other related States.

2.4. The principle of beneficiary pays

The principle of beneficiary pays (BPP) is a quasi-public goods supply principle based on the benefit of a specific enterprise and requires the specific beneficiary to pay the corresponding expenses according to the benefit degree (Hu Yefei and Tian Shiyu, 2019). The theoretical basis of this principle is the "beneficiary pays" theory. This theory requires the special beneficiaries of specific public utilities or services to share the public costs based on the special benefit relationship within the scope of their benefits. The development of global public health governance mechanism from individual behaviors to joint cooperation shows that the positive externalities in the field of public health can enable the international community to obtain broad common interests (Zeng Ruisheng, 2012).

Where a port state responds to a foreign cruise ship with COVID-19 or other epidemic risks, the public health and safety interests widely obtained by the international community are the general interests, while the interests of the flag state, the nationality states of persons onboard, and the nationality states of shipowners or operators other than the ship's flag state, are the special interests. Such special interests are available at the costs paid by the port state. Thus, it is reasonable for the benefited States to share such costs.

2.5. The principle of reasonable administration

This is a basic principle of administrative law. It means that the activities of a governmental organ within the scope of administrative authority should be reasonable (Hu Jianmiao, 2012). That is, a governmental organ should make administrative decisions and measures according to the conditions, types, and range stipulated by law. The decisions and measures should conform to the intention or spirit of the law and also to the legal rationality such as fairness and justice (Wen Jinfeng and Xu Guoli, 2015).

A port state's response to a foreign cruise ship with COVID-19 or other epidemic risks is made by or under the control of the public health authority and other competent authorities exercising administrative powers on behalf of the State. These authorities should follow the principle of reasonable administration in taking response measures. The reasonableness shall be manifested in the following three aspects: -

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The states or regions of flag of convenience include Panama, Liberia, Malta, Bermuda, Marshall Island, Belize, Cyprus, St Vincent, and etc.

First, reasonable motivation, i.e. the measures taken by the competent authorities of the port state should be for the purpose of protecting public health safety of the persons onboard the cruise ship and of the nationals of the State itself.

Secondly, reasonable measures, i.e. the measures taken by the competent authorities of the port state should be able or at least reasonably expected to protect public health safety of the persons onboard the cruise ship and of the nationals of the state itself. At the same time, it is required to avoid unnecessary interference with the voyage of the cruise ship and prejudice to the dignity, human rights and fundamental freedoms of persons onboard the ship. In particular, in the case of two or more alternative measures to protect public health and safety, a competent authority of the port state should choose the one that can best realize the goals.

Thirdly, reasonable result, i.e. theoretically the public health interests protected by the port state should not be less than the infringement on individual rights. Public health is different from clinical medicine, as the former pays more attention to the protection of group interests rather than individual interests. Therefore, the primary ethical evaluation criterion of public health measures is whether the measures taken can protect the health and safety of the group (Wang Chunshui *et al*., 2008). Thus, the public interests protected by the public health measures in response to foreign cruise ships with COVID-19 or other epidemic risks should not be considered less than preventing the infringement on the human rights of persons onboard the ships.

III. The obligations of a port state

3.1. Granting free pratique to a foreign cruise ship

As introduced in the first part of this paper, free pratique to some cruise ships was refused by port states during the outbreak and spread of COVID-19. Whether a port state should grant free pratique to a foreign cruise ship with COVID-19 or other epidemic risks, especially where there are affected or suspect persons onboard, proves to be one of the most prominent legal issues.

3.1.1. General obligation of a port state to grant free pratique

Generally speaking, in the case of a foreign cruise ship with COVID-19 or other epidemic risks, especially where there are a large number of affected or suspect persons onboard, free pratique to her is a precondition and even conducive for the port state to promptly and effectively provide medical assistance to the affected or suspected persons and to play an important role in protecting the health and life safety of all the persons onboard. This is also a

direct embodiment of the principle of international human rights protection.

Thus, by virtue of the principled provision of Art.28(1) & (2) of IHR, a port state shall not refuse free pratique to a foreign cruise ship for public health reasons to enable her to enter a port and to enable the persons onboard to embark or disembark, whether there are affected or suspect persons onboard, and irrespective of their number.

3.1.2. Exceptions of the obligation of a port state to grant free pratique

Art.28(1) of IHR stipulates that the obligation of a port state to grant free pratique is subject to Art.43 thereof. Art.43 allows the states to implement additional health measures in accordance with their relevant national law and obligations under international law in response to specific public health risks or PHEIC, but is subject to the general condition that "such measures shall not be more restrictive of international traffic and not more invasive or intrusive to persons than reasonably available alternatives that would achieve the appropriate level of health protection". By virtue of Art.43(1)(b), such additional health measures can include refusal of free pratique which is prohibited in Art.28(1) & (2) of IHR which says, "provided such measures are otherwise consistent with these Regulations".

In the event of a foreign cruise ship, however, it will be very difficult to meet the above general condition in practice, because refusal of free pratique will or may cause prejudice to taking promptly health measures by other related state or states, and thus will not "achieve the more appropriate level of health protection" than the case of the port state's granting free pratique, unless the port state lacks the capability to take health measure as analyzed *infra*. In addition, the condition of "such measures are otherwise consistent with these Regulations" contained in Art.43(1)(b) seems ambiguous. As a result, it will be very difficult or even impossible to justify refusal of free pratique to a foreign cruise ship with COVID-19 or other epidemic risks by availing of the provisions of Art.43 of IHR. This may imply that IHR pays more attention to the principle of international human rights protection than the principle of state sovereignty.

Free pratique granted to a foreign cruise ship with COVID-19 affected or suspect persons onboard is for the ship's calling at port and the embarkation of the persons onboard to receive public health response by the port state. In exceptional cases, the embarkation of the persons onboard is for the purpose of their repatriation. Thus, as an exception of the obligation of a port state to grant free pratique, it seems necessary to consider whether a port state can refuse free pratique to a foreign cruise ship on the basis of the principle of state sovereignty if the required prompt and effective public health response to the ship in the pandemic situation of COVID-19 are beyond its actual response capacity.

In the authors' view, the port state's actual response capability should not be ignored. As required by Art.13(1) of IHR, all state parties shall develop, strengthen and maintain their capacity to respond promptly and effectively to public health risks and PHEIC as set out in Annex 1.[6] According to statistics, however, among the 196 states parties to IHR, 104 states have the basic capability to prevent, detect, and control the outbreak of COVID-19 (Nirmal Kandel *et al*., 2020). Thus, 45% of the state parties to IHR do not have the capability as required by IHR. In addition, a port state that has such capability may no longer be able to respond to a foreign cruise ship with a large number of affected or suspected persons onboard if a serious pandemic situation has broken out in the port state, or two or more cruise ships apply for free pratique at the same time or successively.

If a port state is required to comprehensively respond to the public health risks under such circumstance, it will not be beneficial to the safety of persons onboard the cruise ships, but may also be unbeneficial to the public health and safety of the nationals in the port state, which is not in line with the principle of international human rights protection, that of state sovereignty and that of reasonable administration.

To balance these three principles, consequently, it is advisable to differentiate granting free pratique to a foreign cruise ship from implementing public health measures. In other words, free pratique is granted, but the public health measures shall be implemented within its actual capability. However, a port state should not refuse free pratique to the ship on the grounds of insufficient capability in implementing public health measures. In such a case, granting free pratique is for the main purpose of (a) disembarkation of passengers to allow those who are nationals of the port state to be quarantined, isolated or medically treated according to their health situations, and repatriation of foreign nationals by other means of transport, and (b) taking on fuel, water, food, supplies, and stores.

3.1.3. Risk assessment for a foreign cruise ship

Before responding to a foreign cruise ship with COVID-19 or other epidemic risks, a port state shall conduct a risk assessment on the ships and take the assessment results as the basis of policy formulation. Such an assessment is called "evidence-based risk assessment" (EBRA) and the resulting policy is called "evidence-based policy" (EBP). EBP emphasizes the use of evidence tested by scientific procedures and empirical methods as the basis for policy-making. It is a relatively advanced public policy theory formulated in western developed countries in recent years (Zhang Yunhao,

[6] As required by Art.1 of Annex 1 to the IHR, each state party shall make such a core capacity available not later than five years from the entry into force of the IFR, i.e. by 15 June 2012.

2017).[7] Thus, where a foreign cruise ship applies for free pratique, risk assessment of the port state should be passed to enable it to judge whether it has the capability of response and what health measures should be implemented. The risk assessment shall be made scientifically by use of available evidence of risks to the public health of persons onboard and potentially to the public health of the nationals of the port state.

Noticeably, free pratique to some foreign cruise ships were directly refused by various port states without conducting EBRA during the outbreak and spread of COVID-19. For example, after leaving from Hong Kong on 1 February 2020, the cruise ship Westerdam with 1,455 passengers and 802 crewmembers had been refused free pratique at Manila in the Philippines, Kaohsiung in Taiwan of China, Ishigaki in Japan, Guam in the United States, and Laem Chabang in Thailand, before she was finally allowed to enter Sihanouk in Cambodia on 13 February, although no affected or suspect person was found onboard. Another example is, after leaving from Miami on 23 February 2020, the cruise ship MSC Meraviglia with 4,580 passengers and 1,600 crewmembers onboard had been refused free pratique at Ocho Rios in Jamaica and Georgetown in Grand Cayman Island, before she was finally allowed to enter Cozumel in Mexico on 28 February 28, although the medical records showed only one case of seasonal influenza onboard and the patient had never been to any area affected by COVID-19.

Advisably, therefore, risk assessment including the factors to be considered and the procedures should be made specific in national law or international treaty. The IHR requires in Art.43(2) a state party to conduct EBRA before adoption of "additional health measures". It seems also helpful or necessary for a port state to conduct EBRA before taking general health measures other than "additional health measures" to ensure the measures be taken scientifically and the requirement of granting free pratique provided in Ar.28(2) of IHR is complied with.

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[7] The United Kingdom is an important advocate of evidence-based policy. In March 1999, the British Blair government published the white paper Modernising Government which pointed out that policies should be "shaped by the evidence rather than a response to short-term pressures". See: White Paper: Modernising Government, March 1999. http://www.archive.official-documents.co.uk/document/cm43/4310/4310.htm. (Accessed 20 June 2020). In September 1999, the Cabinet Office of the British government published the Professional Policy Making For The Twenty First Century. The document proposes eight core competencies for professional policy-making, the fourth of which is the capability of "using evidence", that is, to use the best evidence "from a wide range of sources and involves key stakeholders at an early stage". Strategic Policy Making Team Cabinet Office: Professional Policy Making For The Twenty First Century. See: https://dera.ioe.ac.uk /6320/1/profpolicymaking.pdf. (Accessed 16 July 2020).

3.2 Implementing surveillance, notification & verification, and health measures

As stipulated in Art.1 of Annex 1 to IHR, the core capability of each state shall include "surveillance, reporting, notification, verification, response and collaboration activities". It can be inferred from this provision that a port state has the obligation of implementing surveillance, notification and verification, and health measures with respect to a foreign cruise ship with COVID-19 or other epidemic risks.

3.2.1. Surveillance

Surveillance of public health risks of a foreign cruise ship is the premise of ensuring a port state to take prompt and effective response measures. Surveillance normally begins with health or epidemic declaration of a cruise ship. Normally, the ship's agent in the port of call obtains the health information from the medical personnel onboard the cruise ship and reports to the public health authority of the port state. Practice proved that this method is difficult to ensure the integrity and accuracy of information due to the limitation of medical personnel's capability. For example, on 2 July 2016, the Italian-flagged cruise ship Medi Cagliari applied entry into Qingdao in China and one crewmember was infected with malaria. However, the ship's agency did not have this information and failed to report truthfully in the maritime health declaration. Consequently, the risk assessment made by China's Qingdao Entry-Exit Inspection and Quarantine Bureau was insufficient, resulting in the risk of epidemic spread (Yu Yingquan, et al., 2017). Advisably, it is more effective for the public health authority of a port state to contact the medical personnel onboard the ship directly and, when necessary, to dispatch personnel to board the ship for quarantine inspection.

After obtaining sufficient and accurate information of a cruise ship's public health, the competent authority shall determine the appropriate quarantine inspection mode to be implemented, as required by the principle of reasonable administration. In this regard, the Administrative Measures for the Quarantine of Entry and Exit Cruises of 2016 in China stipulates in Art.13 that the quarantine inspection may be implemented at berth, onboard during voyage, at anchorage or telegraphically, as the quarantine inspection institution has decided based upon the declared information and the scale of quarantine risks of a cruise ship.

In deciding the mode of quarantine inspection, the efficiency of inspection, and the accuracy and sufficiency of public health information shall be taken into consideration to enable a port state to implement appropriate response in a prompt and effective way. During the outbreak of H1N1, the cruise ship Diamond Princess called at Qingdao in China in October 2009 and Fuji Maru called at Tianjin in China in January 2010. Quarantine inspection

was promptly implemented onboard at anchorage. Consequently, the suspected passengers were timely detected and separated from others (Wang Xiqin *et al*., 2010).

3.2.2. Notification and verification

As required by Art.6 of IHR, where a foreign cruise ship may constitute a HPEIC within its territory based upon assessment, a port state shall through its National IHR Focal Point and by the most efficient means of communication available, inform WHO within 24 hours of the assessment of public health information well as any health measure implemented in response thereto. Following a notification, the port state shall continue to communicate to WHO timely, the accurate and sufficiently detailed public health information available to it on the notified event and report; when necessary, the difficulties faced and the support needed in responding to the potential HPEIC. In addition, as requested by WHO, the port state shall verify the notified case of potential PHEIC, i.e. to provide information to WHO confirming the status of the event. Such notification and verification is necessary for WHO to play its role in response to a PHEIC, e.g. consulting with and attempting to obtain verification from the port state, duly making the information to other states parties, determining whether the event constitutes a PHEIC, and providing appropriate guidance, advice and assistance to the port state.

Notification and verification shall be based upon assessment of PHEIC risks. In response to COVID-19 risks onboard a cruise ship, assessment is based upon body temperature measurement and nucleic acid detection of the persons onboard, especially the suspect persons. Samples of nucleic acid detection are sent to the laboratory to obtain the test data. Laboratory data are also the basis of inspection and quarantine to be implemented by the competent authority of the port state in accordance with its national law (Bi Yuguo et al., 2008).

3.2.3. Public health measures

The public health measures for the affected or suspected persons shall be implemented by a port state on the basis of a risk assessment and appropriate to the other prevailing circumstances, and for the purpose of health protection of persons onboard and the nationals on land in the port state. The measures mainly include quarantine or other health measures for the suspected person, for public health observation, and isolation and necessary treatmented of the affected persons.

(1) Quarantine or other health measures for suspected persons

Quarantine is against the suspected persons in order to avoid potential infection to other persons. Where suspected persons are quarantined, the

following health measures such as continuous body temperature measurement and nucleic acid test, for the purpose of public health observation shall be implemented.

As introduced in the first part of this paper, it was arguable whether it was appropriate for a port state to place and quarantine the suspect persons onboard the cruise ships for public health observation during the outbreak and spread of COVID-19 due to two reasons: limited capability of placing the suspected persons in land facilities of the port state and prevention of the spread of infection on land. For instance, more than 3,700 persons onboard the British-flagged Diamond Princess had been placed onboard for quarantine inspection for two weeks before they were allowed to disembark at Yokohama in Japan in February. On 18 February 2020, Kentaro Iwata, a professor at Kobe University Hospital of Japan pointed out that there were serious defects in the prevention and control of infectious disease on board Diamond Princess including the lack of division between safe and dangerous areas, and the lack of professionals responsible for infection control. The Japanese National Institute of Infectious Diseases (NIID) explained in a report that "to maintain operations of the ship, some crewmembers continued to perform essential and limited services while the ship remained in quarantine", which resulted in crewmembers "not fully isolated, in the same manner as passengers, during the quarantine period" (Japanese National Institute of Infectious Diseases, 2020).

Noticeably, a cruise ship has limited and confined space. Many passenger cabins are even without openable windows. The air conditioning and ventilation systems equipped with air purification devices cannot prevent virus transmission onboard. As a result, placing a large number of suspect persons onboard the cruise ship for the quarantine purpose is not appropriate. First, it may cause potential infection to others. Secondly, it is difficult to provide timely and comprehensive medical services for them onboard. Thirdly, as the period of quarantine for persons in the case of COVID-19 risk is usually 14 days, it may excessively confine the freedom of the suspected persons causing mental pressures on them and consequentially significant interference to their health. Moreover, most of the passengers on a cruise ship are old ones[8] and some may have other chronic diseases and need special medical services. In other words, if the port state has quarantine facilities ashore, quarantining the suspect persons onboard may be deemed as a deviation from the principle of reasonable administration, unless such

[8] According to statistics, 51% of passengers on cruise ships are over 50 years old. In the case of the cruise ship Supreme Princess called at Auckland in the United States on 9 March 2020, the average age of passengers was 66 years old and 1,200 passengers were over 70 years old. https://www.cdc.gov/quarantine/pdf/signed-manifest-order_031520.pdf. (Accessed 1 May 2020).

quarantine can be justified under the prevailing circumstances. For example, when the cruise ship Costa Atlantica called at Nagasaki in Japan, there were no passengers onboard, but only 623 crewmembers. The Japanese government arranged the suspect persons with mild symptoms and the close contacts onboard for quarantine and isolation. The cruise ship was able to provide cabins with good ventilation for healthy crewmembers, and therefore the quarantine and isolation purposes could basically be achieved.

Noticeably, IHR does not provide specific requirements and guidance of how quarantine is to be carried out. However, effective health measures should ensure that the potential spread of infectious diseases will not be further enhanced (WHO, 2020). According to the principle of international human rights protection and that of reasonable administration, however, a port state shall not place the suspected persons onboard the cruise ship for the quarantine purpose solely in consideration of preventing the spread of infection on land beyond the necessary time needed for risk assessment. Nevertheless, placing the suspected persons onboard a cruise ship will be justified by the limited capability of placing the suspected person in land facilities of the port state.

(2) Isolation and treatment of infected persons

According to the principle of international human rights protection, when affected persons are detected onboard a cruise ship, the port state shall arrange their isolation and provide appropriate medical treatment after their disembarkation, unless they are repatriated from the port state.

IHR contains provisions in this regard in four places. First, Art.18 stipulates that the recommendations issued by WHO to States Parties with respect to persons may include advice on implementing isolation and treatment where necessary of affected persons. Secondly, Art.31 stipulates that, as health measures relating to entry of travelers, if there is evidence of an imminent public health risk, a State Party may compel or advise the travelers to undergo additional established health measures including isolation to prevent or control the spread of disease in accordance with its national law and to the extent necessary to control such a risk. Thirdly, Art.32 stipulates that a State Party shall provide travelers appropriate medical treatment in implementing health measures. Fourthly, ANNEX 1 to IHR stipulates in B(2) that the core capacity of ports required for responding to an event that may constitute a PHEIC shall include provision of care for affected travelers by establishing arrangements with local medical facilities for their isolation, treatment that may be required.

From the above provisions, two conclusions may be drawn: first, IHR does provide how a port state shall isolate the affected persons and provide them necessary medical treatment and it seems clear that isolation and medical treatment shall be dependent upon the national law of the port state;

secondly, Art.1 of IHR separately defines "traveler" and "crew" and therefore, the obligations of a port state under Arts.31 & 32 do not apply to the crewmembers onboard a cruise ship or other conveyance.

Following an outbreak of COVID-19 onboard a cruise ship, the obligation of a port state in the isolation and treatment of affected persons was a crucial issue.

So far as isolation and medical treatment is concerned, in the case of cruise ship Diamond Princess at Yokohama in Japan in February 2020, the affected passengers onboard were finally arranged for hospitalization by the Japanese authorities. In the case of the cruise ship Grand Princess at Oakland in the United States in March 2020, the US government gave priority to hospitalizing the affected passengers. Unlike the expression of "treatment where necessary of affected persons" in Art.18, Art.32 of IHR requires a port state to provide the affected passengers "appropriate medical treatment". Understandably, "appropriate medical treatment" means the medical treatment which is necessary for protecting the health of the affected passengers and is also practicable within the capacity of the port state under the prevailing circumstances of the case.

So far as crewmembers are concerned, a large cruise ship normally has more than one thousand crewmembers and they should be treated to protect their safety in a same or similar way as passengers. In the case of the cruise ship Ruby Princess, she arrived at Sydney in Australia on 19 March 2020. Among the 13 persons who received nucleic acid test, 3 passengers and 1 crewmember were found infected with COVID-19 virus. The 3 affected passengers were sent to hospital for treatment, but the affected crewmember remained onboard with the rest of the crew. On 6 April, she called at Kembla near Sydney. 22 crewmembers onboard were found infected and about 200 crewmembers had symptoms of infection (MarineLink, 2020). This example may well prove the importance of treating crewmembers the same as passengers.

IV. The rights of a port state

4.1. Implementing public health measures on arrival and departure

By virtue of Art.23 of IHR, a port state may implement the following health measures upon the arrival or departure of a cruise ship for public health purpose of preventing the international spread of disease: (a) requiring information concerning passengers' destinations so that they may be contacted, and also on their itineraries to ascertain if there were any passengers in or near an affected area or other possible contacts with infection or contamination prior to arrival, as well as reviewing of their health

documents; (b) taking non-invasive medical examinations and on the basis of evidence of a public health risk, applying additional health measures of the least intrusive and invasive medical examination with regard to suspect or affected passengers on a case-by-case basis; (c) inspecting baggage, ship, goods and other things onboard.

Besides, by virtue of Art.31(2) of IHR, if there is evidence of an imminent public health risk, a port state may, in accordance with its national law and to the extent necessary to control such a risk, compel or advise passengers to undergo least invasive and intrusive medical examinations that would achieve the public health objective, or additional established health measures to prevent or control the spread of disease, including isolation, quarantine or placing passengers under public health observation.

Noticeably, the above right of a port state is concomitant to its obligations of implementing public health measures in the purpose of health protection of persons onboard and the nationals on land in the port state and is requisite for fulfilling this obligation.

In this regard, the above IHR's provisions expressly relate to the passengers and there is no provision in relation to the crewmembers. As a large modern cruise ship normally has hundreds or more than one thousand crewmembers onboard, advisably the above IHR's provisions should also apply to the crewmembers to fully comply with the principle of international human rights protection.

4.2. Requesting assistance and collaboration

The authors analyzed the meaning and emphasized the importance of the principle of international cooperation to be followed in a port state's response to a cruise ship with COVID-19 or other epidemic risks in 2.2 *supra*. IHR contains mainly in Art.44 the provisions of assistance and collaboration in public health measures in two aspects, i.e. that to be rendered by WHO to a state party and that between or among the states parties.

With respect to the WHO's assistance and collaboration, Art.44(2) stipulates that WHO shall collaborate with states parties upon request and to the extent possible, in (a) the evaluation and assessment of their public health capacities in order to facilitate the effective implementation of IHR; (b) the provision or facilitation of technical cooperation and logistical support to states parties; and (c) the mobilization of financial resources to support developing countries in building, strengthening and maintaining the core capacities provided for in Annex 1. In addition, Arts.8, 10, 13(3) & (4) contain provisions of the WHO's assistance or collaborate regarding assessment and other technical guidance and assistance in the response to public health risks, especially in an event that may constitute a PHEIC as well as technical and financial support to developing countries in building,

strengthening and maintaining the core capacities.[9] For this purpose, Art.13(5) stipulates that when requested by WHO, States Parties should provide support to WHO-coordinated response activities to the extent possible. Generally speaking, the provisions of IHR regarding WHO's assistance and collaboration are sufficient, although some of them proved not specific in the state port's response to foreign cruise ship with COVID-19 risks.

With respect to the assistance and collaboration between or among the state parties, Art.44(1) stipulates that states parties shall undertake to collaborate with each other, to the extent possible, in (a) the detection and assessment of, and response to, infectious events; (b) the provision or facilitation of technical cooperation and logistical support, particularly in the development, strengthening and maintenance of the public health capacities; (c) the mobilization of financial resources to facilitate implementation of their obligations under IHR; and (d) the formulation of proposed laws and other legal and administrative provisions for the implementation of IHR. The provisions of IHR in this regard are quite general and simple. In particular, IHR does not contain sufficient provisions regarding assistance and collaboration to be rendered by the nationality state of conveyance, travelers and crew. Consequently, they are not specific in a state port's response to cruise ship with COVID-19 or other epidemic risks.

A large modern cruise ship has an extensive number of persons onboard. For example, as mentioned in the first part of this paper, there were 2,647 passengers and 1,148 crewmembers onboard the cruise ship Ruby Princess. A port state may have already had an outbreak or spread of COVID-19 and/or may need to accept two or more cruise ships at the same time. Thus, it may often very difficult for a single port state to timely and effectively respond to a cruise ship's public health emergency. By virtue of Art.41(1) of IHR and the principle of international cooperation, a port state has the right particularly to request the flag state of a cruise ship and the nationality states of passengers and crewmembers to provide assistance and collaboration. In this regard,

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[9] Art.8 stipulates that a state party in whose territory the event has occurred may request WHO assistance to assess any epidemiological evidence obtained by that state party; Art.10 stipulates that when WHO receives information of an event that may constitute a PHEIC, it shall offer to collaborate with the state party concerned in assessing the potential for international disease spread, possible interference with international traffic and the adequacy of control measures, including an offer to mobilize international assistance in order to support the national authorities in conducting and coordinating on-site assessments; Art.13(3) stipulates that at the request of a state party, WHO shall collaborate in the response to public health risks and other events by providing technical guidance and assistance and by assessing the effectiveness of the control measures in place, including the mobilization of international teams of experts for on-site assistance, when necessary; Art.13(4) further stipulates that if WHO determines that a PHEIC is occurring, it may offer further assistance to the state party including an assessment of the severity of the international risk and the adequacy of control measures.

advisably IHR need to develop specific rules or guidance.

4.2.1. Assistance and collaboration from the flag state of a cruise ship

Where a cruise ship with COVID-19 or other epidemic risks has entered a port, her flag state is unable to perform its obligations under Art.94(1) of UNCLOS which stipulates: "every state shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag". As required by the principle of international human rights protection, the port state shall respond to the public health risk onboard the ship. At the same time, the personal supremacy of the principle of national sovereignty requires the flag state to provide assistance and collaboration to the extent possible to the port state as requested or initiatively, e.g. (a) providing information about the ship, passengers and crewmembers to facilitate the port states to timely and effectively implement public health measures; (b) assigning epidemiological experts to provide remote or on-site guidance or other technical assistance; (c) providing logistical and/or financial support.

Where a cruise ship flies a flag of convenience, the State with real connections with the ship is that of her actual owners or operators which are the actual beneficiaries of the port state's the public health measures in response to the ship. Thus, these states should provide assistance and collaboration to the port state.

4.2.2. Assistance and collaboration from the nationality states of passengers and crewmembers

A port state may also request the nationality state of the passengers and that of the crewmembers to provide the assistance and collaboration in the manners as described in 4.2.1 *supra*. Provision of such assistance and collaboration is also required by the personal supremacy of the principle of national sovereignty. Besides, these states shall take timely action to evacuate their nationals, so as to avoid excessively occupying the medical resources of the port state. One example is that, in February 2020, when the persons onboard Diamond Princess were allowed to disembark in Japan, the US government and the Canadian government respectively arranged chartered flights to repatriate their nationals from the cruise ship. Another example is that on 26 February 2020, the Indonesian government sent KRI Dr Soeharso, a navy hospital ship, to take back 188 Indonesian crewmembers from the Bahamian-flagged cruise ship World Dream in Riau Islands.

4.3. Claiming compensation from shipowners and their liability insurers

A large amount of expenses will normally be incurred by a port state in the process of response to a foreign cruise ship with COVID-19 or other epidemic risks. According to the principle of beneficiary pays, the port state may require the owners of the cruise ship to bear the corresponding expenses.

In this regard, as provided for in Art.40(1) of IHR, except for passengers seeking temporary or permanent residence, no charge shall be made by a port state for the following measures for the protection of public health: (a) any medical examination required by the port state to ascertain the health status of passengers; (b) appropriate isolation or quarantine requirements of passengers; (c) any certificate issued to a passenger specifying the measures applied and the date of application; or (d) any health measures applied to baggage accompanying passengers. As provided for in Art.40(2) of IHR, however, a port state may charge for health measures other than those referred to in Art.40(1), but not exceeding the actual cost of the service rendered and in compliance with the published tariff. In addition, by virtue of Art.40(5) of IHR, the port state may seek reimbursement for expenses incurred in implementing the health measures provided for in Art.40(1) from (a) the ship's operators or owners with regard to the crewmembers; or (b) applicable insurance sources. Besides, Art.41 of IHR enables the port state to charge for the health measures to the ship, baggage, goods or postal parcels not exceeding the actual cost of the service rendered and in compliance with the published tariff.

According to the above provisions of IHR, a port state cannot charge the expenses of the health measures of medical examination, isolation or quarantine etc., from the passengers except those seeking temporary or permanent residence in the port state, unless such expenses are covered by insurance in which case the port state may seek reimbursement from the insurers. The port state may charge the expenses of medical treatment measures rendered to (a) the passengers, but without indicating who should pay, and (b) the crewmembers from the owners or operators of the ship. In reality, the main costs incurred by a port state are those of emergent health measures with regard to the passengers, but reimbursement can only be sought from insurers under IHR.

Almost without exception, each cruise ship has entered a shipowners mutual protection and indemnity club (P&I club) which covers most of the risks of shipowners' liability arising from the operation of the cruise ship. For instance, the P&I risks of Carnival Cruise Lines are covered by Gard, Steamship Mutual and UK P&I Club. Take the Rules 2020 for UK (Europe),

UK P&I N. V. as an example,[10] Cl.1(c) "liability to persons other than seamen" and Cl.3 "illness and death of seamen" in Rule 2 provide the shipowners' liability in case of illness and death of passengers and of crewmembers respectively.[11] In particular, expenses of quarantine, disinfection and port arising from the outbreak or spread of infectious diseases onboard the ship are provided for in Cl.16 "quarantine expenses".[12]

Therefore, the expenses incurred by a port state in implementing the health measures including medical treatment to the affected persons onboard a cruise ship under Art.40 of IHR are covered by a P&I club so far as the shipowners' liability is concerned.[13] However, the expression of "applicable insurance sources" in Art.40(5) of IHR seems ambiguous. There may be two understandings: (a) the port state may seek reimbursement for the expenses directly from the liability insurers (P&I club) within their scope of coverage or (b) the port state may seek reimbursement for the expenses from the shipowners, provided that the expenses are within the scope of coverage of their insurer (P&I club). Literally, it seems this expression has the meaning of above (b). Due to the principle of "pay to be paid" under the liability insurance law, however, the port state's direct reimbursement for the expenses from the shipowners' liability insurers (P&I club) should be based upon statutory compulsory liability insurance and the collateral regime of direct action against the liability insurers, as in the case of liability for ship's oil pollution damage as provided for in 1992 CLC or 2001 Bunker Convention.[14] Obviously, IHR does not contain provisions of compulsory liability insurance

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[10] Rules 2020 for UK (Europe), UK P&I N.V. https://www.ukpandi.com/fileadmin/uploads/uk-pi/2020/Rules/Rules_section_only_2020.pdf. (Accessed 5May 2020).

[11] Cl.1(c) of Rule 2 of the Rules 2020 for UK (Europe) provides: "Liability to pay damages or compensation for personal injury, illness or death of any passenger and hospital, medical or funeral expenses incurred in relation to such injury, illness or death." Cl.3 of Rule 2 provides: "Liability to pay damages or compensation for illness and death resulting from illness of any seaman, and hospital, medical, funeral or other expenses necessarily incurred in relation to such illness or such death including expenses of repatriating the seaman and sending abroad a substitute to replace him."

[12] Cl.16 of the Rules 2020 for UK (Europe) provides: "Additional expenses incurred by the Owner of an entered ship as a direct consequence of an outbreak of infectious disease on that ship, including quarantine and disinfection expenses and the net loss to the Owner (over and above such expenses as would have been incurred but for the outbreak) in respect of the cost of fuel, insurance, wages, stores, provisions and port charges."

[13] The compensation for such expenses by the P&I Club is based on the actual occurrence of the pandemic on board. If there is no pandemic situation of infectious diseases on the cruise ship, the additional expenses for isolation and quarantine for prevention purposes and delayed departure due to suspected infection are not covered. FAQ: Covid-19 and Club cover.https://www.ukpandi.com/knowledge-publications/article/faq-covid-19-and-club-cover-151921/. (Accessed 14April 2020).

[14] International Convention on Civil Liability for Oil Pollution Damage, 1992; International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001.

and direct action. As a result, the port state cannot seek reimbursement for the expenses from the shipowners' liabilities insurers (P&I club), which shall not best ensure the port state's reimbursement for the expenses.

The reasonableness that the port state's reimbursement for expenses of the public health measures is dependent upon the "applicable insurance sources" is arguable. Advisably, compulsory shipowners' liability insurance and direct action against the liability insurers similar to ship's oil pollution damage need to be considered to ensure the port state's reimbursement. In doing so, it will be practicable for a port state to require the shipowners to provide security for public health measures in the form of a letter of security issued by their liability insurers as a precondition for the port state to grant free pratique and to implement public health measures, and consequently the port state may well comply with the requirement to allow passengers and the ship to depart from the territory thereof under Art.40(6) of IHR.

In addition, the port state may charge the expenses of medical treatment measures under Art.40(2) of IHR. It seems unreasonable for the affected passengers to pay a large amount of such expenses. Advisably, it should be the liability of the owners or operators of the ship to pay these expenses which will be finally borne by their liability insurers (P&I clubs).

V. Conclusions

From the above analysis, the following conclusions may be drawn:

(a) When a port state responds to a foreign cruise ship with COVID-19 or other epidemic risks, the principles of national sovereignty, international human rights protection, international cooperation, reasonable administration and beneficiary pays shall be followed in determining the port state's obligations and rights.

(b) The port state has the obligations to grant free pratique to a foreign cruise ship, implementing surveillance, notification & verification and public health measures, provided that the granting free pratique and the public health measures shall be based upon scientific assessment and within its capability.

(c) The port state has the rights which are requisite for fulfilling, concomitant to or consequential upon its obligations, i.e. implementing public health measures on ship's arrival and departure, requesting assistance and collaboration from WHO and other related states, and claiming compensation for expenses of public health measures from shipowners and/or their liability insurers. Advisably, WHO need to develop specific rules or guidelines regarding the port state's obligations and rights for the purpose of improving the

national law of the State Parties and for the port state's implementation of prompt and effective public health measures.

(d) IHR does pay enough attention the principle of national sovereignty and therefore this principle and the principle of international human rights protection need to be re-balanced by reference to the experience of various port states' response to foreign cruise ships during the outbreak and spread of COVID-19. IHR does not contain sufficient provisions with regard to crew of conveyance and more attention should be paid to the crewmembers onboard. In addition, provisions of IHR regarding reimbursement of expenses of public health measures incurred by a State Party need to be improved.

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THE PITFALLS OF EMPLOYMENT TENURE IN JAPAN: A CASE STUDY*

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ABSTRACT

Executive summary: this article will use a recent Japanese court case to illustrate the pitfalls of employment tenure within the larger context of employment regulation in Japan.

KEYWORDS: Japan, Employment Law, Outsourcing, Worker Dispatch, Court

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* Unless otherwise noted, English versions of statutory language are from the translations available on the Japanese government's law in Japanese Law Translation website at https://www.japaneselawtranslation.go.jp/en. Similarly, unless otherwise noted, English translations of language from Japanese Supreme Court rulings are from the "Judgments of the Supreme Court" section of the Courts in Japan website at: https://www.courts.go.jp/app/hanreien/search?.

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I. Overview

In the fall of 2021, the Osaka High Court issued a ruling with significant ramifications for users and providers of outsourcing and labor services. On appeal from an initial ruling by the Kobe District Court, the High Court found the Defendant company ("Defendant") to have wrongfully terminated five employees ("Plaintiffs") and ordered it to pay them four to five years' worth of back pay and confirmed they had a right to continued employment.[1] This was an expensive proposition, particularly given that Defendant had not hired Plaintiffs in the first place, let alone fired them. Plaintiffs were formally employed by another company named "Life." Life provided outsourcing services to Defendant and the plaintiffs were involved as employees of Life. The court nonetheless found an employment relationship to exist between Defendant and plaintiffs, and for it to have been wrongfully terminated when Defendant cancelled its outsourcing contract with Life, even though Life was the employer of record and had paid the salaries of some of the plaintiffs for almost two decades. Life was not even a party to the case.

In June of 2022 the Supreme Court of Japan summarily rejected Defendant's appeal. This made the High Court judgment final and indicated the Supreme Court did not find the lower court to have overreached in its application of the law or award of remedies.[2]

The *Osaka Case* will likely become an important precedent. Explained properly, it is also a useful vehicle for demonstrating the pitfalls of employment laws in Japan, and the potential magnitude of risks that come with trying to circumvent them. This article will describe the salient details of the *Osaka Case* after first providing a contextual overview of the relevant features of Japan's legal and regulatory environment, which is overseen primarily by the Ministry of Health, Labor and Welfare (the "MHLW").

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[1] Osaka High Court judgment of Nov. 4, 2021, 1253 Rōhan 60.
[2] Supreme Court, 3rd Petty Bench decision of June 7, 2022 (unpublished).

II. Japanese regulation of employment and its alternatives

2.1 Regular vs. Irregular Employment

Japan is famous for "lifetime employment." This is a misnomer because such employment is not "for life" and describes a type of employment that only applies to a portion of the nation's total workforce.[3] This article will use term "regular employment," since that is closest to *seiki koyō*, the Japanese term commonly used to describe it. *Seiki koyō* is often discussed in comparison to the alternative, *hiseiki koyō* or "non-regular" employment.

2.1.1 Regular Employment

Regular employment has three key attributes: it is direct, full time, and not bound by a contract term. Anything lacking all three of these attributes is irregular employment. This is a gross oversimplification of employment in one of the world's largest economies, but it is a useful one because it expresses some of the key contextual features necessary to understand the case this article is about. A brief summary of each attribute of regular employment follows.

2.1.1.1 Direct.

The employment contract arises from a simple three-process: the employer tells the employee what to do (and, if necessary, how to do it), the employee follows those instructions, and is compensated by the employer for doing so.[4] A corollary of this is that any arrangement involving a worker being told what to do by one party but paid by another is potentially problematic, since it obfuscates who the employer is and thus who is responsible for all the legal obligations being an employer entails, starting with basic things like payment of salaries and workplace safety. If you order a meal in a restaurant you are not employing the cooks. If you go into the kitchen and start telling them how to prepare your meal, it gets more complicated.

In the Japanese context an additional complication is that for historical

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[3] According to Japanese government statistics, non-regular employment has gone from accounting for approximately 20% of the workforce in 1965 to around 40% as of 2019. Data available at MHLW website, at: https://www.mhlw.go.jp/stf/wp/hakusyo/kousei/19/backdata/01-01-03-18.html. As of June 2022, the MHLW reported 36 million workers in regular employment and 21 million in non-regular employment, the former number representing a slight decrease from the prior year, and the latter an increase. MHLW, Rōdōryoku Chōsa [Workforce Survey], 2022, available at: https://www.stat.go.jp/data/roudou/sokuhou/tsuki/index.html.

[4] MINPŌ [CIVIL CODE], Law no. 89 of 1896, art. 623. ("An employment contract becomes effective when a first party promises to a second party that the first party will engage in work and the second party promises to pay remuneration for this.") Cf. Restatement of Employment Law §1.01.

reasons, there are statutory prohibitions on intermediaries benefitting from the labor of others.[5] A limited exception is a worker dispatch arrangement under the Worker Dispatch Act (WDA), of which more will be said later.

2.1.1.2 Full Time

That regular employment is a full-time endeavor bears little comment. However, it is not the case that all forms of non-regular employment are part-time. In fact, the form of employment commonly known as *pāto*, a truncated version of the Japanized English expression "part time job," can involve a 40-hour week or more. The term *arubaito* (from the German *arbeit*) is commonly used to describe casual side jobs, though the students and freelancers employed may spend more of their productive time on such employment than other endeavors (such as studying). The labor dispatch arrangements discussed later in this article are also considered "irregular" but are also often full time jobs.

An important perspective often missed by Western writing on regular employment in Japan – symbolized by the ubiquitous "salariman," drudging for long hours at the office and commuting for several more hours a day - is that it was essentially based on families, rather than individuals. In other words, the original "design" (to oversimplify the complex process by which the system came about) was that a regular employment job could support a family; any other type of employment was supplemental income earned by other members of that family.[6] The longstanding complaint that irregular workers earn only a fraction of what is paid to regular workers sitting next to them despite both performing essentially the same jobs, was thus both reasonable but also arguably irrelevant given the family-based assumptions underlying the design described above. [7]

That these assumptions have long been flawed seems obvious, and the gap between the system's "design" and reality has become increasingly obvious due

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[5] Specifically, the Employment Security Act prohibits payment of compensation to anyone for providing workers, other than a recruiter licensed under the Act, and the Labor Standards Act prohibits "exploitation by intermediaries." Shokugyō anteihō [Employment Stability Act], law no. 141 of 1947, art. 40; Rōdō Kijunhō [Labor Standards Act], Law no 7 of 1947, art. 6 ("Other than as permitted by law, it is prohibited for any person to profit from intervening in the employment of others in the course of trade.")

[6] For an example of this perspective, *see, e.g.,* KEIICHIRŌ HAMAGUCHI, ATARASHII RŌDŌ SHAKAI [A NEW WORKING SOCIETY] (2009). Regular employment is also more likely to involve family-focused benefits such as housing allowances, additional compensation for having children, and access to corporate housing programs.

[7] That there is an aspect to this gap that is deeply rooted in gender discrimination and "traditional" family roles also bears mention. Even within the universe of regular employment many employers established two versions, one for men and one for women and there was an underlying assumption (or even a requirement) that female workers would quit once they got married. Since gender discrimination in Japanese employment is a subject that has been covered in great length elsewhere, in the interests of brevity it will not be elaborated on here.

to a number of factors, including Japan's demographic decline, globalization, prolonged economic stagnation, decline in marriage, and changes in economic policy. The gap between regular and irregular employment is a longstanding political issue in Japan and manifests itself in a variety of areas of tension: the popularity of measures protecting irregular workers who are also voters, the needs of businesses seeking to minimize fixed, long term costs, gender equality, balancing home life and work, and so forth. Beyond mentioning them, all of these topics are beyond the scope of this article.

Rather than the distinction between "full time" and "part time," the more important distinction between regular and non-regular employment may be in what "full time" means. Regular employment has long been associated with excessive (and often unlawful) overtime and quasi-forced after-hours socialization, and the phenomenon of *karōshi* (death from overwork) a term sometimes found to include suicides attributable to (over-)work related suicides. Although significant legislative and regulatory efforts have gone into limiting the working hours of all workers, including most of those in regular employment, overwork remains a problem. While non-regular employment may involve a full (legal) work week, and even problematic overtime, it is likely to be more predictable.[8]

Thus, one of the many factors that has resulted in women being employed in non-regular jobs, particularly if they are the sole primary caregivers of minor children, is the excessive *unpredictability* of regular employment as to overtime. In recent years, significant efforts by the MHLW and employers alike have gone into reducing excessive and/or uncompensated overtime.

2.1.1.3 No Fixed Term

Of the three attributes of regular employment, that it involves no fixed term (subject to retirement age, as discussed below), is perhaps the most important to understanding employment regulation in Japan, particularly as it relates to non-regular employment. It is also critical to understanding the *Osaka Case*.

Lack of a defined contractual term is the real essence of "lifetime" employment, which typically starts immediately after graduation from college (or even high school) and ends upon reaching retirement age. During this time, the employment contract between employer and employee will be defined

[8] While the increase in those in non-regular employment is often regarded as problematic, government data suggests those in such jobs "against their will" (*fuhon'i seiki rōdōsha, i.e.,* irregular workers who are in such jobs because they cannot get regular jobs with regular employee status), has been decreasing in recent years. Government data also shows that time – working time, commuting time, and flexibility to balance work and family - are key factors behind many workers choosing non-regular employment. Analysis of Labor Economics (2021 fiscal year), at 28-29. Available at: https://www.mhlw.go.jp/stf/wp/hakusyo/roudou/20/20-1.html.

primarily through the Rules of Employment, which companies are required by law to prepare and file with the local labor bureau.[9] Mandatory retirement ages establish a maximum tenure of employment if provided for in the Rules of Employment. By law it is prohibited for employers to establish a mandatory retirement age younger than 60.[10]

Regular employment is the default setting in Japan unless employers satisfy the requirements applicable to various forms of non-regular employment. One such form is employment pursuant to a fixed term employment contract. However, unlike the United States where employment at will is the default and fixed term employment contracts offer employees a degree of certainty as to the length of their tenure, in Japan such contracts essentially perform the opposite function: they give employers a degree of certainty as to when they can *terminate* the employment relationship.[11]

Full time employment pursuant to a fixed term contract that is renewed repeatedly may be the form of non-regular employment closest to regular employment. However, as with all forms of non-regular employment, courts, regulators and legislators have developed rules and interpretive practices that both establish a firm presumption of regular employment, and render the termination of employment – particularly regular employment – extremely difficult.

2.1.1.4 Membership v. Skills (Job Description)

Though not necessarily a "feature" of regular employment, one

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[9] Labor Standards Act, Ch. 9. The Rules of Employment also apply to non-regular employees and may even clearly distinguish between different categories of workers. The Ministry of Health, Welfare and Labor publishes a "Model Rules of Employment," which are 75 pages long and contain 68 articles covering subject such as the hiring process, discipline, working hours, salary and other compensation and benefits, termination and so forth. See: https://www.mhlw.go.jp/stf/seisakunitsuite/bunya/koyou_roudou/roudoukijun/zigyonushi/model/index.html. One ramification of the Rules of Employment is that virtually all employees can be assumed to be working under the same terms, except to the extent incentive-based compensation and other factors may result in some receiving more compensation than others.

[10] Kōreishatō no koyō no anteitō ni kansuru hōritsu [Employment Stability for the Elderly Act], Law no. 68 of 1971, art. 8. The same law also requires employers with a retirement age of lower than 65 to provide opportunities to employees the opportunity to continue working until the age of 65, albeit in non-managerial positions and pursuant to a different compensation structure than applied before reaching the mandatory retirement age. Amendments passed at the time of writing but not taking effect until 2025 will encourage employers to continue employing workers until the age of 70.

[11] Restatement of the Law of Employment, §2.01. As noted in §2.03(b) of the Restatement, employees in a U.S. law fixed term employment contract are generally free to terminate even a fixed term employment contract unless they have expressly agreed otherwise. Under Japan's Civil Code (art. 628), employees wishing to terminate a fixed term employment contract must have "unavoidable reasons." However, the Labor Standards Act (art. 137) limits the applicability of even this limitation to the first year of a fixed term contract (art. 137).

ramification of it is that it is unlikely to be based on particular skills or job descriptions. In what could be called the "classical model" of regular corporate employment, new workers join the company immediately after graduation. This means they are unlikely to have any useful skills immediately relevant to their jobs. Nor are they hired to do a specific job. During their prolonged tenure they can expect to receive training and be rotated through a variety of roles at various factories, branches, and subsidiaries. Over time they may develop specific skills and start to specialize once they and management (hopefully) ascertain what they are best suited for, but ultimately their greatest expertise will be in how their employer functions.

This is sometimes called the "membership" model of employment and is distinguished from a supposedly western "job-based" model, where a worker is hired based on a detailed job description. In recent years there has been increasing talk of moving to a "job-based" system of regular (?) employment, though it is not clear how this can be accomplished without overturning many foundational aspects of Japanese employment regulation, as well as the expectations many may still have towards regular employment.

2.2 Employment Protection and the Presumption of Regularity

To merely read some of the relevant statutes can give a very misleading impression of what is involved in an employer terminating — or even declining to renew — an employment contract. The Civil Code, the foundation of civil law in Japan, establishes employment contracts as a specific category of contract that can be terminated on as little as two weeks' notice for those with no defined term.[12] Article 20 of the Labor Standards Act appears to establish a uniform minimum notice period of 30 days for termination of any type of employment contract, with article 21 appearing to provide even greater flexibility as to specific types of short-term employment and employees in a probationary period.

Japanese courts have long been "activist" when it comes to protecting employment.[13] This is exemplified by the Kōchi Broadcasting Case, in which all three tiers of Japan's judiciary refused to uphold the termination by a radio company of an employee charged with reading the morning news who overslept — twice in a two week period — resulting in the broadcast of empty static for all or part of the allotted time.[14]

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[12] Civil Code, art. 627(1). The Civil Code notice period is three months for other arrangements, such as a contract without a term where compensation has been agreed for a period of at least six months or employment lasting for more than five years. Arts. 626 and 627(3).

[13] *See, e.g.*, Frank K, Upham, *Stealth Activisim: Norm Formation by Japanese Courts*, 88 WASH. U. L. REV. 1493 (2011).

[14] Saikō Saibansho [Sup. Ct.], 2nd Petty Bench Judgment of Jan, 31, 1977, 268 RŌDŌ HANREI, 17. The case is also discussed in Upham, *supra* note 10.

Article 1 of Japan's Civil Code establishes three basic principles that apply to all private law dealings:

- Private rights must conform to the public welfare;
- The exercise of rights and performance of duties must be done in good faith; and
- No abuse of rights is permitted.

The notion that rights can be "abused" may be alien to some common law lawyers, but it features frequently in Japanese jurisprudence.[15] In the employment context, it has been used by courts to invalidate their attempts to terminate employment contracts. This was the rationale used in the Kōchi Broadcasting Case, but it has also been used more recently by courts to prevent termination for poor performance in cases where employers have tried to use a more "job-based" model of employment,[16] and also in layoffs in connection with the shut-down of non-performing business units.[17] Courts have also used abuse of rights to reject the imposition of disciplinary actions,[18] and to prevent employers from declining to renew fixed-term employment contracts in situations where they are found to have an expectation of renewal (often based on multiple prior renewals), thereby making non-renewal analogous to termination of a regular employment arrangement.[19] In essence, the safe approach is that courts will likely find a regular employment contract to exist

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[15] Japan's constitution contains a proscription on the abuse of constitutional rights, though it has not featured prominently in constitutional jurisprudence. Nihonkoku Kenpō [Constitution of Japan], art. 12. Note there is (of course) academic debate over whether a doctrine of "abuse of rights" might also actually exist in the common law, even if not described as such. *See, e.g.* Joseph Perillo, *Abuse of Rights: A Pervasive Legal Concept*, 27 PAC. L. J. 37 (1995); Bruce Pardy, *Disabusing the Common Law of "Abuse of Rights": The Only Legitimate Rule Redux*, 84 S.C.L.R. (2d) 201 (2018).

[16] Tokyo High Court judgment of Apr. 24, 2013, 1074 Rōhan 75.

[17] Tokyo High Court judgment of Oct. 29, 1979, 330 Rōhan 71; Tokyo High Court judgment of Feb., 2007, 937 Rōhan 178 (summary available at The Japan Institute for Labour Policy and Training (JILPT) website: https://www.jil.go.jp/hanrei/conts/10/90.html).

[18] In the *Nestle Japan Case*, the Supreme Court found an employer's use of its disciplinary power to terminate an employee seven years after committing violence against a superior to be an abuse of that power. Supreme Court, 2nd Petty Bench judgment of Oct. 6, 2006, 925 Rōhan 11.

[19] *See, e.g.*, Supreme Court, 1st Petty Bench judgment of July 22, 1974, 206 Rōhan 27, Ōsaka High Court judgment of Jan. 16, 1991, 581 Rōhan 16. The Leading case on this point is the *Hitachi Medico Case*, in which the Supreme Court of Japan declined to find the non-renewal abusive because the worker involved was hired on a provisional base for seasonal work, and thus could not have reasonably expected regular employment. However, as is often the case with the Supreme Court of Japan, in the course of rejecting a claim from a specific case announces a rule that could be applied to others. Supreme Court, 1st Petty Bench judgment of December 4, 1986, 486 Rōhan 6. (Summaries of all three cases are available on the JILPT website: https://www.jil.go.jp/hanrei/conts/11/92.html). Non-renewal of fixed-term contracts is generally referred to as *yatoidome*.

absence of stringent compliance to the rules applicable to the various forms of non-regular employment.

Much of this and other jurisprudence has been codified, primarily in the Labor Contract Acts of 2007 and subsequent amendments. Article 16 of the Act provides that "If a dismissal lacks objectively reasonable grounds and is not considered to be appropriate in general societal terms, it is treated as an abuse of rights and is invalid."[20] Article 15 applies essentially the same rule to even disciplinary actions short of termination. Article 14 establishes that even a temporary transfer (shukkō — secondment to another company) may be abusive and thus invalid. Despite this "codification," in not providing any "safe harbor" provisions the Act clearly anticipates that determinations about whether an action by an employer is "objectively reasonable" or an abuse of rights will continue to be left to the courts.

With respect to fixed-term contracts, the Labor Contracts Act codifies the right of workers to demand the renewal of a fixed-term labor contract if it was renewed repeatedly in the past or the worker had other grounds for expecting a renewal.[21] It also effectively establishes a maximum term of five years for employment under any combination of fixed-term contracts by giving workers in any such employment arrangement lasting for longer than five years the right to demand a contract of regular employment and deeming it accepted by the employer.[22] The Act also establishes that conflicts between a labor contract or collective bargaining agreement and the Rules of Employment will be resolved in favor of the Rules of Employment, and codifies other jurisprudence limiting the ability of employers to modify the rules of employment which form the basis for most employment contracts to the disadvantage of employees.[23]

Courts have also allowed for findings of "abuse" of the corporate form in the employment context, through cases recognizing a possible right of employees of liquidated subsidiaries to demand employment against the parent entity or even other subsidiaries carrying on the business of the liquidated entity.[24] A specific statute also protects workers from being involuntarily spun-off into a separate company.[25]

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[20] Rōdō Keiyakuhō [Labor Contracts Act], law no. 128 of 2007, art. 16.
[21] *Id.,* art. 19.
[22] *Id.,* art. 18.
[23] *Id.*, arts. 9 – 13.
[24] *See, e.g.*, Osaka High Court judgment of Oct. 26, 2007, 975 Rōhan 50.
[25] Kaishabunkatsu ni tomonau rōdō keiyaku no shōkei tō ni kansuru hōritsu [Act on the Succession to Labor Contracts upon Company Split, Law no. 103 of 2000. Despite its innocuous title, article 1 of this Act clearly establishes its purpose as being "the protection of workers."

2.3 Worker Dispatch

The final piece of the puzzle necessary to understanding the *Osaka Case* is the Worker Dispatch Act of 1985 (the WDA), which governs another category of irregular employment – *haken,* or dispatched workers.[26] The WDA creates a special exception to the prohibitions on intermediaries benefitting from the labor of others discussed earlier in this article. It allows for the *temporary* use of another employer's workers, so long as that other employer is a licensed provider of worker dispatch services.[27] It also permits the existence of an otherwise unacceptable arrangement: employees of one company working under the instruction and supervision of the management of another company.

The WDA protects dispatched workers through the licensing requirement, which ensures service providers meet minimum standards, by imposing on both providers and their clients rigorous compliance requirements intended to prevent the arrangement from obfuscating the various duties of employers and giving labor regulators broad powers of intervention.[28] In exchange for complying with a complex set of regulations and paying a margin to a licensed service provider, businesses are able to enjoy the flexibility of having part of their workforce be "temporary" and not subject to the strictures of regular employment. As we shall see, however, in conjunction with the laws already described, the WDA imposes significant restraints on this flexibility.

The WDA has a complex history, a brief description of which is helpful for understanding some of its quirks. Recall from earlier in this article that the system of regular employment is presumptively *not* skill-based. The traditional "membership" based system of employment implicitly favored hiring and developing workers as generalists who could function in a variety of roles. As a result, companies needing certain specialized skills for a particular project might find those skills lacking in-house, but not sufficiently necessary to hire someone having them on a regular employment basis.

The WDA originated as a means for businesses to effectively "rent"

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[26] Rōdōsha no haken jigyō no tekisei na un'ei oyobi haken rōdōsha no hogotō ni kansuru hōritsu [Act on Securing the Proper Operation of Worker Dispatching Business and Protecting Dispatched Workers], Law no.88 of 1985.

[27] WDA, arts 5-22. In the past the WDA provided for two types of worker dispatch arrangements. Under the first, a company could dispatch its own regular employees to do work for a customer. This only required a "notification" type of license, and employees had to be paid whether dispatched or not. The second required a full license from the MHLW, but allowed the service provider to maintain a register of potential workers and dispatch them only when there was a client. Workers in such arrangements were not paid unless dispatched. . In 2015 the WDA was amended so all providers must have a license, and the licensing requirements were made more stringent.

[28] WDA arts 23-25, 30-38 (obligations of licensed service providers), arts. 39-43 (obligations of clients). The Act also mandates that the contractual arrangement between a dispatch agency and a client contain various provisions mandated by the employment regulator. WDA, art. 26.

workers having specific skills from licensed service providers. Unlike regular employment, therefore, it was a *skills-based* employment model. When first passed, the act only allowed worker dispatch for specific roles involving specific skills; these were set forth on a "positive list" and worker dispatch (often called "staffing") of general-purpose employees or any skill category/role not on the list was prohibited.

Over time the scope of the Act was expanded. The "positive list" was changed to a "negative list," so that only dispatch arrangements involving roles on the list were prohibited. The negative list is still a part of the WDA and its implementing regulations; at the time of writing worker dispatch is prohibited in connection with "port transport work," "construction work," "security services", and the dispatch of doctors, dentists, pharmacists and various other categories of a medical professional.[29] Relevant to understanding the *Osaka Case* is the fact that "manufacturing work" was also on the negative list until 2004.

The initial liberalization of the WDA left in place its focus on skills. Specifically, it established a bifurcation between "specialty category roles", which could be performed by dispatched workers indefinitely, and other general roles which could only be performed by dispatched workers for three years. The underlying assumption for the distinction seems to have been that a client with a demonstrated need for general workers beyond a certain length of time should engage them through regular employment, while workers in the special categories were particularly suited to perform the same role indefinitely, and perhaps did not want "membership-style" employment.

Rationale aside, this liberalization created a compliance nightmare for service providers and clients alike. This was in part because the categories of skills eligible for dispatch for more than three years were established before PCs and the Internet became ubiquitous features in the workplace, but the categories still included quaint items such as "filing," "research," and "preparation of transaction documents," which would now likely be considered a routine feature of many general office jobs.[30] Thus, if a client procured a

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[29] WDA, art. 4; Rōdōsha no haken jigyō no tekisei na un'ei oyobi haken rōdōsha no hogotō ni kansuru hōritsu shikōrei [Enforcement Order of the Act for Securing the Proper Operation of Worker Dispatching Business and Protecting Dispatched Workers], Cabinet Order No. 1995 of 1986, art. 2. The dispatch of attorneys and certain other professionals is also prohibited, but through the functioning of the respective licensing statutes rather than the WDA. For example, article 27 of the Attorneys Act prohibits licensed attorneys from partnering with non-attorneys, which would apply to an arrangement whereby a dispatch services provider staffed licensed attorneys to a client. Bengoshihō [Attorneys Act], law no. 205 of 1949.

[30] The "skilled" categories also contained various roles traditionally filled exclusively by women, such as "secretary," "receptionist" and "demonstrator", thus embedding a gender gap into the system. Before the distinction between special and general categories was eliminated, there were 26 specialty categories. Descriptions of them can still be found on the Internet. *See, e.g. Seirei de sadameru 26 gyōmu* [The 26 Categories as set by regulations], MHLW reference

receptionist (one of the 26 "specialty categories" to which the 3-year limit did not apply) from a worker dispatch service provider, but then started asking her to do "general" tasks, such as preparing conference rooms, emptying the trash, or preparing documentation, at what point has she become a "general" worker subject to the 3-year maximum (a discovery that may come too late if the discovery that she is no longer a "receptionist" occurs in year 4 of her dispatch arrangement)?[31]

This confusing bifurcation was eliminated in 2015 when the WDA was amended to establish a basic three-year maximum for all dispatch arrangements involving a particular worker to a particular client business division.[32] While the law leaves open the possibility of service providers and clients simply replacing specific dispatched workers every three years (an arrangement some dispatched workers might well desire also), the MHLW has issued a directive mandating a cooling off period of three months should be observed before a business unit can again use a dispatched worker once the three-year period has been reached.[33] The underlying logic of the system, as administered, is that if a business needs a worker for more than three years, it should consider alternative arrangements, preferably regular employment.[34]

2.4 Worker Dispatch and the Problem of Disguised Outsourcing

Two other types of contract provided for in Japan`s Civil Code are the

document: https://www.mhlw.go.jp/houdou/2008/12/dl/h1226-3c.pdf.

[31] For an overview of the WDA regime and some of its problems, *see* COLIN JONES, *Byzantine Temp Rules Need Permanent Fix,* Obey, NOT KNOW: ESSAYS ON JAPANESE LAW AND SOCIETY 53-59 (2019); and COLIN JONES & FRANK RAVITCH, THE JAPANESE LEGAL SYSTEM 426-427 (2018).

[32] WDA, art. 35-3. "A dispatching business operator must not continuously provide the worker dispatch . . .of the same dispatched worker for more than three years with regard to work in an organizational unit at the client's place of business or other places at which the work under a dispatching arrangement is performed." This prohibition is backstopped by a corresponding client-side prohibition under article 40-3. Clients must also generally not use dispatched workers (as opposed to a specific dispatched worker) in a particular context for more than three years but have the possibility of extending it if certain conditions are met. Art. 40-2. These amendments took effect in 2018.

[33] Hakensaki ga kōzubeki sochi ni kansuru shishin [Guideline for measures that should be adopted by businesses receiving dispatched workers], MHLW Directive 138 of 1999 (as amended). As to the employment contract between the dispatched worker and the dispatch agency, the five-year limit on fixed term contractual arrangements described earlier in this article applies.

[34] While not relevant to the Osaka High Court Case, 2018 amendments to the WDA taking effect in 2020 impose baroque information sharing and collaboration requirements on providers dispatched workers and their clients with the aim of achieving pay parity between dispatched workers and employees on the client-side when both are effectively doing the same work. WDA, arts. 26, 30-3, 30-4, 31-2, 34, 40.

"contract for work" or *ukeoi,*[35] and the "mandate" or *inin*.[36] Together they encompass a broad range of business arrangements, including a variety of what would in English be called "outsourcing." *Inin* arrangements may include outsourcing of specific business processes, such as operation of a call center or managing an IT help desk, while *ukeoi* typically involves the completion of a range of one-off project-based tasks, such as installing a new IT system or fitting out the interior of an office. A key assumption underlying either arrangement is that the company engaging the outsourcing vendor does so because the vendor has the expertise the company lacks and/or does not wish to develop it internally.

A compliance problem that arises in some outsourcing arrangements that involve sending contractors to a client's premises to work closely with client employees — particularly if client starts managing contractor employees directly — is that they risk being viewed as an unlicensed labor dispatch arrangement in violation of the WDA, and thus also violations of the prohibitions under the Labor Standards Act and the Employment Security Act discussed earlier. Suspicion about the provenance of the arrangement would also have a historical basis in the widespread use of "disguised outsourcing" (*gisō ukeoi*), particularly in domains where worker dispatch is prohibited. Relevant to the Osaka Court Case, *gisō ukeoi* was used to avoid the proscription on using dispatched workers in manufacturing, particularly prior to 2004 when manufacturing was removed from the WDA negative list.[37] *Gisō ukeoi* arrangements are contracted and described as "outsourcing," but substantively consist of merely providing labor to work under the instructions of client, thereby enabling the vendor to avoid the constraints of the WDA, and their clients to avoid hiring employees directly.

The MHLW provides guidance on what constitutes a legitimate outsourcing arrangement.[38] The courts have also taken an interest in the subject, as epitomized by the 2009 *Panasonic Display Case*, in which the Supreme Court ruled on an appeal of a judgment of the Osaka High Court recognizing in a former outsourcing company employee of a regular employment relationship

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[35] Civil Code, Article. 632. "A contract for work shall become effective when one of the parties promises to complete work and the other party promises to pay remuneration for the outcome of the work."

[36] Civil Code, Article. 643. "A mandate shall become effective when one of the parties mandates the other party to perform a juristic act, and the other party accepts the mandate."

[37] Even if a role or job category can be performed by dispatched workers, there may still be an incentive to use a disguised outsourcing arrangement, since they are not subject to the maximum terms of dispatch that apply under the WDA.

[38] Rōdōsha hakenjigyō to ukeoi ni yori okonawareru jigyō to no kubun ni kansuru kijun [Guidelines in connection with the distinction between labor dispatch and outsourcing business], MHLW directive No, 37 of 1986 (as amended). This and instructional pamphlets and other guidance can be found at the MHLW website: https://www.mhlw.go.jp/bunya/koyou/gigi_outou01.html.

with the electronics manufacturer.[39]

The Supreme Court did find that the arrangement had been an unlawful worker dispatch arrangement, but declined to find a regular employment relationship existing between Panasonic and the worker, but only because (1) the illegal WDA arrangement alone did not void the employment contract between the worker and the outsourcing vendor, (2) there was no other evidence to suggest the worker-vendor employment contract was void, and (3) before the arrangement was terminated, Panasonic had entered into a direct *fixed term* employment contract with the worker and made it clear that that this arrangement would not be renewed.

The significance of the *Panasonic Display Case* was not so much the result, but that the court took the opportunity to articulate what would not be an illegitimate outsourcing arrangement, and at least implying that an employment relationship might be found to exist in other circumstances.[40] In another example of the legislature codifying and clarifying labor law jurisprudence, 2012 amendments to the WDA were passed clarifying that knowing users of unlawful labor dispatch arrangements would be deemed to have made an offer of employment to the workers in such arrangements — effectively giving courts the right to declare an employment contract to exist.[41] The Osaka High Court Case was the first instance of applying this newly clarified statutory remedy.

III. The Osaka Case

With this overview out of the way, the judgment in the *Osaka Case* can be explained with relative ease. The court conducted a thorough review of the lower court's ruling and its own amended finding of facts.[42] For purposes of understanding its ruling, however, the following summary should suffice.

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[39] Supreme Court, 2nd Petty Bench judgment of Dec. 18, 2009, 993 Rōhan 5.

[40] "…in cases where the contractor gives no direction or order to the worker, while the party ordering the work, within his/her establishments, directly gives specific directions and orders to the worker, thereby having the worker carry out the work, such manner of providing work cannot be deemed to be a contract for work, even if the contractor and the party ordering the work conclude a contract for work as a legal form. In such cases, if no employment contract is concluded between the party ordering the work and the worker, the relationships among these three parties should be construed to fall within the category of worker dispatching as set forth in Article 2, item (i) of the Worker Dispatching Act." *Id.* English translation of judgment available at courts.go.jp website: https://www.courts.go.jp/app/hanrei_en/detail?id=1046.

[41] WDA, Article. 40-6.

[42] Most civil cases (other than small-claim cases and family cases) are commenced in District Courts, with initial appeals as a matter of right to High Courts. Unlike the common law system, appeals courts can review and modify the lower court`s finding of facts and conclusions of law. For an overview of the structure of the judicial systems and civil litigation, see JONES & RAVITCH, *supra* note 31 at chapters 3 and 10.

The four of the five plaintiffs became employees of Life during the 1998-2000 period, and the fifth in 2013. All were putatively terminated in 2017, and four were employed continuously until that time, while one went through a period including a cycle of leaving and returning. A common thread for all was that their contractual arrangements lacked clarity, some had been proffered but not signed a fixed term employment contract at least once, yet all had been employed long past the purported term of the contracts, and what efforts to renew them were taken were inadequate and desultory. In short, Life had sloppy compliance. The court also took it as fact that the company's president had admitted in a negotiating session with the company labor union that "our company doesn't have fixed term employment anyways." As between Life and the plaintiffs, therefore, there was a regular employment relationship.

As between Life and the Defendant, the Court found they entered into an outsourcing agreement in 1999 pursuant to which Life agreed to operate one of the production lines within Defendant's factory. The court then did an extremely detailed inquiry into the nature of the relationship between the two companies to ascertain whether it was legitimate outsourcing and not an illegal worker dispatch arrangement. As noted earlier, worker dispatch for manufacturing was not permitted until 2004.

The court found many questions about the legitimacy of the outsourcing arrangement. The Life employees (including plaintiffs) involved in it worked closely with Defendant's employees, receiving and giving training, and sharing shifts and covering for each other's days off. Records relevant to the arrangement were prepared based on documents prepared by Defendant, and data processed by Defendant computer systems. The outsourcing service fee was fixed and did not seem to include any adjustment for defects or even the cost of production inputs, which were supplied by Defendant in the same manner as it did to other parts of its factory. The court cited numerous examples where the president of Life seemed to have little or no direct involvement in, and received only little information about, the outsourcing service his company was supposedly providing, even when his employees were involved in accidents at Defendant's factory.

In 2006 Life and Defendant entered into an agreement whereby the former purportedly leased part of a building within the factory for use as an office. The following year, they entered into an agreement whereby Life paid usage fees to Defendant for the use of the production line equipment involved in the outsourcing arrangement. The court noted that the amounts charged under these arrangements were exceptionally low, had no seeming relationship to the cost of the equipment, and there was not even any agreement as to which party was responsible for repairing and maintaining the assembly line (which was done by Defendant workers in reality). To the court the basis for the outsourcing fee seemed to mainly be the cost of providing workers.

Over time Defendant's demand regarding the scope and complexity of the

outsourcing arrangements grew. However, Life's labor union refused to agree to a new arrangement that would have had them working twelve hour shifts.[43] In 2017, an effort was made to convert to a worker dispatch arrangement involving another vendor, which hired some of Life's workers though not the plaintiffs. The same year, the outsourcing contract between Life and Defendant was terminated. Plaintiffs and other remaining Life employees were sent to Defendant's factory on a 30 day worker dispatch contact. Plaintiffs were then made redundant by Life at the end of the dispatch and outsourcing arrangements.[44]

These and other factors made it obvious to the court that Defendant routinely gave detailed instructions to Life employees about how to run "their" part of the factory, and there was no evidence that these employees were doing anything beyond simply following these instructions. There were no indicators that Life was providing its own expertise and making suggestions about how things should be run. The court found Defendant's assertions that its communications were mere "confirmations" of discussions with their outsourcing partner unpersuasive. The very detailed factual inquiry by the court was presumably necessary because article 40-6(1) of the WDA provides a defense for users of workers who are "non-negligently unaware" of the circumstances.

Having found the arrangement to be a longstanding and clearly intentional effort to circumvent the constraints of the WDA, the court easily dealt with the Defendant's secondary arguments. One of these was that at least some of the plaintiffs had failed to give timely notice of their intent to accept the "deemed" offer of employment during the mandated period.[45] The court found each to have given timely notice.

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[43] The right to form unions and act collectively is protected by article 28. Unions are a significant feature in the employment landscape in Japan though one of declining importance in recent years. *See, e.g.*, Hiroyuki Fujimura, *Japan's Labor Unions: Past, Present, Future*, 9 JAPAN LABOR REVIEW 6 (2012), available at: https://www.jil.go.jp/english/JLR/documents/2012/JLR33_fujimura.pdf. Although labor unions were involved in both the *Panasonic Display* case as well as the case discussed here, their role was not a decisive factor in how the courts ruled in both instances, in the interests of brevity union involvement has not been discussed.

[44] Within the Japanese employment system *seiri kaiko* – redundancy – is difficult, but still easier than individual terminations, at least if there is a legitimate reason for doing so, such as the closure of a factory or business unit. From the case record it is not clear why plaintiffs chose to assert employment rights against Defendant rather than Life. One possible explanation is that Life was in financial difficulties and Defendant had deeper pockets and better credit, as is often the case in manufacturing subcontracting arrangements. One aspect of regular employment is that the larger a company is, the higher it is likely to be for a court to find somewhere else in the organization to redeploy employees no longer needed in a specific business unit.

[45] Art. 40-6(2)2 of the WDA states that a deemed offer of employment arising under the Act may not be withdrawn or terminated for a one year period.

Defendant also tried to point to some of the attempts to amend the arrangements towards the end to argue that the plaintiffs only had a fixed term contract with Life. Since the WDA only mandated a deemed offer of employment to workers in an illegal dispatch arrangement on the same terms as they had with dispatching vendor, therefore, even if there had been a deemed offer of employment that had been duly accepted, the employment contracts so formed would have already expired at the end of their terms. Having delved into the lack of any clearly defined limits to the employment relationship between the plaintiffs and Life (including the absence of any reference to fixed term employment in the Life Rules of Employment) and found abundant evidence of the inadequacy of efforts to introduce such limits after the plaintiffs had already worked for Life, the court was unconvinced.

Life was not a party to the case, so what happened to it is unclear. The WDA together with other statutes provides for the possibility of criminal punishments being imposed on those who violate the prohibition on unlawful worker dispatch arrangements.[46]

The Supreme Court's ratification of the Osaka High Court's application of the statutory remedy for unlawful worker dispatch arrangements to the facts in the case creates a significant data point relating to what this remedy means. However, lower courts should be expected to apply the remedy in less extreme, prolonged instances of unlawful worker dispatch and disguised outsourcing arrangements. HR and compliance professionals involved in business in Japan should act accordingly.

[46] E.g., WDA art. 59.

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Restatement of Employment Law

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ARREST OF SHIPS
: GATEWAY TO A SUCCESSFUL CLAIM

*Hoda Asgarian**

ABSTRACT

When claiming against someone, the main concern is whether the claim can be secured and paid. It is the same in the field of the marine industry. In the marine industry, it is important to secure the claimant's claims. One way to fulfill this is to arrest the ship, which enables the claimants to successfully reap the benefit of a claim. When an arrest warrant is issued, the vessel is detained to secure the maritime claim. There is always the question of jurisdiction and some countries are more favorable to the arrest than the others. Besides, as the ship is used for commercial usage, the unlawful detention may cause substantial financial loss to the owner; hence the claimant must be aware of the drawbacks, as he will be the one responsible for the impairment. Moreover, if the claimant agrees to the ship's release (either the shipowner secures the claim in other ways or agrees upon other terms) or the court decides so, the vessel remains under arrest. There are many issues raised by the arrest of the ship, and this essay will review the salient ones.

KEYWORDS: Arrest, Sister Ship Arrest, Wrongful Arrest, Jurisdiction, Shipowner.

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I. Introduction

For a long time, seagoing vessels were the most reliable ways to transport things, compared to steam engines or railroads. Ships abled commercial relations between nations and even rolled up in diplomacy. Their fame and importance grew along with their development in durability and seaworthiness. They also became a good source for the creditors to guarantee their claims.[1] In the current economic situation and due to the continuing chaos, it seems that the creditors to the marine industry should be aware of the ship arrest as a remedy in this area due to its rationale. It is a pivotal pre-judgment instrument often deployed to secure ship owners' appearance and acts as a guarantee for the claimants' claim.[2]

Ship arrest is a detrimental way to obtain security for maritime claims. It is suitable for various creditors, such as owners that need to repossess the vessel under the charter party, bunker suppliers that have not been paid, banks that has terminated the loan facility wishing to draw on his mortgage, crew members that have outstanding wages. Ship arrest is a relatively easy, low-cost and quick solution for maritime claims. Meanwhile, it is also necessary to know if the vessel is a ship or only a floating object. In the latter case, maritime laws and regulations, such as arrest or marine insurance, are not applied[3] and if the ship

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[1] Keith Francis Strohm, Advanced Dungeons and Dragons of Ships and the Sea, p.6.

[2] Kalu Kingsley Anele, *Rethinking the arrest of ship regime in Nigeria,* Commonwealth, Law Bulletin, 2019, https://doi.org/10.1080/03050718.2019.1656091, (last visited: March. 18, 2022).

[3] Alexandra Bailey, When is a ship a ship?, United Arab Emirates, United Kingdom - March 1 2018, Ince, https://www.lexology.com/library/detail.aspx?g=874e6e7a-8a6d-42a9-a0fa-

is arrested, it is not allowed to leave the port and is under the authority of a court that has jurisdiction over it.[4]

Furthermore, enforcement of a maritime claim has always been a significant and challenging issue for claimants, ship owners and operators. Therefore, the maritime community has developed several remedial or enforcement solutions over a long period. Among all such efforts to enforce a naval claim or to recover a debt, arresting the ship was most popular and feasible. Ships are not the only subjects to be arrested; any other objects that can be held as maritime property can also be claimed by the claimant. Cargos would be a prime example. Therefore, one should know the scope of the maritime property and which items can be regarded as naval property. While freight and another naval parcel can be arrested along with a ship or separately, the regime of ship arrest is unique and independent from its legal framework comprising both substantive and procedural law. Thus, while there are plenty of enforcement means for all kinds of maritime property, the most prevalent one is the regime of ship arrest.[5] Also, an arrest only applies to the vessel and not its crew, who retain all their rights as seafarers. [6]

The primary purpose of this essay is to study the law of ship arrest, base on the Ship Arrest Convention of 1952 and 1999. This paper will also shortly look at Iran law on ship arrest This will able us to look at different regimes on ship arrest and compare their differences and similarities. The method taken in this essay is the dogmatic approach, which looks at relevant legal instruments, including legislation and applicable case law. The main focus will be on modern conventional laws. The first one is the convention on the Arrest of Sea-Going Ships, which is the product of the Comité Maritime International (CMI) but adopted under the auspices of the Government of Belgium. This convention is, therefore, one of the so-called Brussels conventions. The second is the international convention on the Arrest of Ships 1999, which was spearheaded by the United Nations Conference on Trade and Development (UNCTAD) with the support of the CMI and the collaboration of the International Maritime Organization (IMO). There is no unified approach to the procedures and the grounds for legitimate arrest, which is a complex problem in maritime law. Due to the lack of uniformity, each country applies one of the above conventions, but the ideal case is to combine the two.[7] This essay covers the following

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e7c3fc12497b, (last visited: March. 23, 2022).

[4] Arrest of Ships, SRI, https://seafarersrights.org/seafarers-rights-fact-files/arrest-of-ships/, (last visited: March. 23, 2022).

[5] Nadia Isikova, *the Ship Arrest Convention of 1952 and 1999: International and Ukrainian Perspective*, (Master of Science Thesis, World Maritime University, 2012), p.2.

[6] Arrested and Detained Vessels and Abandoned Seafarers, *A Guide to Who Does What, Merchant Navy Welfare Board (MNWB)*, Second Ed. 2014, Arrested_Vessels_A_Guide_t.pdf (toolkitfiles.co.uk), (last visited: March. 18, 2022).

[7] A Vlasov and S Buev, *Arrest of ships in the legislation of Arctic region countries: the USA and*

contents: In chapter 2, this essay examines the historical background and the theoretical basis of the concept of ship arrest by looking at the historical process by which the two conventions on the arrest of ships were ratified. This will be followed by some issues related to the arrest of the ship, such as false full arrest or arrest of sister ship. The essay concludes with the discussion and examination during the entire thesis.

II. Historical background and theoretical basis of the concept of ship arrest

Historically arrest of the defendant (action in persona) has been a primary essential remedy, and arrest of the property (ship in our case); (action in rem) has been a secondary remedy in the process of enforcing a claim. Though, the combination of the two was also possible as they are alternatives.[8]

The rules and procedures for arrest vary by jurisdiction. Arrests generally affect the ship's inability to leave port or berth until the merits of the case have been heard, a judicial sale has been made, or the debtor has provided satisfactory security for the claim.[9] In this case, as long as the decision by the court is pending, the movement or trade of the ship is legally prohibited.[10] A brief definition of arrest is given by one author as follows; "judicial detention of a vessel pending provision of security for a maritime claim".[11] The arrest of the maritime property has three aspects. First, it is a form of temporary or re-trial remedy. Creditors can obtain additional protection in procedural talking by filing a "caution" against release. Secondly, although less similar to English law, arrest is a way for a claimant to seek jurisdiction over the merits of a case. Thirdly, it is a method required to secure the ease of a judicial sale, and is itself a means of applying interest granted or executed through the act of rem.[12]

There are different attitudes toward the arrest of ships in civil law countries

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Canada, IOP Conference Series: Earth and Environmental Science, 2019, p.6.

[8] Williams Tetley, *Arrest attachment and related maritime law procedure, (*1999) 73 Tulane Law Review, 1895-1985. < http://www.mcgill.ca/maritimelaw/maritime-admiralty/arrest>, (last visited: Dec. 12, 2012).

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[10] Soumyajit Dasgupta, *Ship Arrest Under Maritime Law: Reasons, Procedure, and Precautions*, Last Updated on September 28, 2021, https://www.marineinsight.com/maritime-law/ship-arrest-under-maritime-law-reasons-procedure-and-precautions/, (last visited: March. 29, 2022).

[11] Simon Baughen, *Shipping Law,* (Second edition, London: Cavendish Publishing limited, 2001).

[12] David C. Jackson, *Enforcement of Maritime Claims, (*4th edition, London: informa publishing, 2005), p.230.

such as France, Spain, and Iran compared to common law countries such as England and North America. Below we will briefly go through each regime.

A. Common law jurisdiction

Ship arrest is a component of rem's action, which can be traced back to Roman law, and means action on things. Generally, a step in rem involves the tracking down of maritime claims (or claims like a maritime lien or other charges) in proceedings brought directly against a ship or other property which is the subject of the claim or which belongs to the person who is assumed to be liable for the claim.[13] An action in rem is an action against res. Admiralty law refers to the ship or other property subject in rem proceedings as the res. In lay terms, we can say that the vessel was issued as if it were a legal entity that committed the wrongdoing upon which the claim is based.[14]

English law prefers to explain rem admiralty jurisdiction in the procedural theory. The statutory right of action in rem is regarded as a procedural method of expelling the responsible ship-owner, not as an act against a wrongdoing personified ship.[15]

It can be said that in common law countries, an action can be brought either against the owner, which can be an individual or a corporate entity or any other legal person (action in personam) or against the property itself, such as the ship or cargo (action in rem).

B. Civil law jurisdiction

In the so-called countries, the laws concerning the jurisdiction, arrest and release procedures are usually established in a Code of Procedure, while the claims' ordering, priority, and enforceability are in the Maritime or commercial (Merchant) Code. Civil law systems generally consider a ship arrest as a 'security measure',[16] which means the seizure of assets until the court decides on the merits of the claim in a subsequent trial and in enforcement pursuant to the judgment by compulsory sale through a public auction. It is noteworthy that

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[13] Gregory Nell SC, *The Arrest of Ships - Some Legal Issues*, A paper presented at the Federal Court of Australia Admiralty and Maritime Law Seminar on "SHIP ARRESTS AND INSOLVENCY", 21 May 2009, p.39, https://www.fedcourt.gov.au/law-and-practice/national-practice-areas/admiralty/admiralty-papers/20090521, (last visited: March. 29, 2022).

[14] Attorney General's Chambers, Admiralty Jurisdiction of the High Court: Arrest of Ships on Demise Charter to Secure the Obligations of the Demise Charterer, (24 April 2003), p.5 < http://app.agc.gov.sg/DATA/0/Docs/PublicationFiles/Admiralty_Jurisdiction_of_the_High_Court_Consultation_Paper.pdf>, (last visited: Jan. 2, 2013).

[15] William Tetley, *Maritime Liens and Claims, (*2nd edn, Les Editions Yvnon Blais Inc, Montreal, 1998), pp.977-978.

[16] Supra note 5, p.8.

the court has unlimited power unless it is explicitly curtailed. Hence the claimant has all remedies against the ship and its owner.[17] The process by which a person brings an action against another person or a legal entity is known as an action in personam, and is in many ways similar to an ordinary civil claim in which another person sues a legal entity.

One should not ignore the fact that Roman law had influenced the procedure of arrest both in England and civil law countries; however, the action in rem was developed as a result of the conflict between the Court of Admiralty and the ordinary law courts and became an operative method to get the actual defendant into court.[18]

Arthur Browne, in his monumental work, *A Compendious View of the Civil Law and the Law of the Admiralty,* wrote:

"The remedy in rem against the ship or goods is founded on the practice of the civil law, which gives an action in rem, to recover or obtain the thing itself, the actual specific possession if it…"[19]

It is now apparent that the substantive maritime law in the standard law system bears a civilian imprint.[20]

III. Unification of the international law of ship arrest

The number of people believing that there should be a common legal foundation for international transactions outweighs those who do not consider a uniform basis for it. The concern is chiefly in the international carriage, where the same ship can be subject to several legal regimes throughout the same voyage.[21] By the end of the 19th century, it became evident that the national legislators and politicians could not make any improvement in unifying international law.

This led to the setting up of the CMI, the oldest organisation globally, whose exclusive focus is the unification of maritime law and related

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[17] Krrishan Singhania, Niti Jain, Afreen Fazal, *Arrest of ships in India where there is a foreign-seated arbitration agreement*, 15 April 2021, https://www.ibanet.org/article/51cbfcea-d7f4-4dee-befa-b271d267dca7, (last visited: March. 29, 2022).

[18] Supra note 5, p.10.

[19] Arthure Browne, *A Compendious View of the Civil Law and of the Law of the Admirlty, vol. 2,(Dublin ,1802, /new York 1840), p.99, <http://books.google.com/books?id=lTwyAAAAIAAJ&printsec=frontcover&source=gbs_ge_summary_r&cad=0#v=onepage&q&f=false>,* (last visited: Jan. 3, 2013).

[20] Supra note 5, p.11.

[21] Tony Kegels, "Arrest of Ships The End of Uniformity?" (Prof. em. University of Antwerp), p.111, http://www.kegels-co.be/pdf/file/Kegels%20Tony,%20Arrest%20of%20Ships,The%20End%20of%20Uniformity%20-%20In%20Liber%20Amicorum%20R_%20Wijffels.pdf>, (last visited: Jan. 3, 2013).

commercial practices.[22] Its achievements in this area are significant. Consensus for international texts could often be found through years of study, open debates and a discreet approach to different opinions.[23] This chapter will be followed by a brief look at the two successful methods of CMI on the issue of ship arrest.

A. Historical overview

Arrest has been one of the essential topics of CMI since 1930 and was further studied both in subcommittees constituted by the CMI Bureau Permanent or during conferences in 1932, 1933, 1937 and after the war in 1947, 1949 and 1951. Negotiations for drafting the 1952 Arrest Convention lasted for almost three decades, which is a truly extended period. This is due to the fundamental differences between the civil law and the common law conceptions regarding the possibilities and method for arresting a ship; hence, it can be inferred that drafting Arrest Convention is the result of a legal compromise between two different legal systems and, in this sense, it can be considered as an achievement.[24]

Besides, it is worth mentioning that ship arrest has been traditionally closely linked to claims arising from collision cases. In almost all jurisdictions, such a claim qualifies as a maritime lien. A maritime lien is security that gives a creditor a right in rem on the ship, regardless of its owner, and takes priority over mortgages, such as, for instance, crew claims.[25] Arrest is unquestionably the most popular way to enforce maritime liens, mortgages, and hypothecs. In both cases, priority positions of holders of such claims are protected against arrest effectuated by other claimants. While the international conventions on ship arrest cover jurisdictional and remedial matters, proprietary and security aspects of maritime claims are the subject of the Maritime Liens and Mortgages Conventions (MLM conventions).[26]

a. Development of 1952 convention

In some countries, primarily civil code countries, only a physical person or a company can be held liable while an object cannot be. In this case, a

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[22] Nigel H. Frawley*, The CMI and its Relationship with IMO, the IOPC Funds and other UN Organizations*, January 7, 2011.

[23] Supra note 21, p.113.

[24] Pelayia Yessiou-Faltsi, *The 1952 Brussels International Convention on the arrest of ships for maritime claims on jurisdiction, Important steps for the unification of maritime law*, Aegean Institute of the Law of the Sea and Maritime Law 2011, p.175.

[25] V. RUIZ ABOU-NIGM, *The Arrest of Ships in Private International Law*, Oxford University Press, Oxford 2011, Reviewed by Herman Boonk, Boonk Van Leeuwen, Rotterdam, p.328.

[26] Supra note 5, p.13.

creditor can arrest all the assets of a reluctant debtor for all his debts, no matter what the source of it, and seize bank accounts, real property, furniture, ships, etc. Hence, for instance, a ship could be arrested in such countries for an unpaid hotel bill while arrest is only granted to inhabitants and not their property in any form in some other countries, contrary to others that the liability is only the ship's liability.

The United Kingdom, one of the main actors during the Conference, was used to action in rem, a movement linked to the existence of a maritime lien such as claims for towage, chartering of a vessel, crew wages, repairs on ships, deliveries or services rendered to the ship, carriage of goods, ownership, mortgages, salvage, etc. It automatically authorises claimants to proceed in rem against a related ship regardless of the vessel's right at the arrest.[27]

This situation was the same in the United States, where the action in rem and maritime liens are linked: amongst them are maritime torts, damages to ships, cargo, persons, or other goods, as well as naval contracts, charter parties, repairs, delivery and so on. Besides, some other countries, such as Scandinavians, linked the right of arrest to personal liability of the owner of the vessel or the existence of a mortgage or lien but in the sense of the privilege, very limited in number.[28]

However, conflict between legal systems were not only problem; there were two factions divided by different economic interests. One were carriers and ship owners, and their P & I Clubs and banks, the other clients of vessel, cargos, their underwriters and passengers etc. It is thus comprehensible that 20 years were needed to bring all these different legal systems together.

In the end, all these discussions led to the compromise between the civil and common law countries. In this sense, the continental countries dropped their rights to arrest ships for all kinds of claims and agreed to restrict these claims to a limited number of maritime claims mentioned in article 1 of the Convention and, as said in article 2, "in respect of no other claims", and it also allowed arrest of the sister ships in the same ownership as the ship in respect of where the original claim arose. The so-called convention's central focus was to limit the variety of lawsuits in which a ship could be arrested and grant jurisdiction over merits to the court where the vessel is arrested.[29]

The arrest convention 1952 identifies the common law principle of the finding of jurisdiction on the facts by the court where the domestic law provides so. The Convention also addresses questions of an arrestor of a ship and the

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[27] A summary of ship arrest in the UK and in English law based jurisdictions, IY Legal, https://www.iylegal.com/a-summary-of-ship-arrest-in-the-uk-and-in-english-law-based-jurisdictions, (last visited: April. 02, 2022).

[28] Supra note 19, pp.114-115.

[29] J.P. Verheul ,*The Convention Relating to the Arrest of Seagoing Ships of 1952. Some Questions,* Netherlands International Law Review, 30, (1983), p. 383.

rights of the parties to agree on another tribunal.[30]

Some of the reasons that the 1952 Convention was widely accepted can be as follows:

First, it unifies the rules and procedures of arrest; explicitly, Article 2 allows detention of "ship flying the flag of one of the contracting states in the jurisdiction of any of the Contracting States in respect of the closed list of maritime claims, but in respect of no other claim." Second, Article 3(3) bans repeated and additional arrests on a claimant's claim in a contracting state after an earlier arrest were affected in another member state. Moreover, it was necessary to ratify the Arrest Convention to become a party to the Lugano Convention 1993.[31]

Despite the undeniable achievements, there are still some deficiencies in the 1952 Convention. One of them could be the closed list of maritime claims, which does not reflect the realities of shipping. Another could be the vagueness of the wording of the rules in some parts, which makes the doors open for national courts to interpret them based on their instincts which could defer the primary purpose of the convention. Moreover, particular linguistic distinctions create differences between how civil and common law jurisdictions deal with the subject matter of arrest. And also, it can be said that the strict and literal interpretation of Article 3 has caused problems for the ship-owners having chartered their vessel by demise or time or voyage charter to a third party. If third party, an operator or time charterer, caused a maritime claim, the concerned vessel could be arrested.

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[30] Supra note 12, p. 312. However, there must be one of the links between the claim and the country, specified in Article 7 as follows:

"(a) if the claimant has his habitual residence or principal place of business in the country in which the arrest is made; or

(b) if the claim arose in the country in which the arrest was made; or

(c) if the claim concerns the voyage of the ship during which the arrest was made; or

(d) if the claim arose out of a collision or in the circumstances covered by Article 13 of the International Convention for the Unification of Certain Rules of Law concerning Collisions between Vessels, 1910; or

(e) if the claim is for salvage; or

(f) if the claim is for a mortgage or hypothecation of the ship arrested."

It seems fair to infer that the 1952 Convention reached an acceptable balance of interests:

-The ship became immune to arrest expected the restrictive list of maritime claims under article 1.

-The concept of the action in rem and the ship's liability was maintained.

-And so was the liability in personam.

[31] Mahin Faghfouri, *International Convention on Arrest of Ships,* International Ocean Institute, December 2017, https://legal.un.org/avl/ha/icas/icas.html, (last visited: April. 07, 2022).

b. Development of the 1999 Convention

Following the increasing trade among the world, namely between the European Economic Community and North Africa (mainly Morocco, Algeria and Tunisia), as well as the situation in countries such as Lebanon, whose maritime law was often at the forefront of alteration and was a basis for the majority of shipping contracts in the Middle East, the need for a much more unified set of rules was noticeable.[32] Furthermore, shipping has become more competitive and sophisticated than ever following these changes. Over 99% of world trade in volume terms is conveyed by sea, and the need to understand all the rules of the maritime industry with utmost clarification is paramount.[33]

There was a need to propose some measures to bridge the gaps. As a result, if one mixes all the upcoming maritime alterations such as newly born countries, new rulers, new CMI, one-ship companies endangered by the 1952 Convention, loss of influence of the countries having negotiated the 1952 Convention, and so forth, he would have the background of 1999 Convention and the reasons behind its formation.

By the 1980s, it was recognised that international shipping had undergone various dramatic changes, ranging from noteworthy advancements in maritime and marine engineering technology to catastrophic environmental incidents. The technological and scientific improvements brought up some new issues that were not addressed in the 1952 Convention and hence were outdated. Furthermore, some ambiguities in the 1952 Convention led to various and broad interpretations, resulting in a need for a new convention to reconcile different legal systems and strike a balance between them.

The International Convention on Maritime Liens and Mortgages 1993 (MLM) was the first outcome and, despite the very low rate of its ratification,[34] served as a background to the following work by the Joint UNCTAD/IMO Intergovernmental Group of Experts on Maritime Liens and Mortgages and Related Subjects (from now on "the JIGE") on the Arrest of Ships Convention. The UNCTAD/IMO "JIGE" worked on the draft in three steps between 1994 to1996 and produced a final draft Convention in 1997. The final text of the draft convention, which was accepted at the last meeting of JIEG in December 1996, contained a substantial number of phrases in square brackets, meaning that the JIEG had not been able to reach agreements on these wordings, which were thus left to the Diplomatic Conference to be resolved. The 1999 Geneva Convention adopted most of the 1997 draft but made significant changes while

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[32] Arab Law Quarterly, Vol. 4, No. 3 (Aug., 1989), p.260, Arrest of Ships Volume 7, (The Arrest of Ships Series) Editor, Christopher Hill, Lloyds of London Press, 1988.

[33] Alan E. Branch, Elements of Shipping, Eighth Ed., Published by Routledge, 2007, p.1.

[34] Francecso Berlingieri, "Arrest of Ships", CMI Yearbook 1996, Antwerp 1, p. 290.

rejecting some radical proposals.[35]

B. Scope of application

On a general look, it is inferred that the 1999 Convention has a broader scope and has struck a more reasonable balance, albeit with fewer ambiguities than closing the doors of various interpretations. Regarding Article 2 of the 1952 Arrest Convention, a sea-going ship flying the flag of a state party to the convention can be arrested only within the jurisdiction of a contracting state for a listed number of maritime claims. Under the 1952 Convention, a claimant has a right to charge a ship in respect of a maritime claim in the jurisdiction of a contracting state irrespective of the court's jurisdiction over the merits of the case. Contrary to the 1952 Arrest Convention, Article 8 of the 1999 Convention mentions that the rules shall apply to any ship within the jurisdiction of a state party to the Convention. Hence, a vessel flying the flag of a non-state party to the 1999 Convention would be subject to the convention when it is in the waters of a state party unless it had made specific reservations to the contrary based on Article 10 of waiting while ratifying the convention.

IV. Procedures and rules regarding arrest, re-arrest, release and counter security

A. Arrest procedure

The Admiralty Rules 1988 (Commonwealth Rules hereafter "Cth") sets out the requirements for commencement proceedings in personam and rem concerning an expanded category of maritime claims.[36] On 18 November 2006, these rules were amended. Significantly, from a practical standpoint, the rules were amended, but some of the forms attached as a schedule to the regulations were also amended. Even though the amendments were made some time ago, some documents continue to be lodged in the old or adapted form but not by the current rules. The essential documents to be installed when seeking to arrest a ship are an application for an arrest warrant, a supporting affidavit, and an arrest warrant.[37]

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[35] Nicholas Gaskell and Richard Shaw, "The Arrest Convention 1999", *Lloyd's Maritime and Commercial Law Qaurterly*, 4, p.470.

[36] Andrew Chamberlain, Holly Colaço and Richard Neylon, The Shipping Law Review, Law Business Reasearch, Eighth Edition, p.106.

[37] Rainer Gilich, " Practical issues arising from the arrest of ships",(Delivered to Admiralty Seminar on 22 May 2009), p.64, https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&ved=0CDcQFjAA&url=https%3A%2F%2Fmaritimejournal.m

a. The application of an arrest warrant and the undertaking to pay costs and expenses

The arrest highlights the balance between central authority and local autonomy in response to global events from an international perspective.[38] Generally, it is carried on in ports as part and parcel of the internal waters of the coastal state.[39] Regarding the procedure, at first, it should be mentioned that when the ships are arrested, the Marshal will incur some costs which are later repaid from the arresting party or their solicitors. These costs may vary depending on the place of arrest, whether the ship in question is at an anchor or berth, the detention length, and even the ship's size. The latter concerns the growth of the world economy and transportation volume, which opens the room for having large container ships to reduce cost and improve transportation efficiency.[40] Hence, in practice when keeping a boat in custody, the price would differ between a giant boat and a smaller one.

Moreover, the claimant must be able to make a rational assessment of the period in which the ship is arrested. The reason is that not all claims are minimal and solved quickly. Some claims like mortgage foreclosures which are high in value, may last much longer and cause an increase in the cause.[41]

Some of the typical expenses are mentioned briefly as follows:

a) Insurance: ships arrested by a Marshal are insured by the Court while under arrest.
b) Marshal's expenses reasonably incurred in the service or the execution of an arrest warrant
c) Helicopter hire (should arrest occur at anchor)
d) Flight, accommodation and vehicle hire costs incurred by the Marshal if the arrest is affected at a regional port and no local police officer can be appointed.
e) Ship movement costs

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urdoch.edu.au%2Findex.php%2Fmaritimejournal%2Farticle%2Fdownload%2F96%2F140&ei=dz3rUJ2lHs7Oswa6u4HoBg&usg=AFQjCNHVUAkCKj2_hg-0dVuFgyNPQHjrfg&sig2=xCv6j-nyrFSDO6IcUQ nP2g&bvm=bv.1355534169,d.d2k, (last visited: April. 8, 2022).

[38] Timothy Romans, *Mysterious Ships, Troublesome Loans, and Rumors of War: The Tokugawa Arrest of Suetsugu Heizō Shigetomo*, Journal of World History, Volume 29, Number 4, December 2018, p.514.

[39] Eddy Somers, *The arrest of ships in maritime zones beyond internal waters in Belgian maritime law*, Faculty of Law, Ghent University, Universite itstraat, Nov 2000, p.61.

[40] Yongfeng Qi, Jing Li, Chengbin Shi and Qintian Zhu, *Continuous Cooling Transformation of Undeformed and Deformed High Strength Crack-Arrest Steel Plates for Large Container Ships*, 2018, p.1.

[41] G. Robert Toney, Alan Swimmer, *Real World Challenges: Practical Maritime Arrest Considerations*, National Maritime Services, p.35.

f) Bunkers[42]

Stepping back to the application, it should contain the name of the person signing the form and the name of the firm or the organization that the person comes from. For a law practice to be bound, the undertaking must be signed by a principal certified by the law practice to give such an undertaking. A principal is defined by the rules as follows:

-in the case of a law firm: a partner,
-in the case of a multi-disciplinary partnership: a legal practitioner partner,
-in the case of an incorporated legal practice, a legal practitioner director.[43]

b. The supporting affidavit

There should be a statement included in the supporting affidavit which proves that there is no caveat against the arrest of a ship in force. Similarly, any detail about any prior proceedings brought by this jurisdiction or any foreign jurisdiction should be stated in the supporting affidavit. Regarding this, Rule 39 of the Admiralty Rules 1988 (Cth) imposes a duty of disclosure on parties to a proceeding commenced as an action in rem.

c. Arrest warrant

The arrest warrant should not be signed by the practitioner lodging it. Hence the contract should be submitted unsigned. The related Registrar will sign it once she is satisfied with the order of the documentation.[44] An area registrar issues an arrest warrant District Registry where the documents are filed.[45]

B. Arrest procedure on different maritime claims

According to Article 3 of the 1952 Arrest Convention, the plaintiff can use the right to arrest based on the claim that a maritime claim exists. Security can be arranged without investigation into whether or not liability has been established or not; that as it may, some principles should be emphasized more, and a procedure should be handled to provide an enabling environment for the

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42 Supra note 37, p.64.
43 Ibid.
44 Ibid, p.65.
45 Admiralty & Maritime, Marshal's Manual, Chapter 3, https://www.fedcourt.gov.au/law-and-practice/national-practice-areas/admiralty/jurisdiction/marshal_manual/chapter-3, (last visited: April. 9, 2022).

arrestors who have a legitimate claim to arrest a vessel while adequately protecting the right of the ship owners concerning sufficient compensation for wrongful arrest.[46]

a. Arrest against the debts of the shipowner

Regarding the 1952 Convention, one can arrest a particular ship regarding which the maritime claim arose, and there is no need for establishing personal liability. But this is different from the new 1999 Convention, which requires the shipowner to be personally liable for the debt and be the owner at the time of the arrest. However, each jurisdiction interprets these rules differently. For instance, Belgian courts permit detention in Belgium even if the ship is no longer under the person's ownership and is liable for the maritime claim. In contrast, such in Greece is null and void.

b. Arrest against the debts of a demise charterer

According to the 1952 Convention Article 3(4), the ship can be arrested for a claim against a demise charterer when "the charterer and not the registered owner is liable for a maritime claim relating to the ship". This rule is somehow controversial. It is not practical to permit arrest for a claim that cannot be enforced against the ship later. Moreover, it does not make sense as the vessel owner can still gather hire when the vessel is arrested for a claim for which the demise charterer is responsible. This will leave no choice for the former to arrange for security and release the boat.[47] Most claimants try to convince the judges to widely interpret the term "beneficiary owner" brought in the so-called article. In contrast, judges seem reluctant to do so and regard this phrase as equitable ownership, hence a stricter interpretation that makes a claim against a demise charterer is unlikely to succeed.[48]

c. Sister ship arrest

The only ship that may be arrested is the one that has a claim arisen. At the same time, on some occasions and due to multiple reasons, the claimant cannot control the ship in question. For instance, the vessel may be located in a jurisdiction where the arrest is not possible or is very difficult.[49] This covered

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[46] Kalu Kingsley Anele*, A Comparative Analysis of the Arrest of Ship Procedures in Nigeria and Korea: The Need for a Paradigm Change*, Journal of Korean Law | Vol. 19, August 2020, p.225.

[47] Supra note 5, p.38.

[48] Ship Arrest Cyprus – Demise Charterers, Case commentary, Oxford Maritime, pp.1-2.

[49] HFW Arrest Pack, 1st Ed.,April 2018, p.6.

the 1952 Arrest Convention that recognises the sister ships' right to arrest. If vessels A and B are owned by the same legal entity and this legal entity is the debtor of the claim, either vessel may be suspended, even if the claim is only about vessel A. Under the Arrest Convention, the nexus between the debtor and the surrogate or the sister ship is that the debtor must own the boat in question so that it can be arrested.[50] If the vessel's ownership is organised with a holding company and single-purpose companies as the registered owner of each boat, the arrest of a sister ship will not be possible.[51] Besides these, sister ship arrest is not a universally accepted provision of customary international law.[52]

The arrest of sister ships was one of the issues that the common law and the civil law differed slightly. While in the common law, all assets of the debtor and thus all vessels owned by the debtor could be arrested as security for any debt, whether maritime or not, in the civil law, a ship could be captured only in respect of a maritime claim and only that specific ship could be arrested, but any other boat. These dissimilarities made the differences between the purposes of the arrest. In the civil law, it is a means to obtain security. In common law, it is a means to find an admiralty jurisdiction. The ultimate compromise was to reduce the absolute right of a ship's arrest only to specified claims and extend the right of an arrest to other boats in the same ownership.

The provisions of a sister ship arrest are mentioned in both arrest conventions. It allows arresting a ship other than a particular ship if the person liable for the maritime claim owns the other boat. This rule is more clarified in the arrest Convention 1999 because it also covers the situation in which the ship is owned by a demise charterer, time charterer or voyage charterer. The latter differs in various jurisdictions such as England, which bonds it to the fact that only if the shipowner or demise charterer is liable in personam to the bunker supplier can any of its ships be arrested.[53]

d. Arrest and forced sale

A new rule was introduced in Article 3(3) of the 1999 Convention, which forbade the arrest of a ship not owned by the person liable for the claim, except a sale was possible later. It is a necessary provision that protects the right of the ship owners, notably when a ship is arrested under the civil law jurisdiction for

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[50] Matthew Harvey, *Arresting Surrogate Ships: Who Is An Owner?*, (2004) 18 MLAANZ Journal, p.75.

[51] Ingar Fuglevag, Obtaining security for claims by arrest of ships,(International Law office, July 2009), p.5, <http://www.vogtwiig.no/en/Nyheter/Ship-Arrest-in-Norway/>, (last visited: Dec. 12, 2012).

[52] Dillon Eustace, The Rights and Wrongs of Ship Arrest in Ireland, March 2016.

[53] The Risk of Ship Arrest for unpaid Bunkers arising from the OW Bunker group collapse, The Swedish Club, p.2.

the debts of a time charterer.[54]

Regarding the worth of a vessel in a forced-sale environment, the vitality of the market should be considered from the time of the arrest until the sale time; there might be drastic changes to the prices in a way in which the arrestor might be reluctant to sell the vessel in the end.[55] This becomes more important as the arrestor is responsible for the time of the ship being arrested and the following costs. Suppose that the arrestor has underestimated or overestimated the worth of the vessel in this phase. In that case, he cannot take time to face higher prices in the market due to his responsibility mentioned above. There is always the possibility of additional claims on the ship, which can hold the process even longer.[56]

e. Re-arrest

On the one hand, the 1952 Convention and its Article 3(3), which allows the arrest of a ship only once with the same maritime claim, constitute a general rule in most national jurisdictions and do not grant the right of the second arrest with the same marine claim. On the other hand, the 1999 Convention and its article 5 provide that the claimant can arrest a ship again after it has been released if the amount of security turns out to be inadequate. It also allows multiple arrests of different vessels to provide additional protection. Mostly civil law countries have discretion on the issue of re-arresting. This can only be carried out if security is ensured adequately.[57]

C. Wrongful arrest

As mentioned earlier, the arrest of ships is a recognised feature in international maritime commerce and international maritime jurisdiction. Valid claims are usually not successful in the court unless they are in the shade of an effective operational arrest of the ship's system. When the involved persons of a vessel, such as shipowners or insurers, deploy the ship, they should embrace the emerging claims against it. On the other hand, the claimant should provide justified reasons to take advantage of remedy.[58]

Regarding the arrest of ships, ship owners may suffer from substantial

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[54] Supra note 35, pp.479-480.

[55] G. Robert Toney, *Arrest of Vessels: Practical Considerations*, National Maritime Services, p.5.

[56] Alan Swimmer, G. Robert Toney, *Real World Challenges: Practical Maritime Arrest Considerations*, National Maritime Services, p.35.

[57] Paul David and Shee-Jeong Park, Det Norske Veritas AS v The Ship 'Clarabelle' [2002] 3 NZLR 52;
[2002] 2 Lloyd's Rep 479 (CA), p.134.

[58] Michael Woodford, Damages for Wrongful Arrest: Section 34, Admiralty Act 1988, (2005, 19 MLAANZ Journal), p.115.

financial losses even when a slight delay is caused to the ship's sailing schedule due to the arrest of their ships; significant commercial pressure may be cast upon ship owners to settle any claim. This is why the notion of a wrongful arrest is so controversial, mainly because of the salient difference between common law and civil law countries. While the former imposes liability only when the arrest is acquired in bad faith or with gross negligence, the latter imposes a strict liability to the claimant for all losses without any exception.

For more than 100 years, it had been generally accepted that a shipowner could not claim damages for wrongful arrest save. Hence damages could be claimed under limited circumstances, such as an arrest made with bad faith or gross negligence. The leading case that often establishes the rule is the *Evangelismos* (*1858*). In this case, the court told that the vessel in question was wrongfully arrested instead of another boat. The owner claimed damages, but Dr. Lushington dismissed it because the arrest was made in the bona fide belief that the *Evangelismos* was in collision and that there had been no mala fides in the proceedings.[59]

The above rule was applied in English Law countries and other common law countries. On the contrary, arrestors face strict liability in certain civil law countries if the claim fails on the merits. For instance, in Italy, the arrestor would be held liable if it proved that the arrest was made without diligence.[60] Concerning *Evangelismos*, Bernard Eder states that: "I have found it difficult to understand the basis or rationale of the rule that a ship-owner should not be entitled to damages save in the case of mala fides or crassa negligent. There is little, if anything, in the reported cases to explain the basis of the rule".[61]

Bernard Eder believes that the law regarding this matter should be reviewed. This sheds light on Article 1 of Protocol No 1 to the European Convention on Human Rights, which now forms a part of the "Convention Rights" given effect by the Human Rights Act 1998. Under the Article, every natural or legal person (including a shipowner) is entitled to a peaceful enjoyment of his "possessions" and this purportedly contains a legal entitlement to the use of the ship.[62] Any intrusion on such quiet enjoyment must fulfill what is described as the "fair balance" test. Based on this ground, it seems that the law, which deprives innocent ship owners of the reimbursement for the arrest of their ship in the absence of evidenced mala files or gross negligence on the part of the arresting party, fails to fulfill the "fair balance" test - particularly with regard to specific features of existing admiralty law and practice

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[59] Bernard Eder Q.C., Wrongful Arrest of Ships: A revisit, Essex Court Chambers, p.6-7.

[60] Georgio Berlingiery, Liability for Wrongful Arrest; A report on this Study and on the Activities of the IWG, CMI Yearbook 2015, p.297.

[61] Supra note 51, p.9-10.

[62] See generally Human Rights Practice ("HRP") Jessica Simor &Ben Emerson QC (2003) chap 15.

mentioned above that favour the arresting party. [63]Besides, there are judges who conclude that an arrest, or even the mere threat of an arrest, is an effective way of obtaining security, such that that their practice ensures that few arrests are even deemed as necessary; although they do not believe in the fact that there should be counter security from the arrestor. Further, unlike a freezing injunction, a ship arrest is asset-specific and would only paralyse the owner's business as structured as a single ship company. [64]Arrest Convention 1952 does not provide any sanction for wrongful arrests. Article 6(1) in 1999 Convention provides a rule that empowers the court to decide whether the claimant is liable to provide security or not. Both conventions do not provide a direction on wrongful arrests. However, this seems to be a critical issue, and more attention should be paid to it. This leaves the damages of the shipowner uncompensated by alleging that the arrest was bona fide. There should be some remedies for the damaged ship owner even if there were no negligence or lousy faith; otherwise, there may be some harmful effects stemming from the useful measure of arrest to the innocent ship owners.

In Armada Lines Ltd. v. Chaleur Fertilizers Ltd.,[65] (June 26, 1997) No. 24351 (S.C.C.), the Federal Court of Appeal (Canada) made a groundbreaking decision that the arrestor could be liable for wrongful arrest by merely proving that the detention was illegal or was without legal justification. This was the first time of a court applying a rule other than gross negligence or bad faith. This was later reversed by the Supreme Court of Canada, referring to *Evangelismos* and the given factors.[66] It is inferred from the rules that *Evangelismos* is evidently in favour of the arrestors, and strict liability could be so rigid in this area. The conventions could not strike a balance between these two rules, and it seems that a compromise cannot be made in this regard.[67]

D. Release

A ship is the security for the maritime claim itself. If the owner wants to release the boat, he should provide the claimant with another means of protection.[68] If the defendant provides the arrestor with bail or other

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[63] Supra note 51, p.15.

[64] Landmark Court of Appeal Decision on Ship Arrest Counter-Security and Wrongful Arrest Damages, Dec. 11 2018, https://www.wfw.com/articles/landmark-court-of-appeal-decision-on-ship-arrest-counter-security-and-wrongful-arrest-damages/, (last visited: April. 12, 2022).

[65] 1997 CanLII 362 (SCC) | Armada Lines Ltd. v. Chaleur Fertilizers Ltd. | CanLII

[66] Shrikant Pareshnath Hathi, Binita Hathi and Brus Chambers, Ship Arrest in India and Admiralty Laws of India, 12th Ed., Chapter 48, 2019, http://admiraltypractice.com/chapters/48.htm, (last visited: April. 13, 2022).

[67] Giorgio Berlingieri, Liability for Wrongful Arrest of Ships: the efforts towards possible uniform rules, Journal Poredbeno Pomorsko Pravo = Comparative maritime Law, Vol. 59, No. 174, 2020, p. 30.

[68] Haifeng Lin, A comparative study on the legal system of arrest of ships in China, The Maritime

satisfactory maritime securities, he can enable the ship's release even before the dispute is resolved. The plaintiff should certainly assent to the protection provided. Otherwise, this will not proceed.[69] For instance in Iran, which is not a part of either convention or a civil law country added above, if there is an agreement between the parties, the ship can be released immediately following a letter sent by the court to the port guard authorities informing them of the lifting of the arrest. The security can come in cash deposits or bank guarantees in Iran.[70]

The importance of the release is that it enables the ship to continue trading even under arrest.[71]

Due to Article 4(1) of the Arrest Convention 1999, the release is mandatory when sufficient security has been provided in an acceptable form. If there is no agreement between the parties on the amount and the nature of the deposit, the court should decide about it, which can be cash, bank guarantee or a letter of undertaking from the ship owner's P&I club.[72]

E. Jurisdiction on the merits

In the current fluctuating shipping markets, the salient point in arresting a ship is the country where the arrest occurs. Some jurisdictions are the most favorable for arrest, and the best are considered unique.[73] According to the 1952 Convention, the court of the forum arrest is allowed to determine the case on the merits. The 1999 Convention narrows down the application of this

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Commons: Digital Repository of the World Maritime University, World Maritime University Dissertations 2006, p. 7.

69 Marc D. Isaacs, *Arrest of Maritime Property – Mechanics and Emergencies*, National Judicial Institute/Canadian Maritime Law Association Joint Seminar in Maritime Law Ottawa, April 15, 2011, at 3.

70 Omar N. Omar & Adam Gray, SHIP ARRESTS IN PRACTICE, ELEVENTH EDITION 2018, A COMPREHENSIVE GUIDE TO SHIP ARREST & RELEASE PROCEDURES IN 93 JURISDICTIONS, p. 99.

71 Supra note 5, p. 41.

According to Article 3(3) and 7(4) of the 1952 Arrest Convention, the situation when the arrested ship must be released are the following:

a) The ship had already been arrested in respect of the same maritime claim;
b) Where the owner has provided security;
c) The claimant has failed to bring proceedings on the merits within the time bar.

There can be other conditions under which the ship may be released:

a) The ship owner established the limitation fund according to the 1957 Limitation Convention, 1976 LLMC Convention and CLC 1992;
b) Judicial sale of the ship;
c) Bankruptcy of the owner.

72 Supra note 5, p. 42.

73 Lisa Clarke, A quick overview of ship arrest in some popular jurisdictions, Legal Briefing June 2016, p. 5.

provision, saying that the parties can agree to take the dispute to another jurisdiction or arbitration while accepting the argument keeping the right of refusal for the later nominated jurisdiction.[74]

V. Conclusion

The ship arrest is a trusted way to obtain security for a claim and potentially prepare for a judicial sale of the vessel if that becomes necessary. It is an appropriate remedy for different creditors, such as the owners who need to repossess the boat under the charter party, the bunker suppliers that have not been paid, and a bank that has terminated the loan facility and wishes to draw on its mortgage or crew members wih outstanding wages. It is a relatively easy, inexpensive and quick solution. The claimants can also arrest the sister ships and secure the claim, although there are always difficulties regarding the jurisdiction either for the arrest of the boat or on the merits of the case. The differences between the 1952 and 1999 conventions and the internal legislative rules in the countries have left the doors open for claimants to choose among the most favorite countries' cases as favorable toward an arrest. This can lead to the unfair arrest, taking years and imposing even more damages on the shipowner. Apart from the financial pressure he bears, he might undergo further obligations and be liable for the delay in the shipment of the cargo or any other claims arising from it.

An arrest can act as a double-edged sword, meaning it might be applied as the means of security in favour of the claimant. If used with negligence, it can cause unsettled damages to the shipowner. This was always a controversial issue, and the *Evangelismos,* which based the rule merely upon lousy faith or gross negligence, could not strike a balance. While most countries apply the rule above, Australia is one of the rare, fair countries that did not follow the rule and has departed from this position by legislative changes. The Australian Admiralty Act 1988 provides a lower threshold for 'wrongful arrest'; the claimant is liable to recover if the arrest was obtained 'unreasonably and without good cause' rather than with malice.[75] In my opinion, other countries might take the same viewpoint and do not stick to the old rules that are proven to be unfair in certain circumstances.

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[74] Rashid Juma Mohammed, An Act to Provide for the Effective Incorporation and Implementation of the Arrest Convention 1999 into the Laws of Tanzania Zanzibar IMO, International Maritime Law Institute, 2019-2020. at 2.

[75] Chia Song Yeow, *Recent Developments In Singapore Law On Wrongful Arrest Of A Ship*, A Rajah & Tann Publication, Volume 3 Issue 2.

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Korean Maritime Cases during 2019 and 2020

*In Hyeon Kim**

ABSTRACT

This article presents 11 maritime cases rendered by the Korean Supreme Court during 2019 and 2020. Legal issues involved in maritime lien, surrendered B/L, switched B/L and logistics contract are addressed in the article. These cases will provide a good guidance for foreigners.

KEYWORDS: Maritime Lien; Charter Party; Time Charterer; Bill of Lading; Surrendered Bill of Lading; Marine Insurance; Wreck Removal

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I. Charter party and maritime lien

A. Maritime Lien In Case of Towage Claims against Time Charterers *(the KSC case 2019.7.24. Docket No. 2017ma1442)*

In the KSC case *2019.7.24. Docket No. 2017ma1442*, time charterer B entered into a charter party with ship owner A for borrowing the vessel X (Korean flagged). The charterer B hired several tugs from tug boat companies for vessel X's several entrances to and departures from Korean ports. Because the towage was not paid, the tug boat companies applied for auction sale against the vessel X based on maritime lien under the Korean law. This application was granted by Incheon District Court.

The ship owner A argued that Korean Commercial Code(hereinafter KCC) did not recognize the maritime lien on claims incurred by the time charterer, and appealed the case to the second instance court.

> KCC Art. 777 allows creditors to exercise maritime lien against a vessel which incurs several claims including towage and pilotage. Art. 850(1) states that when a bare boat charterer uses a vessel for navigation for commercial purposes, they shall have the same rights and obligations as a ship owner in relation to a third party. According to Art. 850(2), the maritime lien allowed in Art. 777 is also allowed when the same claims are incurred by the bareboat charterer of the vessel. However, there is no provision in KCC on whether the same maritime lien is allowed in the case of a time charterer.

In Incheon District Court 2017.10.17. Docket No. 2015La838 Decision, the court decided as follows:

It is very clear that Article 850 is placed in KCC's section 5, which is only related to bare boat charterers. On the other hand, time charter provisions in section 4 do neither have any similar provisions with the above nor have *mutatis mutandis provision.*(Omitted) Maritime lien regarding claims incurred by time

charterers was denied in the 1993 Maritime Lien Convention, according to the Korean Supreme Court (*KSC case 2014.10.2. Docket No.2013Ma1518 Decision).*[1]

In light of the regulatory system, revision history and the Supreme Court judgments, the ship owner in a time charter party holds the control right over the vessel, whereas the charterer lacks such rights, unlike in the case of a ship lease or a bare boat charter. The current KCC Article 850 is clearly applicable only to bare boat charters and cannot be applied *mutatis mutandis* to time charters. Because the towage claim is a claim against the time charterer, even if such claim are of such nature that may be secured by maritime lien under Art. 777(1), the claimants may not invoke such maritime lien on the ship owner, and therefore the creditors are not allowed to apply for the auction sale of the vessel.

The Korean Supreme Court overturned the lower court's decision as follows:

The KCC does not have any provision regarding the liability of a time charterer against a third party. However, it is reasonable to say that Art. 850(2) related to bareboat charterers is *mutatis mutandis* applicable to time charterers, and thus claimants with maritime lien incurred from time chartered vessel are allowed to apply for auction sale against the very vessel of the ship owner based on following reasons:

First, a time charter party is similar to a bareboat charter party in that the charterers obtain the free right of making use of the vessel, along with the contract for the ship owner to supply crews to the vessel. Thus both contain a special agreement between the ship owner and the charterer. Art. 850(1) regarding the bareboat charterer is *mutatis mutandis* applicable to the time charterer in relation to the business items such as cargo loading, towage and discharging against the third party, and the time charterer has the same liability as the ship owner.

Second, only the bareboat charterer becomes party who has right and obligation for the items regarding the use of the vessel in case of the bareboat charter party, and no direct legal relationship between the ship owner and the third party brings about. However, KCC has Art. 850(2) in order to protect the maritime claimant, so that the maritime lien is effective against the ship owner and the maritime lien holders can have priority rights for compensation from the ship's auction

[1] The KSC interpreted that the previous provision which allowed the maritime lien holder of a claim incurred by the time charterer to exercise the maritime claims was deleted in the 1993 Convention, reinforcing the position of the vessel mortgagee, facilitating ship financing by reasonably reducing the scope of claims which would lead to maritime lien. Such reasoning may be widely considered in the interpretation of Art. 850 as well.

> sale price. This kind of need of protecting the maritime lien holder is not different from the case between the bareboat charterer and the time charterer.
>
> In particular, the towage claim stipulated in Art. 777(1)(i) of the KCC deserves high protection regardless of the identity of obligor - ship owner, bareboat charterer, or time charterer. The towing company is not allowed to reject the application for towing service from an applicant, if there is no special circumstance, according to Art. 29(1) of the Ship's Entering and Departing Port Act. In case the towing company breaches the above provision without a reasonable excuse and rejects a request for towing services, it is subject to criminal charges according to Art. 55(iv) of the same Act. As such, the towing company has to compulsorily enter into a towing service contract for the vessel regardless of who the operator of the vessel is. In addition, at the time of the towing service contract, it is very difficult for the towing company to ascertain who the obligor for towing charges is, between the ship owner and other charterers. The decision of the lower court is reversed and we return the case to the Inchon District Court.

The concept of maritime lien comes from the notion that the vessel itself is a debtor, *action in rem*, which is different from the notion that only a person can be a debtor, *action in personam*. Although maritime lien is considered a real right, without any registration on the vessel's registry book, it holds prevailing effect on the vessel over the mortgagee. The crew's wage claims, claims concerning the ship's port due, pilotage, towage, damage claims regarding the ship's collision etc. are claims covered by maritime lien under KCC Art. 777. In Korea where only *action in personam* is admitted, the relationship between the debtor and the maritime lien raises an issue.[23]

The legal relationship against the third party cannot be decided by the party's agreement between the ship owner and the time charterer. Thus, the liable party is regulated by statutory provisions. The KCC has a provision of Art. 850 to the effect that the bareboat charterer is liable and has right against third the same as the ship owner, like Japanese maritime law and German maritime law.

However, there is no such provision regarding time charter parties. KSC solves the matter by applying the above provision to the case *mutatis mutandis*.

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[2] Korean law does not adopt *action in rem*, but rather *action in personam*. Therefore, the relationship between the vessel and obligor has to be dealt with.

[3] This decision of KSC will be recorded as a milestone decision in Korean maritime law history. Historically, time charter parties appeared at a late stage than bareboat charter parties. The legal nature of the time charter party has been disputed for a long time in Korea as well as in Japan. Whether the ship owner or the time charterer is liable for the collision claim or cargo damages is still in dispute in Korea.

Considering that the legal nature of time charter parties is very similar to bareboat charter parties, Art. 850 regarding bareboat charter parties can be applied to time charter parties.

The issue in this case was whether Art. 850(2) is *mutatis mutandis* applicable to time charter parties. After it provides towing services, the towing company has a maritime lien against the vessel and a claim against the ship owner under Art. 777. Art. 850(2) stipulates that the maritime lien is still available when the obligor is a bareboat charterer, and therefore, the vessel owned by the ship owner can subject to maritime lien.

The issue is related to whether the legal nature of time charter parties is similar to that of bareboat charter parties. KSC decided that the two kinds of contract are similar in nature, taking into consideration its previous 1991 decision on time charter parties(the so-called Polsa Dos case*)*.[4] The court reiterated that there are two sections in the time charter party such as navigation section, and business section which is a matter of the time charterer. The court further decided that the time charterer has the right of free use of the vessel in relation to the business section, and this makes the application of Art. 850 to the time charterer possible. KSC regarded the legal nature of the time charter party as similar to that of the bareboat charter party.[5] KSC also took into consideration that the towing company is required to provide towing services according to Korean domestic law. As such, the KSC decided that the towing company shall be allowed to apply for auction sale against the very vessel even though it provided services for the benefit of the time charterer, that is, even if the obligor for towing charge is the time charterer.[6]

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[4] *KSC case 1992.2.25. Docket No. 91da14215.*

[5] In 2003 KSC decided that the ship owner rather than the time charterer is liable for damages incurred in the ship's collision *(KSC case 2003.8.22.Docket No.2001da65977*). In the judgment, the court enumerated two sections of matters involved in the time charter party such as the navigation section and the business section. The ship owner was vicariously liable for collision damages incurred by the ship's master's negligence because the collision accident was committed by the ship's master who was hired and controlled by the ship owner. If the legal nature of time charter parties is similar to that of bareboat charter parties, KSC should apply Art. 850(1) to the collision case, as a result of which the time charterer shall be liable for the collision damages (The Japanese Supreme Court has made a decision to this effect). But the court decided differently. The KSC in the case regarded the towing service as a kind of business section. The time charterer has free right of use of the vessel. In other words, the time charter party is similiar to the bareboat charter party in respect of the business section only. Accordingly, the court decided that the Art. 850(2) is applicable *mutatis mutandis* to the time charter party.

[6] This judgment is detrimental to the ship owner. In case the nationality of the vessel is Korean, the vessel is subject to maritime lien when the towing charges or pilot charges are incurred. However, the ship owner makes use of the proviso of Art. 850(2) if they give prior notice to the third party that the vessel is not subject to maritime lien according to the contract between the ship owner and the time charterer. If so, the vessel is no longer subject to maritime lien according to Art. 850(2).

In case a foreign party may be involved, the governing law of the case would be decided by the Korean Act on Private International Law Art. 60. In one KSC case, the vessel was of Russian nationality. According to Russian Maritime Law, the claimant against the time charterer did not have maritime lien. Thus KSC decided that the claimant was not allowed to exercise maritime lien against the time chartered vessel, according to Russian law.[7]

The purpose of commercial law is to provide foreseeability or predictability and thus facilitate commercial transactions. To achieve the above purpose it is necessary to introduce a provision in KCC that can regulate the external effects of time charterer on maritime lien, like the new Japanese Commercial Code Art.[8]

B. Legal nature of time charterer's claim against the ship owner for remaining bunker(KSC case 2019.12.27. Docket No. 2019da218462)

In KSC case *2019.12.27. Docket No. 2019da218462,* the ship owner chartered out Vessel X to Hanjin shipping for 12 years. NYPE 46 with English governing law clause was engaged for the time charter party. The daily charter hire was $23,000. Hanjin Shipping applied for rehabilitation proceeding to a Korean rehabilitation court. The court decided to start the rehabilitation proceeding on Sept. 1, 2016. The administrator for the Hanjin Shipping sent a message to the ship owner on October 20, 2016 cancelling the time charter party. The ship owner had a claim of $1,100,000 in charter hire against Hanjin Shipping accrued from Sept. 1 to Oct. 20. The claim was regarded as a claim for common interest without any restriction for payment in favor of the claimant.

When the ship owner made claims to the administrator, they counterclaimed that the claim by the ship owner should be set-off by their claim

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[7] *KSC case 2014.7.24. Docket No. 2013ma1518decision.*

[8] Here is a summary of the liabilities of parties involved in the operation of a time charter party according to Korean law and the court's decision.

(i) Who is the obligor for the bunker supplied during the operation of the vessel: The time charterer according to contracts such as NYPE.

(ii) Who is liable for cargo damages under the Bill of Lading: It was decided by the KSC that the legal nature of the time charter party is similar to that of the bareboat charter party and, therefore, Art. 850(1) is *mutatis mutandis* applicable to the time charterer. Accordingly, KSC rendered that the time charterer was liable for cargo damages against the holder of the Bill of Lading. However, there are lots of criticisms on this decision. A majority of scholars argue that the carrier under the contract should be liable for the cargo damages.

(iii) Who is liable for collision claims?: It will be decided as the ship owner according to 2003 KSC's decision as explained.

(iv) Whether maritime lien can be attached to the time chartered vessel when the claimant has a claim from the time charterer: It will be possible according to 2019 KSC's decision.

for the remaining bunker price against the ship owner according to Appendix Art. 33(bunker adjustment clause) of NYPE 1946, because the ship owner should take over and pay the time charterer for the remaining bunker when the vessel is returned to the ship owner.

However, the ship owner argued that Hanjin Shipping's argument had no grounds because the above bunker adjustment clause was only applicable in an ordinary situation and thus not applicable in a rescission case and that only when the time charterer had title for the remaining bunker could they invoke the application of the above clause.

The lower court decided that Appendix 33 was not applicable in cases where the charter party is rescinded and the chartered vessel is returned during the original charter period, and that the time charterer was entitled to invoke Appendix 33 only when it obtained a title for the remaining bunker according to the Saetta case. The administrator of Hanjin Shipping appealed to the KSC.

The KSC decided as follows:

> According to the charter party, the time charterer has an obligation to give prior notice to the ship owner on the place and time for the delivery of the vessel and maintain the same quantity of the bunker as when the vessel was delivered to it as closely as possible. However, the time charterer is not easy for carrying out such obligation in case that the charter party is cancelled during the charter period. The charter party at issue is based on NYPE(New York Produce Exchange) 1946 with Appendix added. Appendix 33, stating that the ship owner has to take over the remaining bunker and pay its price to the time charterer, does not specify the termination case of the charter party unlike the ordinary "delivery" and "redelivery" cases. However, in NYPE 2015, unlike in NYPE 1946, the expression "on any termination" was introduced. Therefore, we decide that Appendix 33 is not applicable in case that the charter party was rescinded by the administrator after the commencement of the rehabilitation proceeding.
>
> According to UK court's judgment, only when the time charterer has title to the remaining bunker can its right be assigned. Even when the ship owner takes over the vessel from the time charterer who does not hold the title for the remaining bunker, the owner is not regarded to obtain the title.

The governing law for the charter party was English law. The administrator for Hanjin Shipping tried to set off the claims of the ship owner against Hanjin Shipping with its counterclaim for remaining bunker prices owed by the ship owner to Hanjin Shipping. //

The ship owner argued that Hanjin Shipping's counterclaim did not exist. It argued that Appendix 33 is applicable for the normal end of the charter party but not for cancellation cases during the charter period. It further argued that the time when the charterer has a title for the remaining bunker, it is entitled to invoke Appendix 33. The KSC went along with the ship owner's argument.

Bunker adjustment clauses such as Appendix 33 are required for the time charter agreement. Bunker is supplied by the time charterer during charter party period. During the charter party period, the bunker is owned by the time charterer. However, the time charterer is not able to take out the remaining bunkers when the time charter party ends. The very best way to settle the issue is for the ship owner to take over the remaining bunker.

KSC considers NYPE 46 with Appendix 33 to be inapplicable in case of cancellation during the charter period, considering its wording. Adoption of NYPE 2015 with more comprehensive wording of "any event" is desirable.

II. Carriage of goods by sea

A. The Legal nature between logistics contract and multi-modal contract (KSC 2019.7.10. Docket No. 2019da213009)

In the KSC case *2019.7.10. Docket No. 2019da213009,* A who sells Jeju Samdasu drinking water, entered into a logistics contract with B and C. Under the logistics contract, B and C undertook the total service of the Samdasu drinking water which includes warehousing, stevedoring, and transporting goods from the factory of A. B used maritime transport in delivering drinking water from Jeju Island to Inchon, then distributed them in Seoul area. C used maritime transport to deliver drinking water from Jeju Island to Wando Island, then used land transport from Wando Island to Chungcheong Province.

However, B and C could not complete the service of the contract; A appointed a substitute company to carry out the remaining service of the contract, which caused A to spend additional expenses. A raised lawsuit against B and C to get damages. Because the lawsuit was raised three years after the due date, B and C argued that the lawsuit was time-barred. However, A argued that the above case is not a matter of carriage contract and that he was eligible for such a claim.

In the first instance, a one-year statute of repose was applied. The court deemed that the damage occurred in the sea leg, so Art. 816(1) of the KCC) was to be applied. As a result, the suit was set aside because the suit was raised one year after the day that goods were to be delivered. In the second instance, however, the court regarded that the damage was caused by B and C's not carrying out the service, and thus Art. 816(2) of KCC was applied.

Art. 816(2) is applicable when it is unclear in which segment of transport

the damage has occurred or the occurrence of the damage is not limited to any particular area in its nature(so-called concealed damage case). The laws governing the longest transport segments have been applied.

Accordingly, it applied maritime law for B and land law for C. The lawsuit against B by A was dismissed because B argued that the claim was time-barred under Art. 814 of KCC. But, the claim against C by A was admitted because C did not argue that it was time-barred under Art. 121 of KCC but argued that it was time-barred under Art. 814. A and C appealed to the KSC.

The KSC defined the logistics contract as followings:

The multi-modal transportation contract is to carry out the carriage of goods with at least two different modes including land leg, sea leg, and air leg. (omitted) when the merchant undertakes to carry out services of loading and discharging at the port, warehousing, and shifting of goods, and providing logistics information, In addition to the multi-modal transportation, it is called as a total logistics contract under which the multi-modal transportation is the core part.

The court further decided on the applicable law as followings:

When damage occurs during carrying out multi-modal transportation, which law among several different laws according to the mode of transportation will be applicable to the case becomes issue. According to Art. 816(1) the multi-modal carrier is liable according to the law of the leg under which the damages occur. And, when it is not clear in which leg the damages occur or when the area of damagecannot be designated in nature, the carrier is liable in accordance with the law of the leg in which the distance of transportation is longest. (omitted) if the sea leg is the longest in a concealed damages case, maritime law is applicable to the case. A sea carrier's obligation and right against the shipper or consignee is extinguished unless the lawsuit is raised within one year from the date when the cargo is delivered to the consignee or the date when the cargo ought to be delivered(Art. 814(1)), regardless of the cause of action. It seems that the plaintiff tried to invite the merchant in order to move goods from the factory at Jeju Island to the shore in Korean Peninsula when it announced the bidding for the contract. Taking into consideration the above, it seems reasonable that the contract is a kind of multi-modal transportation contract. In order to decide the liability of the multi-modal transportation carrier, Art. 816 is applicable. the damages that plaintiff argues are additional expenses caused by the plaintiff's hiring a substitute company, which is subject to the case that the area of the damage cannot be found or it cannot be designated in nature. Therefore, Art. 816(2) is applicable and thus carrier is liable

according to the law in the leg with the longest distance.

The Court decided on A's appeal as follows:

Defendant 1(B) moved the goods produced by the plaintiff from Inchon port to Seoul area. In this case, the distance between Jeju Island and Inchon port clearly exceeds that between Inchon port and logistics center. Therefore, maritime law should be applied to the case when we decide whether the time bar period passed or not. According to Art. 814(1), the plaintiff should raise a claim within a year from the date when it could receive the goods if the carriage was done as scheduled by defendant 1(B). The carriage of goods produced by the plaintiff seems to be completed within a month from the date of delivery from the factory to the designated place by the plaintiff. The goods which occurs last at the end of June 2014 seem to have been delivered to the plaintiff around the end of July 2014. However, the plaintiff raised the lawsuit on December 12, 2016, which passed the time bar period against defendant 1(B) clearly. The A's appeal is rejected.[9]

The total logistics contract from the factory of the seller to the designated place was involved in the case. Under the contract, the logistic company undertook services including carriage, stevedoring, and warehousing. The logistics contract is not independently regulated under the KCC. The second instance court and the Supreme Court handed down that multimodal transportation was the core part of the logistics contract and applied Art. 816 for the case.

When a merchant undertakes to carry out the transportation of goods with several different modes of transportation, the contract is called as a multi-modal transportation contract. There is a possibility that several different laws are applicable in multi-modal transportation. The land law is more unfavorable to the carrier than the maritime law under Korean law. Under maritime law, the carrier enjoys package limitation and shortened time bar period while it cannot enjoy them under land law.

The courts took a firm position that the case was a kind of multi-modal transportation. In the case of B, the goods were shifted from Jeju island to Incheon(distance of about 500km) by the ship and then moved to Seoul(distance of about 50km). In the case of C, it was shifted from Jeju island to Wando(distance of about 100km) and then moved to Chungcheong province(distance of about 300km). The KSC decided that Art. 816(2) was applicable to the case. It rendered that the time bar provision under the maritime law (Art. 814) was applicable in the case of B, and that the same under the land

[9] C's appeal was also rejected. The court decided that Art. 814 for sea leg carriage was not applicable to C.

law (Art. 121, 147) was applicable in the case of C.[10] Both have a one-year statute of repose.

A's lawsuit was brought about one year after the time bar period triggered in the case of B, as a result the claim was rejected. In the meantime, in the case of C, C did not make a defense against A's claims for the time bar of Art. 121 rather than that of Art. 814. As a result, A's lawsuit against C was accepted by the KSC.

It is not clear whether Art. 816 is applicable for the case in which the damages were caused by the debtor's non-performance of the contract. It is obvious that the provision is applicable in case the damages occurred during the debtor's carrying out the transportation. The damages in the case occurred because the logistics companies gave up carrying out the contract, which additional costs incurred. It is not a matter of damages against goods during the carriage. The KSC applied Art. 816(2) to the case, regarding concealed damages. However, if the court decided that Art. 816 was not applicable in case additional expenses were incurred due to the debtor's non-performance of the contract, Art. 64 in which a five-year statute of limitation was applicable and is favorable for the plaintiff.[11]

The case will be recorded as the leading case that Art. 816 is applied for the first time since it had been adopted in the KSC in 2007.

B. Starting point for reckoning time bar under the KCC Art. 814 *(the KSC case 2019.6.13. Docket No. 2019da205947)*

In the KSC case *2019.6.13. Docket No. 2019da205947*, the shipper in Korea exported 274 automobiles to Syria. The defendant served as a freight forwarder for the benefit of the shipper. It requested an F/F(the plaintiff) to transport them. The automobiles were actually transported by a Japanese shipping company as the actual carrier. They were planning to move to Syria via Turkey (port of M and I). The vessel on which the cargo was laden board left Inchon port in December 2013 and was not able to enter a port in Turkey and thus waited for a long time at a different place. It was finally allowed to enter into a port in Turkey in May 2014. Nevertheless, the customs clearance was not completed because the cargo was not allowed to pass through Turkey's territory to Syria.

Therefore, the plaintiff made claims for freight and additional charges

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[10] *the KSC case 2014.7.24. Docket No. 2013ma1518decision.*

[11] But, the writer thinks that five-year statute of limitation is too long as oppose to one-year statute of repose in case of transportations. It seems reasonable for the courts to decide that the multi-modal transportation is the core of the total logistics contract. However, in case that damages occurs during packing or custom clearance, there is no provision under the Korean Commercial Code. Therefore, there is necessity to insert a special independent provision on the logistics contract under the KCC.

incurred during the waiting period in Turkey against the defendant on September 5, 2017. The defendant argued that the claims had been time- barred. The lower court decided that the plaintiff's claims were time- barred because the time bar period starts, running from the time when the vessel arrived at a Turkey port(Governing law was Korean law).

The KSC decided that the time bar of claim against the carrier by the shipper or the consignee, or the claim from the carrier to the shipper/the consignee under Art. 814 of the KCC has a legal nature in that the time bar period is not allowed to be postponed or stopped.[12]

> The starting point of the time bar is the date on which the cargo was actually delivered or to be delivered. The carrier under the contract for the carriage of goods by sea has obligation to receive, load, stow, keep, transport, discharge and deliver the cargo according to Art. 795(1) of the KCC. Therefore, the carrier's obligation is completed by delivering the cargo to the lawful consignee. The delivery of the cargo is to shift the possession, that is, actual control, of the cargo from the carrier to the lawful consignee. In case the B/L is issued, the cargo should be delivered to the lawful holder of the B/L (Art. 861, Art. 132). Accordingly, even though the carrier hands over the cargo to the warehouse keeper after it takes out the cargo from the ship's hold to the delivery place at the discharging port, the carrier is not admitted to making delivery of the cargo from the control of the carrier to that of the lawful consignee.[13] In case the cargo became lost or impossible to make delivery, the time bar should be decided based on the date when the cargo ought to be delivered. The date when the cargo ought to be delivered is the date when the delivery should have been done if the carriage was normally carried out according to the contract for the carriage.[14]
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> The destination of the cargo under the contract was M and I in Turkey. However, the carrier's delivery obligation does not end at the time of entering into discharging ports but it completes at the time of delivering it to the lawful consignee. Therefore, the lower court should have regarded the date when the cargo was actually delivered to the lawful consignee, or the date when the cargo ought to be delivered in a case the cargo delivery was impossible as the starting point of reckoning time bar period. However, the lower court decided that the carrier's delivery obligation ended at the time when the cargo arrived

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[12] *the KSC case 1997.11.28. Docket No. 97da28490.*
[13] *the KSC case 2004.5.14. Docket No.2001da 33918.*
[14] t*he KSC case 1997.11.28 Docket No. 97da28490; 2007.4.26. Docket No. 2005da5058.*

at a Turkey port and regarded the following day after the cargo arrived at a port as the starting day of running the time bar period.

The KSC finally rendered that there is a mistake regarding the starting point of calculating the time bar period in the lower court decision. The appeal has ground and thus the case is returned to the lower court to decide once again in accordance with the decision of the Court.

The carrier's obligation is complete at the time of the delivery of the cargo to the lawful consignee soon after the discharging of the cargo (Art. 795). In the meantime, the claim from the carrier against the shipper or the consignee or the claim from the shipper or the consignee against the carrier is time-barred unless it is raised within a year after the cargo was delivered or the cargo ought to be delivered (KCC Art. 814). This time bar is not allowed to be postponed or stopped.

The carrier may have a claim for freight to the consignee or the shipper. The consignee or the shipper argues that the carrier's claim is time-barred. And then whether the one year has passed already becomes an issue under Art. 814. What is the date for running one year time bar period? In case the shipper has physical delivery of the cargo, the delivery date of the cargo becomes such a calculating date under Art. 814 of the KCC. On the other hand, in case the cargo was not delivered or it is impossible for the carrier to deliver the cargo, the date when the cargo ought to have been delivered becomes such a calculating date.

In this case, the cargo has not been delivered to the lawful consignee due to the customs clearance. Therefore, the date on which the delivery was completed does not exist in the case. The carrier faced the situation that the cargo was no longer able to be handed over to the consignee. Which date will be the date when the cargo ought to have been delivered in this case? The date on which the carrier abandoned the delivery of the cargo may be an answer. Nonetheless, the lower court decided the simple arrival date of cargo that was laden on board the vessel was such a date. It is obvious that the arrival date at a port is earlier than the date on which the cargo's control is shifted to the consignee at the warehouse. The usual delivery of the cargo at a warehouse follows the arrival of cargo on board the vessel. Therefore, the lower court's decision was wrong.

C. A case that the freight forwarder's liability was imposed (the KSC case *2018.12.13. Docket No. 2015da246186*)

In the KSC case *2018.12.13. Docket No. 2015da246186, a* freight forwarder (hereinafter F/F) undertook forwarding services for cargo from China to Korea. It undertook the whole forwarding service of the cargo such as maritime transportation, warehousing, custom clearance, and domestic transportation from a Chinese port to Inchon Port, Korea. It issued a House Bill

of Lading in its name. The cargo was kept in a warehouse in Inchon port. The cargo was damaged due to a fire caused by warehouse keeper B's fault.

The F/F argued that the warehouse keeper B was its servant or agent and thus it was liable for the damages. Accordingly, the F/F (plaintiff) requested the liability insurer (defendant) to pay insurance proceeds. The insurer argued that (i) the F/F was not liable for the damages because the warehouse keeper B was not the employee of the F/F (ii) the F/F was no longer liable for the damages after the cargo had been entered into the warehouse. The lower court decided that the warehouse keeper B was not a servant or agent of the F/F, and thus the claim from the F/F against the insurer failed.

The KSC decided as followings:

According to the KCC Art. 115, unless the F/F does verify that it or its servant or agent exercised due diligence in the receipt, delivery, keeping, and selecting of the carrier or other F/F for the cargo, it is liable for the cargo damages of loss or in delay. In order to meet the requirement of the servant or agent under Art. 391, of Korean Civil Code, the fact that the person should carry out one of the obligor's duties only by the obligor's intention is good enough. The person does not necessarily need to have the status to get the instruction or supervision of the obligor. Accordingly, it is not important for the person to maintain subordinate relations or independent status in relation to the obligor.

The main job of the F/F is to undertake forwarding service such as entering into cargo transport contract for the benefit of the cargo owner. But, the F/F usually carries out incidental works such as port clearance, checking of the cargo, warehousing, buying insurance, receipt and delivery of the cargo. The F/F as the plaintiff argued consistently, from the time of raising the lawsuit, that it undertook the request from the consignor to carry out the whole service of forwarding such as maritime transportation, ware housing, custom clearance, and domestic delivery from a Chinese port to Incheon port. The lower court accepted the above scope of the F/F's service. Furthermore, taking into consideration the contents of the F/F's freight and the fact that the house B/L was issued, the scope of the F/F may not be narrowed down to the selection of the carrier and entering into the contract for the carriage even though it said that it was a F/F. The F/F had a request from the consignor to carry out not only the selection of the carrier and entering contract for the carriage, but also warehousing the cargo at Incheon and doing custom clearance and domestic delivery. Therefore, we can say that it had duty to carry out such service as requested. B's warehousing activity was carrying out a

part of the F/F's duty under the F/F's intention and thus B was a servant or agent of the F/F. Nevertheless, the lower court rendered decision differently. It was wrong. In order to review the case once again, we decided that the case should be returned to the lower court.

A freight forwarder (F/F) carries out several functions in Korea. Even though its name is F/F, it issues a Bill of Lading and acts as a carrier. It also acts as a pure F/F. Only in cases where it acts as a carrier, it has benefit of invoking package limitation of liability; in cases where it acts as a pure F/F, it is not allowed to invoke the package limitation under the Korean law.

The F/F in the case was involved in the cargo damages. When the cargo was damaged due to fire and thus claim was raised against it, it tried to receive insurance proceeds from the liability insurer. Under the liability insurance, the insured should become liable before the insurer's obligation to pay insurance proceeds to the insured. Therefore, the F/F as the insured argued that it was liable for cargo damages as the obligor because the warehouse keeper B who was at fault in the fire was its servant or agent.

There were two issues in the case regarding liability of the F/F.[15] The first issue was whether the warehouse keeper B was in the status of the servant or agent of the F/F. It means whether the scope of the F/F reaches to the warehousing matters or not. It is usual manner in Korea that the contract for warehousing is entered between the carrier and the warehouse keeper and that the keeper is regarded as the servant or agent of the carrier. However, in the case, whether the keeper is the servant or agent of the F/F was at issue. The KSC decided that the keeper is considered the servant or agent of the F/F if the warehouse keeper receives the request for warehousing by the F/F.

The second issue was whether the duty of the F/F extended to the period that the cargo was in the warehouse. According to the KSC, the delivery of the cargo to the consignee brings about when the cargo leaves the warehouse in case of business warehouse.[16] Therefore, the delivery of the cargo was not made by the F/F as the obligor because the cargo was still under the custody in the business warehouse. Accordingly, the F/F is liable for the cargo damages unless it proves that the F/F duly exercised its duty.[17]

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[15] The cargo was actually transported by the car ferry company. According to the fact by the KSC, the F/F issued a House B/L. Therefore, there is possibility that the F/F acted as a contractual carrier. However, the court regarded the F/F as a forwarder.

[16] However, it occurs when the cargo is entered into the warehouse in case of consignee's operating warehouse.

[17] In my opinion, the F/F carried out two functions together in the case. The fact that the F/F issued the H~~h~~ouse B/L draws my attention. It obtains the carrier's position by issuing a B/L. I think that the F/F as the plaintiff acted as the pure F/F and the carrier as well. The conclusion that the plaintiff was liable for the damages and thus the liability insurer should pay the

The KSC further pointed out that the lower court should investigate whether the F/F actually accepted the liability against the third party. Because the case was involved in the liability insurance, fixing the liability of the insured is a precondition for the insured to apply for the insurance proceeds.

D. Whether the cargo claim damaged by fire is an exempted claim (the KSC case *2019.8.29. Docket No. 2015da220627)*

In the **KSC case *2019.8.29. Docket No. 2015da220627,* t**he cargo on board the vessel was damaged by a fire. The damage to be paid by the carrier was expected to exceed the limitation fund under the KCC. The carrier applied for limitation of its liability proceeding under the KCC Art 776. During the proceeding, the cargo interest of the damaged cargo by fire reported his claim to the administrator as one of claim to be limited. However, during assessing whether each claim is eligible or not, the carrier argued that the claim was caused by fire and thus it does not have any liability, as a result, the claim should be excluded from limitation claims. The creditor argued that the carrier was negligent, which contributed to the damages caused by the fire and thus the carrier is liable for the damages.

The limitation court decided the issues under Art. 59 of Korean Procedural Act for Ship owner's Limitation of Liability. It decided that there was no negligence of the carrier and thus the claim was exempted from carrier's liability. Accordingly, it was not included in the limitation claims; failing to get any compensation from the carrier, the cargo interest appealed to the KSC.

The KSC decided as followings:

> The fire started from the truck for transporting live fish on board the vessel and there was negligence of the captain of the vessel in respect of the process of fire breaking out and being extinguished. The lower court admitted that there was no negligence of the ship owner regarding education of the captain and maintaining fire extinguisher. The lower court also decided that the ship owner was not liable for the cargo damages caused by the fire in accordance with Art. 795(2) and affirmed that the assessment decision of the limitation court to the effect that the plaintiff's limitation claims does not exist in the limitation proceeding. The lower court decision was right and thus the appeal is dismissed.

The carrier has right to invoke the exemption of liability against the cargo damages caused by the fire. It is one of the two exempted liabilities of the carrier

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insurance proceeds will not be different whether the plaintiff acts as the carrier or the pure F/F.

under the KCC Art. 795(2), one of which is the exemption by the crew's error of navigation.[18] Even though the damages are incurred by the crew's negligence, the carrier is exempted from liability under the two conditions.[19] However, the carrier is liable if the fire is caused by the carrier's negligence. Therefore, when the cargo is damaged due to the fire, the cargo interest tries to verify that the fire was caused by the negligence of the carrier. The case comes from the ship owner's global limitation of liability. When the ship owner as the carrier receives claims exceeding or expected to exceed its limitation amount allowed in the KCC, it is eligible for commencing limitation of liability proceeding. During the proceeding, the claimant reports its claims to the administrator in order to get its share at the final distribution stage from the ship owner's limitation fund. In this case, the ship owner argued that the cargo claim did not fall within the claim to be distributed because it was one of the exempted claim. Dispute arises between the ship owner and the cargo interest on the claim's inclusion or exclusion from the limitation claims lists. The KSC decided that the claim was exempted because the damage was caused by the crew's negligence without any negligence of the carrier.

The bottom line of the lawsuit involved in the fire damages claims is the cargo claimant proving the presence of the carrier's negligence to win the lawsuit. In addition, if the claimant proves the unseaworthiness of the vessel at the time of sailing and that it contributed to the fire damages, the carrier's exemption of liability is not permitted. It is well settled rule of maritime law in Korea.

III. Bill of Lading

A. The validity of a switch B/L(The KSC 2020.6.11. Docket No. 2018da249018)

In the KSC case *2020.6.11. Docket No. 2018da249018,* while an intermediary trade was involved in, two types of B/Ls were issued. The first one was issued by the ocean carrier to the export. The second one was issued by the third party upon the request of the intermediary importer. The C is an intermediary trader. The C entered into the import contract for 21 coils with the exporter in China. The C sold them to the K in Thailand. The exporter in China entered into the carriage of goods by sea contract with the H. The H which took cargo from the exporter issued the 1st B/L. In the front page of the B/L, it was written 'Consigner: exporter, Consignee: to the order of Woori Bank in Korea'.

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[18] Please refer to In Hyeon Kim, *Transport Law in South Korea*, Wolters Kluwer(2017), 111.

[19] It is departure from the well-settled liability rules that the carrier is liable for the negligence of its crew as a servant or agent.

In the meantime, the C in Korea requested the defendant to issue another B/L(switched B/L) in order to obtain payment from the buyer in Thailand. In the front page of the second issued B/L, it said 'the consignor: the exporter in China, consignee: to the order of Thai bank in Thailand, notify party: K'. The plaintiff was the cargo insurance company into which the C entered for covering damages during transporting the cargo. The importer K in Thailand found that the cargo became rusty. Only three among 12 coils were accepted by the consignee. The K as importer, claimed against the C and the C admitted the damages and the P&I club paid the damages. The P&I club made a recourse claim against the defendant as the issuance of the second B/L.

The 1st instance court decided that the defendant was not the party to the consignor and thus the claim was rejected. However, the second instance court admitted the liability of the defendant, saying that the defendant became the carrier of the cargo by issuing the switched B/L substituting the original B/L and thus liable for cargo damages, further saying that the carrier is conclusively liable for cargo loss or damages according to Art. 852 against the K, bona fide holder of the B/L.

The KSC decided as followings:

During an intermediary trade, two types of B/Ls were issued. The first one was issued by the ocean carrier to the export. The second B/L was issued by the defendant upon the request of the intermediary trader C, which was a switched B/L for the purpose of changing the contents in the first B/L under the context of intermediary trading. However, the defendant did not enter into the carriage of goods contract with the C as the consignor. In addition, the defendant did not get any request to issue the switched B/L from the issuer of the original(first) B/L. Therefore, the second issued B/L cannot be regarded as a valid B/L considering that it was issued by the person who is not a carrier. The fact that the C or the defendant gets the original B/L at hand without receiving the cargo physically, does not mean that they obtained the delivery of the cargo. The defendant who does not have the status of the carrier cannot be regarded as undertaking the carriage of goods simply by issuing the second B/L.

In conclusion, the defendant is not the carrier with the contract for carriage of goods and accordingly, is not liable for cargo damages incurred in the course of the carriage. Now that the second B/L is not regarded as a valid negotiable B/L and thus it does not have effect as a negotiable instrument, the issuer of the second B/L is not liable for the cargo damages against the *bona fide* third party holder of the B/L. Nevertheless, the lower court imposed the liability upon the defendant as the carrier against the K, as the *bona fide* holder of the second B/L

> because the defendant became the carrier by issuing the second B/L as the switched B/L substituting the original B/L, and also, the carrier as the issuer of the second B/L is liable against the *bona fide* holder of the second B/L. The lower court was wrong in respect of the concept of the carrier who is entitled to issuing a B/L and how to obtain the B/L. The argument of the defendant for appeal has legal ground. The case is returned to the lower court.

The switched B/L is issued when the content in the original B/L is changed. Because the B/L issued in advance exists, two different B/Ls co-exist together if the original B/L is not collected completely. The change of the destination or consignee can be easily done. In the case, the original B/L was issued by the carrier H. The C, consignee as the intermediary who received it, needed another B/L for negotiation purpose to the bank in connection to the second sale with the K in Thailand. The C requested the defendant to issue the second B/L.

The C possesses the original B/L and the K as the importer in Thailand possesses the switched B/L. The insurance company who paid the insurance proceeds to the K, brought about a recourse claim to the defendant as the issuer, alleging that the defendant became a carrier by issuing the B/L and thus liable for the damages. The KSC rendered that (i) the C as the consignor did not enter into a carriage contract with the defendant, and as a result the defendant is not be liable for cargo damages as the carrier; (ii) Art. 854(2) which says that the carrier is liable as stated in the B/L against the *bona fide* third party holder of the B/L requires that the carrier actually possess the cargo on board. If not, the carrier is not liable against the third party holder of the B/L based on Art. 854(2).

The KSC decided that because the defendant issued the second B/L without having contract for the carriage, the B/L was not regarded as a valid B/L and thus he was not liable. It is a long established theory of the KSC that the B/L issued without the carrier's possessing the cargo on board is null and void.

What is the next step for the intermediary which obtained the first B/L to proceed the intermediary trade? He may not need to receive the cargo actually and deposit it in the warehouse and then load the cargo on the other vessel at the intermediary port. He may utilize the current vessel on board, on which the same cargo had been. He may request the original carrier to issue the switched B/L to achieve his own purpose. He needs to issue a B/L, stating him as the consignor, and the H as the carrier. If this kind of the switched B/L is issued, the H as the carrier is still liable for cargo damages. However, in the case, the C requested the defendant to issue the second B/L, stating the C as the consignor, to order of Thai Bank as the consignee and the defendant as the carrier. Here, the defendant did not possess cargo. The KSC said that there was no real contract for the carriage between the defendant and the C as the consignor, and that the B/L issued without carrier's possessing the cargo is null and void.

However, the freight forwarder is regarded as the carrier only if it issues a B/L. When the freight forwarder issues a House B/L, it does not possess the cargo physically. In the case, the C had the right to take the cargo from the carrier by obtaining the B/L. The defendant may be regarded as having cargo by obtaining such right from the C, which may fulfill the requirement of "possessing cargo physically".

According to the fact, the K raised claims based on the second B/L, which it obtained from the bank in exchange with the money. The K may try to obtain the cargo by presenting the second B/L to the defendant as the carrier. The defendant may prepare for delivery of the cargo, in advance, by collecting cargo from the C as the consignor and holder of the original B/L. The C may try to collect the cargo from the H, the original carrier, for selling it to other person which is against the agreement between the defendant and him. If that is the case, the K may suffer damages.

To prevent it, the carrier which will issue the second B/L in the intermediary trade should collect the original B/L in hand from the consignor. The second B/L was issued and circulated. The K who relied on it paid the sales proceeds and obtained it. However, he suffered damages. According to the KSC's decision, the consignee left behind without compensation. The C requested the defendant to issue a B/L without legal ground, which resulted in the K suffering damages. Therefore, the C may be liable for the damages in tort for the loss of the K. The K may bring about claims against the defendant for the cause of action in tort.

B. Legal nature of surrendered B/L (the KSC case 2019.4.11. Docket No. 2016 다 276719)

In the KSC case *2019.4.11. Docket No. 2016da276719,* the importer A entered into a sales contract with the exporter B. A requested the issuance of the L/C to the plaintiff bank for the benefit of the exporter B. B entered into the carriage contract with C and then C issued a House B/L. C requested to the defendant (a freight forwarder, F/F) to carry out the delivery of the goods. The exporter B, subsequently, requested to the carrier C to issue the House B/L in the surrendered type and C agreed to do so. The surrendered house B/L was issued by the C. The goods arrived at the discharging port. The defendant issued the delivery order (D/O) to A as the consignee. A, who took over the goods from the warehouse keeper, did not pay to the Bank. The Bank which paid the price of the goods to the exporter B and possessed the B/L, raised claims to the defendant F/F. The Bank argued that because the defendant F/F issued the D/O without exchanging B/L with the cargo, the consignee A could take out the goods illegally. On the other hand, the defendant argued that the D/O was issued legitimately because the B/L was surrendered, as a result of which the

presentation rule was not applicable to the case. Whether the D/O can be issued without exchanging original B/L became the issue in the case.

The KSC decided as followings:

The cargo should be delivered to the holder of the B/L with exchange of the B/L. Therefore, if the B/L is handed over to the person who is not the holder of the B/L by the shipping agent, the right of the holder of the B/L over the cargo is considered to be infringed by committed tort.

However, when the surrendered B/L is issued under the trading practice, the shipping agent can hand over the cargo without exchanging the B/L with the cargo according to the instruction of the carrier to the consignee under the contract for the carriage by issuing the D/O.

The surrendered Bill of Lading has been circulated for a long time in Korea. Because it is not regulated by the Korean Commercial Code, its legal nature has been disputed in several aspects. One of such issues is whether the limitation agreement written on the back side of the original B/L can be applicable to the case even though the B/L is issued in the way of surrendered type.

The surrendered B/L is issued in two ways. First, the original B/L is issued and then it is returned to the carrier. Subsequently, the carrier issues the B/L in the form of surrendered type. Second, the original B/L is not issued at all but only the front page of the B/L is issued with the stamped letter of "surrendered".[20]

In the first case, the KSC decided that it is a matter of interpretation of the party's intention and that the party's intention to apply the agreement on the back of the B/L existed because it had been issued in advance (the KSC case 2016.9.28. Docket No. 2016da213237). In the second case, the KSC rendered that it cannot be applied to the case because the original B/L had not been issued at all and thus there was no intention of the parties to apply the agreement to the case (the KSC 2006.10.26. Docket No. 2004da27082).[21]

In this decision the KSC clarified that there was no need of the carrier to exchange the cargo with the B/L in case that the B/L is issued in the type of the surrendered B/L. The purpose of issuing the B/L in a surrendered type is to delete the presentation rule in the B/L and thus there is no need for the consignee to exchange the cargo with the original B/L. Such concept has been accepted in the maritime communities for a long time. The KSC accepted this practice for the first time and rendered that the presentation rule does not apply

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[20] Please refer to In Hyeon Kim*, op. cit*., 100.

[21] In the case the argument of the carrier that lower limitation amount in the rear side of the original B/L should be applied was denied.

to the surrendered B/L case. Therefore, the consignee does not have the duty to receive the B/L in exchange for the cargo. The carrier also does not have the obligation to hand over the cargo in exchange for the B/L. The carrier is required to hand over the cargo only to the person who is proved as the consignee.

In the first case of the surrendered B/L, because the original B/Ls have been issued and circulated, issuing a surrendered B/L subsequently is very dangerous if the original B/Ls are not fully retrieved. There is risk that the holder of the B/L appears to obtain the cargo at the later stage.

It is recommended that the carrier use the sea waybill rather than the surrendered B/L.

IV. Governing law

A. Governing law in the case of tort involved in the carriage of goods by sea (the KSC case 2019.4.23. Docket No. 2015da60689)

In the KSC case *2019.4.23. Docket No. 2015da60689,* Korean Air Line (Korean Air) tried to import a cargo from a Holland company. Korean Air as an importer entered into a carriage of goods by sea with Hanjin Co. Limited(Hanjin). Hanjin entered into contract for the carriage with the Chinese defendant as the actual carrier. Because the serial number of a container box's seal was broken as a result of the cargo being discarded by the Korean custom office, Korean Air suffered from the loss of cargo. Hanjin entered into liability insurance contract with the plaintiff as the insurer. The plaintiff paid damages to Korean Air.

The plaintiff who obtained Korean Air's right to claim against the defendant based on tort raised a recourse claim to the defendant. Hanjin as the contractual carrier issued a Bill of Lading with Korean Air as the shipper while the defendant issues a Sea Waybill with Hanjin as the shipper. The plaintiff also subrogated the right of Hanjin against the defendant. Their legal relation was governed by the sea waybill issued by the defendant. However, the defendant did not submit the original sea waybill, but the standard form of the sea waybill instead.

The defendant argued that the case should be governed by the Chinese law and be subject to Shanghai Maritime court according to the sea waybill and that the case should be rejected because it was raised in a Korean court against exclusive jurisdiction agreement and also the lawsuit was time-barred.

The lower court admitted the presence of the agreement in the sea waybill. It decided that the jurisdiction agreement was a kind of additional agreement attached to statutory jurisdiction and thus the Korean court had jurisdiction as

the place in which the tort was committed or obligation was discharged. However, it decided that the limitation period for filing for a lawsuit under the Chinese law was time-barred. The plaintiff appealed to the Korean Supreme Court.

The KSC decided as follows:

The defendant is the person who entered into contract for the carriage with Hanjin. It alleges that the original sea waybill to verify the presence of this contract for the carriage was issued and that the Chinese governing law was incorporated in the back side of the waybill, which became a part of the contract for the carriage. Therefore, the defendant should prove the above fact. However, the reasons which the lower court provided in its decision fall short of proving the above allegation of the defendant that the original sea waybill was issued and the content in the back side was duly incorporated in the contract. The lower court decided that the Chinese law was the governing law on the premise that the original sea waybill would be the same as the standard form of the sea waybill provided by the Chinese governing law clause which was actually submitted to the court.

According to Art. 32(1) of the international private law, the law in the place where tort was committed governs the tort claim. The place in which legal interest resides is included as a part of the place where the tort was committed. The place where the broken seal number was found is Korea and the place where Hanjin resides. The governing law in the case of the plaintiff exercising the recourse claims on behalf of Korean Air against the defendant becomes the Korean law. The lower court's decision is repealed and the case is returned to the lower court.

The cargo interest suffered from damages caused by the removal of seal number. The contractual carrier admitted the liability for the cargo interest. The cargo interest raised claim against the liability insurer for the contractual carrier. The insurer brought about a lawsuit against the actual carrier in the Korean court by exercising subrogation right which it obtained from the contractual carrier as the insured. The defendant who is the actual carrier argued that the Korean court did not have jurisdiction and the Chinese law governed the case according to the agreement in the sea waybill. However, the original sea waybill was not submitted to the court as an evidence. Only the standard type of sea waybills was submitted to the court. The lower court admitted the presence of such agreement in the sea way bill in the case. However, the KSC decided that the presence of the back side of the sea waybill was not enough to be admitted only by the evidence submitted in the lower court.

The KSC accepted that the lower court did not decide on the tort claim between Korean Air and the defendant which was subrogated to the plaintiff. And it decided on the governing law for the tort claim. It applied Art. 32(1) of the Korean international private law to the case. Art.32(1) says that the law in the place where the tort was committed becomes the governing law. The court says that the place where the result of committing tort exists is also included in such place. The final place where the broken serial number of the seal was found is Korea. Korean Air which has legal benefit resides in Korea. Therefore, the governing law for the plaintiff to make a recourse claim against the defendant in the shoes of Korean Air should be the Korean law.

According to the KSC *1985.5.28. Docket No. 84daka966,* when the damages were consistently occurring from the moment that the tort was committed at sea until a vessel finally arrives within the Korean territorial area, Korea can be considered as a place where the result of tort was brought about.

Because the lower court's decision was different from that of the KSC, the KSC ordered that the case should be reviewed once again in accordance with its decision.

V. Marine Insurance and Others

A. Who is entitled to the insured under bareboat charter party(KSC 2019.12.27. Decision Docket No. 2017da208232)

In the KSC *2019.12.27. Decision Docket No. 2017da208232,* a Korean shipping company (Plaintiff)(charterer) borrowed vessel X from a Panamanian shipping company with a bareboat charter party contract for 50 months. According to the contract, the plaintiff was entitled to obtain the vessel at the end of the charter period by paying the remaining 38,000,000Yen as the remaining price of the vessel. The daily charterage was 130,000Yen. If the vessel becomes a total loss, the money which was paid in advance to the owner by the charterer should be returned to the charterer.

S company acted as a managing company for vessel X. S entered into the hull insurance contract with H insurance company with the English law as the governing law. Both the owner and S as the manger were listed as the insured in the insurance policy. The plaintiff paid the insurance premium.

Vessel X sank in July, 2013. Both the plaintiff on behalf of S and the defendant requested the insurance proceeds to the insurer H. They argued that they are eligible for insurance proceeds. However, H deposited the insurance proceeds to the Pusan district court, saying that it could not make certain who the right person is to obtain the insurance proceeds.

The plaintiff said that the contract was a kind of bareboat charter with hire purchase(BBCHP) contract.[22] He argued that he was the insured because it had an expectation right on 92% of 235,730,000 Yen(charterage plus delivery money for the vessel) and S listed as the insured was his agent. He brought about a lawsuit, requesting that he had the right to obtain the insurance proceeds.

In the first instance, the court ruled that the contract was very similar to the BBCHP,[23] but different from it in that the charterer should pay 20 % of the whole charterage at the end of the contract in order to obtain vessel X's title. The court rendered that under the BBCHP the charterer does not have any remainder to pay at the end of the charter period because it pays the whole price of the vessel by way of installment every month. Therefore, it decided that the current charter contract was different from that of the BBCHP and similar to a pure lease contract. In conclusion, the court decided that the plaintiff did not have an expectation right for the vessel which the charterer might have under the BBCHP.

Furthermore, the court rendered that in the insurance policy S, the plaintiff was not the insured and thus the owner has the right to obtain the insurance proceeds. The plaintiff appealed to the KSC.

The KSC rendered as follows;

There was no evidence of S having expressed that he was the agent of somebody or that H, as the insurer, knew such fact and that S wsa granted the delegation right for insurance contract from the plaintiff and S had the intention to enter into the contract on behalf of the plaintiff. Therefore, there is no way that the plaintiff is regarded as the insured because he is not listed as the insured on the insurance policy under the undisclosed principal theory in English law. The above decision of the lower court was right and affirmed.

The lower court decided that the legal nature of the current charter contract was a simple lease contract rather than the BBCHP even though it has certain characteristics of a BBCHP because the plaintiff as the charterer had an option to obtain the title of vessel X at the end of the charter period. It concluded that the legal right to obtain the insurance proceeds was the owner(defendant).

The lower court also admitted that 19,370,000Yen which had been paid other than the hire by the plaintiff was a part of the unjust enrichment to be returned to the plaintiff. It regarded the total hire

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[22] On the legal nature of the BBCHP contract, there are several theories such as a kind of finance lease. But it is clear that it is regarded as a kind of lease contract under the KCC Art. 848(2).

[23] Under the BBCHP contract, when the charter period ends, the Korean charterers are not required to return the vessel to the ship owner. Rather, it obtains the title of the vessel.

money, which was paid for 50 months, as a pure remuneration of the use of the vessel and thus not an unjust enrichment. The judgment of the lower court was right.

The issue at the case was who the right person is to obtain the insurance proceeds under the bareboat charter party contract. The insurance contract was based on the ITC(Hull) with English law as the governing law. Therefore, who the eligible party is to obtain insurance proceeds should be decided based on the English law.

In general, the listed party on the insurance policy is regarded as the insured. The subjective mind of the insured who is listed will affect the decision. The insurance policy shows the two parties such as the defendant and S as the insured. However, the plaintiff argues that it was the insured as the BBCHP charterer. The only way for the plaintiff to be regarded as the insured is through the undisclosed agency theory. If S was the agent of the plaintiff but did not disclose the fact that it was the agent of the plaintiff, the plaintiff might be regarded as the insured and S as its agent under the English law. The KSC decided that there was no intention of the plaintiff to designate S as its agent. Therefore, the argument of the plaintiff to be admitted as the insured was not accepted.

The lower court decided that the current charter party was not a pure BBCHP but similar to the pure lease contract. It pointed out that the BBCHP contract at issue was different from the BBCHP in that it is required to pay the delivery money(balloon payment) at the end of the charter period. Under the BBCHP there is no need for the charterer to pay the remaining money because there is no remainder of the vessel's price at the end of the charter period.

Based on the lower court's decision, the KSC decided that the charter hire was a remuneration in return of the use of the vessel, not the price of the vessel paid by the charterer and thus there was no unjust enrichment in the charter hire for 50 months.

It seems that the BBCHP charterer has insurable interest against the title of the vessel according to the KSC's judgment because it obtains the expectation right of the vessel gradually by paying the vessel's price as the monthly installment. The BBCHP charterer is required to be listed as the insured.

B. Whether future removal of expenses from a wreck left behind for a long period can be claimed against the opposing vessel's owner (The KSC 2020.7.9. Docket No.2017da56455)

In the KSC *2020.7.9. Docket No.2017da56455* the vessel of the plaintiff sank due to a collision on April 21, 2010, 70% of the fault for the collision damages was imposed upon the defendant. The chief of Yeosu marine police ordered the plaintiff to remove the wreck on August 24, 2010. The Yeosu

mayor also rendered the same order on Aril. 3, 2014. Nevertheless, the execution was not done. The government also has not taken any action such as the substitute for removal work. Several institutes submitted opinion that the removal was not needed and also it was impossible because the wreck stayed 90 meters under the sea surface and there was no danger of oil pollution. The plaintiff did not have special schedule to remove the wreck. The plaintiff made calculation for future removal expenses of the wreck, 70 % among which were claimed against the defendant.

The first instance court decided that the above administrative order by the government was null and void and thus the wreck removal duty of the plaintiff no longer existed. Therefore, the future removal expenses would not be brought about and the plaintiff could not make claim of the expenses to the defendant. However, the second instance court overturned the decision of the first instance court. It regarded the administrative order as a valid one and decided that the defendant should pay the expenses to the plaintiff. The defendant made an appeal to the KSC.

The KSC rendered as follows:

The damages from a tort which the defendant should pay for the plaintiff is limited to the damages which is actualized and finalized. Therefore, when the victim has the obligation to pay expenses against the third party and in order for the victim to raise such claims against the tortfeasor, the obligation to pay expenses has the nature of being actually paid because it is actualized and finalized. Whether the expenses are actualized and damages were incurred should be decided objectively and reasonably based on socially accepted idea (KSC 1992.11.27. Docket No. 92da29948)

(omitted) But, in the case where the execution of the order has not been carried out because of obstructive circumstances which impede a successful execution after the administrative order was rendered and the agency also has not enforced such execution against the plaintiff, the court should be more cautious in admitting that the expenses became actualized taking into consideration of such circumstances. In this case, in order for the court to regard the expenses incurred as being actualized and finalized while executing the administrative order, not only the existence of the effective administrative order, but also the possibility to execute the order and the necessity of the execution should be admitted, taking into consideration of all documents regarding the time of rendering such administrative order and those submitted until the closing time of fact find hearing.

The salvage and wreck removal order was rendered at the time of the collision accident because the danger to safe navigation of the

> vessel and worries of environmental pollution existed. Because the vessel sank in sand bed 90 meters under the sea, the execution of the order to remove the wreck was hard to have been carried out and the agency also had not imposed any punishment for a long time against the plaintiff for non-performance. It seems that a successful enforcing of the order was not expected because the work was technically impossible and enormous expenses were required. Also, there was a possibility of the order being cancelled because the danger at that time of rendering the order no longer existed. However, the lower court did not take into consideration of such circumstances. It decided that the removal obligation was still imposed upon the plaintiff and thus the removal expenses were actually incurred, based on the fact that the wreck removal order was still effective and the simple remarks in the reports that the removal operation is very hard and the possibility of oil pollution was very low did not make the order null and void per se. But the lower court decision was wrong in that it did not consider the above theory. The defendant's argument for the appeal is accepted.

When the vessel became a wreck with danger to navigation and environment, administrative office renders wreck removal order against the owner of the wreck in accordance with several domestic laws such as Ship Sailing and Leaving Act, and Ship Safety Act. The owner should remove the wreck. If the owner does not carry out the wreck removal, the government agency removes it instead of the owner, and claims the expenses incurred due to the removal work against the owner. The owner of the vessel enters into the P&I insurance to cover the expenses.

The wreck existed 90 meters under the sea level, which makes the necessity of the wreck removal very low. Vessels at sea usually sail with a depth of 15 meters. Therefore, the wreck which stays at the depth of 90 meters does not impede the safe navigation of vessels. In addition, it seems that the cargo on board of the wreck did not have any danger of oil pollution. The lower court decided that the administrative order had been rendered and it was not null and void per se, that the agency did not cancel the order, and thus the plaintiff should follow the order. The lower court further regarded the future removal expenses as being actualized and finalized. However, the KSC opined differently from the lower court. It said that even though the administrative order is effective because it is not null and void per se, the court should be very cautious when it decides whether the expenses became actualized and finalized. It said that in order for the court to accept the expenses, three requirements are needed such as: (i) the existence of an effective administrative order (ii) the possibility to execute the order and (iii) the necessity of the execution. The KSC decided that the lower court did not consider them and the case was returned to the lower court. Even though the wreck removal order was rendered, not only the

administrative agency but also the owner of the wreck did not follow the wreck removal order. Nevertheless, the owner of the wreck brought about the claim against the owner of the opposing vessel upon which 70% of liability was imposed.

The wreck sank 90 meters under the sea level and there was no danger for oil pollution because the cargo of asphalt, a kind of solid material, was on board. It seems that even though the administrative order was valid, there is no possibility for the owner to execute the order and no necessity for the execution of the order.

The KSC presented three requirements for the owner of the wreck to successfully bring about future wreck removal claims against the opposing vessels owner.

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