VOLUME 20 **FALL 2017**

THE ASIAN BUSINESS LAWYER

□RECENT DEVELOPMENT OF MARITIME LAW□
- Based On The 9th East-Asia Maritime Law Forum

□ARTICLES□

□CASES□

Published on November 30, 2017

₩ 10,000

Korea University

SCHOOL OF LAW

Jaeho YEOM, Ph.D ……..…… *President of the University*
Soonkoo Myoung, Ph.D ……...……...……... *Dean of the Faculty of Law*

THE FACULTYOF LAW

Constitutional Law
Jina CHA, LL.B., LL.M., Dr. jur., Associate Professor of law
Youngsoo CHANG, LL.B., LL.M., PH.D., Professor of Law
Seontaek KIM, LL.B., LL.M., PH.D., Professor of Law
Hayurl KIM, LL.B., LL.M., PH.D., Professor of Law
Zoonil YI, LL.B., LL.M., PH.D., Professor of Law
Yeongmi YUN, LL.B., LL.M., PH.D., Professor of Law

Administration Law, Environment Law, Tax Law
Myeongho HA, LL.B., LL.M., *Professor of Law*
Yeontae KIM, LL.B., LL.M., PH.D., *Professor of Law*
Heejung LEE, LL.B., LL.M., PH.D., *Associate Professor of Law*
Jongsu PARK, LL.B., LL.M., PH.D., *Professor of Law*
Hoyoung SHIN, M.A., LL.B., LL.M., *Associate Professor of Law*

International Law, International Commerce Law
International Human Rights Law, American Law, Chinese Law
Pyoungkeun KANG, LL.B., LL.M., PH.D., *Professor of Law*
Jaehyoung LEE, LL.B., LL.M., S.J.D., *Professor of Law*
Kigab PARK, LL.B., LL.M., PH.D., *Professor of Law*
Nohyoung PARK, LL.B., LL.M., PH.D., *Professor of Law*
Asif Hasan QURESHI, LL.B., LL.M., PH.D., *Professor of Law*
Lin ZHANG, LL.B., LL.M., PH.D., *Assistant Professor of Law*

Criminal Law, Criminal Procedures, Criminal Policy
Legal Philosophy, Legal Sociology
Jongdae BAE, LL.B., LL.M., Dr. jur., *Professor of Law*
Taehoon HA, LL.B., LL.M., Dr. jur., *Professor of Law*
Youngki HONG, LL.B., LL.M., Dr. jur., *Associate Professor of Law*
Seunghwan JUNG, LL.B., LL.M., Dr. jur., *Professor of Law*
Soojin KANG, LL.B., LL.M., *Associate Professor of Law*
Joowon RHEE, LL.B., *Professor of Law*
Sangdon YI, LL.B., LL.M., Dr. jur., *Professor of Law*
Zaiwang YOON, PH.D., *Assistant Professor of Law*

Civil Law, Family Law, Legal Methodology
Bupyoung AHN, LL.B., LL.M., Dr. jur., *Professor of Law*
Kyunghyo HA, LL.B., LL.M., Dr. jur., *Professor of Law*
Wonlim JEE, LL.B., LL.M., PH.D., *Professor of Law*
Jewan KIM, LL.B., LL.M., PH.D., *Professor of Law*
Kyuwan KIM, LL.B., LL.M., Dr. jur., *Professor of Law*
Keechang KIM, LL.B., LL.M., PH.D., *Professor of Law*
Myeongsook KIM, LL.B., LL.M., *Associate Professor of Law*
Sangjoong KIM, LL.B., LL.M., Dr. jur., *Associate Professor of Law*
Soonkoo MYOUNG, LL.B., LL.M., PH.D., *Professor of Law*
Youngho SHIN, LL.B., LL.M., PH.D., *Professor of Law*

Commercial Law, Corporate Law
Corporate Finance Law, Securities Law
Younghong CHOI, LL.B., LL.M., PH.D., *Professor of Law*
Inhyeon KIM, B.S., LL.B., LL.M., PH.D., *Professor of Law*
Jeongho KIM, LL.B., LL.M., Dr. jur., *Professor of Law*
Taejin KIM, LL.B., LL.M., *Associate Professor of Law*
Semin PARK, LL.B., LL.M., PH.D., *Professor of Law*
Hyeontak SHIN, LL.B., LL.M., J.S.D.., *Associate Professor of Law*

Antitrust Law, Intellectual Property Law
International Business Transaction Law
Hyojil AHN, LL.B., LL.M., Dr. jur., *Professor of Law*
Youngsun CHO, LL.B., *Professor of Law*
Yongjae KIM, LL.B., LL.M., S.J.D.., *Professor of Law*
Daehee LEE, LL.B., M.L.I., LL.M., S.J.D., *Professor of Law*
Hwang LEE, LL.B., LL.M., J.D., *Professor of Law*
Kyungsin PARK, B.S., J.D., *Professor of Law*
Jinhee RYU, LL.B., LL.M., Dr. jur., *Professor of Law*
Changsop SHIN, LL.B., LL.M., J.D., *Professor of Law*

Civil Procedure, Civil Execution Law
Bankruptcy Law,Labor Law, Social Security Law
Younghwan CHUNG, LL.B., LL.M., *Professor of Law*
Kyengwook KIM, LL.B., LL.M., Dr. jur., *Professor of Law*
Jisoon PARK, LL.B., LL.M., Dr. jur., *Associate Professor of Law*
Jonghee PARK, LL.B., LL.M., Dr. jur., *Professor of Law*
Byunghyun YOO, LL.B., LL.M., PH.D., *Professor of Law*
Namgeun YOON, LL.B., LL.M., PH.D., *Professor of Law*

PROFESSORS EMERITI

Heeyol KAY
Byungsak GOO
Jinwoong KIM
Hyungbae KIM
Heungwoo NAM
Jaesup PARK
Zaiwoo SHIM
ByungHwa LYOU
Jinoh YOO
Sechang YOON
Heebong LEE
Dongyoon JUNG
Nakhoon CHA
Talkon CHOI
Ilsu, KIM
Kisu LEE
Chanhyung CHUNG
Leesik CHAI

DISTINGUISED PROFESSOR

Yonghoon LEE (Former Chief Justice of the Supreme Court)

ASSISTANT PROFESSOR

Judith J. MAERTENS (Korea University)

THE ASIAN BUSINESS LAWYER

The Asian Business Lawyer is a law journal that is issued in English by the Legal Research Institute of Korea University. Our mission is to provide a forum for discussing about business-related legal issues in Asia.

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

Any request about subscription or single volume purchase or any other correspondence should be addressed to **abl_articles@korea.ac.kr.**

Annual subscription will be US$ 15 or 15,000 Korean Won, payable in advance. Single issue is available at US$ 10 or 10,000 Korean Won. Past issues will be available at US$ 7 or 7,000 Korean Won per copy. There will be an additional charge for airmail delivery outside Korea.

CALL FOR PAPERS

The Asian Business Lawyer welcomes unsolicited submission of articles as well as notes and comments.

Manuscripts should be formatted as Microsoft Word documents, and citations should be included as footnotes in accordance with *the Bluebook*. The editorial staff does not conduct systematic fact checks and relies on authors to ensure the accuracy of their statements.

Pieces are accepted during two submissions windows: fall issue and spring issue submissions.

The Asian Business Lawyer retains all copyrights to published articles and assumes no responsibility for manuscripts submitted.

The basic objective of this journal is to publish articles and research notes that provide insights into the legal impacts of business law in global society.

SUBMISSION OF A MANUSCRIPT TO THE ASIAN BUSINESS LAWYER

Anybody submitting a manuscript for the Asian Business Lawyer should submit to the publication editor of the Asian Business Lawyer a manuscript before March 31 for the spring issue, and the September 30 for the fall issue.

Any questions or submissions of manuscripts should be directed to the Publishing Editor of the Asian Business Lawyer at the Legal Research Institute of Korea University in person in 145, Anam-Ro, Seongbuk-Gu, Seoul, 136-713, South Korea, by phone at 82-2-3290-1630, or by e-mail at **abl_articles@korea.ac.kr**.

Please email submissions to **abl_articles@korea.ac.kr**.

Legal Research Institute
Korea University
145, Anam-Ro, Seongbuk-Gu
Seoul, 136-701, South Korea

PAGE FORMAT AND LAYOUT

The manuscript should be prepared with **Microsoft Word**, accompanied by **an abstract**, and a **minimum of five key words** on the front page. You should also include **a bibliography** on the last page.

1. Cover page

The cover page is presented as the first page of the manuscript, containing the following information: (1) the title of the paper; (2) the name(s) and institutional affiliation(s) of positions held by the author(s); (3) an abstract of no more than 200 words; (4) a minimum of five key words. A footnote on the same page should indicate the full name, address, e-mail address, telephone, and fax numbers of the corresponding author.

2. Font

A single font must be used throughout the paper with the only exceptions being in tables, graphs, and appendices. Standard font size for text is 12 points (no font smaller than 10 points will be accepted). Please note that Times New Roman is strongly preferred.

3. Body Text Formatting

The body text of the paper contains headings, sub-headings, pictures, diagrams, tables, figures, formulae and other relevant information.

4. Heading

For headings, a number and a dot should be inserted for each heading in increasing order to the end of the paper e.g., I. INTRODUCTION. Headings are to be in upper cases, and bold font.

Sub-headings may be used to provide clarity of ideas. The sub-heading should be in sentence case, with the initial letter of each word capitalized with the exceptions of conjunctions of four or fewer letters, and prepositions of four or fewer letters. The numbering of the sub-headings should follow the sequence shown below:

I. Heading Title
  A. Subheading Title
    1. Sub-Subheading Title
      (i) Sub-Sub-Subheading Title
        (a) Sub-Sub-Sub-Subheading Title
          (1) Sub-Sub-Sub-Subheading Title

CITATION AND OTHER STYLE NOTES

The Asian Business Lawyer follows the citation rules delineated in *the Bluebook* except where otherwise noted. Korean legal materials are cited according to the following illustrations:

1. Constitution

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

2. Statutes and Regulations

(1) Statues (법률) Names of statutes should be cited according to the official names indicated by the Ministry of Government Legislation.

Korean Commercial Act, No. 9746, Article 1 (May 28, 2009).

*The fact of repeal may be noted in parenthesis for statutes no longer in force.
Securities and Exchange Act No. 8985, Art.1 (Mar. 21, 2008) (repealed 2009).

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

(3) Rules (시행규칙)
Enforcement Rules of the Certified Public Accountant Act, Ordinance of the Prime Minister No. 875, Art. 1 (Mar. 3, 2008).

3. Legislative Material.

The dates of the hearings and sessions held must be fully noted in parenthesis, and the page number of the particular material being cited should be noted as well.

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

4. Case Numbers

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

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

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

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

5. Short Citation Forms and Page Numbers

(1) Short Citation Forms. When using short form citations, the general rules provided in *the Bluebook* apply. "*Id.*" may be used when citing the immediately preceding authority, and "*supra* note" may be used when an authority is fully cited previously.

(2) Page Numbers. When indicating page numbers of the cited material, *"at"* is used when the page number may be confused with another part of the citation.

6. Books, Articles, and Online Sources.

These citations follow the rules provided by *the Bluebook* as shown in the following examples:

(1) Books. The author's full name is placed in the very beginning of the citation. Multiple authors are separated by an ampersand in the order listed in the publication. The title of the book comes after the author(s)' name(s), and then followed by the page numbers of the work cited.

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

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

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

(3) Online Sources. Materials found online should be clearly cited with the full URL of the source. When the source is in the form of a traditional source, and the online source provides increased accessibility to the source, it may be cited in the form of a parallel citation using "*available at"*. For materials found exclusively on the Internet, such sources should be cited using "*at"*.

7. Dates and Abbreviations.

(1) Dates
Dates are transcribed in the form, 'November 30, 2009'. Abbreviations of the name of months may be used according to the rules provided by *the Bluebook*.

(2) Abbreviations
Abbreviations of terms may be standard legal terms of Korean legislation.

VOLUME 20 **FALL 2017**

THE ASIAN BUSINESS LAWYER

Table of Contents

□RECENT DEVELOPMENT OF MARITIME LAW□

□ARTICLES□

□CASES□

RECENT DEVELOPMENT OF MARITIME LAW

The Basis of Carrier's Liability: from Roman Law to the Rotterdam Rules

The history of what the law has been is necessary to the knowledge of what the law is.

- Oliver Wendell Holmes, Jr. 1881

Caslav Pejovic[*]

ABSTRACT

This paper addresses an issue that has been neglected in the theory of maritime law: the historic origin of the system of carrier's liability in carriage by sea. The paper tries to reveals the historic background of the liability regime of the carrier by following development of this regime from Roman law through the Middle Ages, until the modern times. The paper also tries to uncover how the concept of seaworthiness was introduced in the system of carrier's liability. The text also examines the modern legal regime of the carrier's liability system, how was it influenced and to what extent it deviated from the historical roots. Finally, the text will attempt to draw lessons from historical development of the rules governing the carrier's liability in order to provide a broader perspective of mechanisms of maritime law development. The paper may be of particular interest to the scholars who are interested in the history of maritime law, as well to those who have interest in comparative maritime law.

KEYWORDS: Carriage by sea, liability, seaworthiness, carrier, presumed liability, burden of proof

---

[*] Professor of Law, Kyūshū University. This article is based on a presentation given at the 9th East Asia Maritime Law Forum held at Inchon in November, 2017. The author is grateful to Felix Chan of Hong Kong University for his constructive comments. Of course, I remain responsible for all eventual errors in this paper.

Table of Contents

I. Introduction

One of the central issues in the law governing carriage of goods by sea is the liability of the carrier. Under international conventions and domestic legislation governing carriage by sea, the carrier's liability is based, more or less clearly, on the principle of presumed liability.[1] The cargo claimant should only prove the loss of or damage to cargo. Then the carrier has burden to prove that loss or damage was caused by some of excepted cases for which he is not liable for. This contravenes the general principles under which the burden of proof of liability for breach is on the party who suffered damages from breach, rather than on the party who committed the breach. There are some variations and differences among various legal regimes, but under none of them the cargo claimant has the burden to prove the carrier's liability, fault or negligence. This peculiar character of carrier's liability may be less visible under common law, where the issue of fault typically does not

[1] In civil law the term "presumed fault" would be more appropriate, but since the term "fault" is alien to the common law concept of contract liability, a neutral term "presumed liability" will be used in this text.

arise in case of contractual liability. Still, a difference exists, as it will be shown in this text.

Maritime law scholars usually take for granted this peculiar character of carrier's liability without raising questions: Why is it so? What is the origin of such regime of liability? To the best knowledge of the author, two issues have never been addressed so far: 1. Cause of deviation of the carrier's contractual liability from the general principles of contract law, and 2. Legal origin of the concept of seaworthiness, which plays the pivotal role in determining the carrier's liability.

While most of the attention has been directed at interpreting the rules related to carrier's liability and seaworthiness, this paper has a different objective: understanding the background of those rules and the rationale behind their nature. Of course, from a practitioner's perspective the interpretation and implementation of the rules are the only things that matter. However, from the academic and theoretical perspective understanding the background and the rationale of rules is also relevant. One of the issues that will be addressed in this paper is: Why the carrier's liability under contract of carriage departed from both civil law and common law principles applying to contractual liability? Another issue to be addressed relates to the background of the seaworthiness in the system of carrier's liability.

This topic is probably of a greater interest to the civil law scholars which pay more attention to classifications, legal nature, and theoretical explanations. On the other hand, common law is focused on burden of proof and the issue of character of liability is not attracting much attention. In any case, this topic may be of interest to the maritime law scholars who have interest in comparative law.

This paper will try to uncover the roots of the liability regime of the carrier that include the seaworthiness concept by tracing them through the history of maritime law. The paper will follow the historic development of the rules related to carrier's liability and seaworthiness from Roman law, through the Middle Ages, until the modern times. At the moment the carriage of goods by sea is regulated by three international conventions: The Hague-Visby Rules, 1924/1968[2] the

[2] International Convention for the Unification of Certain Rules of Law relating to Bills of Lading ('The Hague Rules') and Protocol of Signature, signed in Brussels on 25 August 1924 (entered into force on 2 June 1931). The Hague Rules were revised by Protocol to Amend the International Convention for the Unification of

Hamburg Rules, 1978[3] and the Rotterdam Rules, 2008.[4] This text will explore different ways in which these three international conventions have addressed the carrier's liability system and to what extent they have departed from the historical roots. Finally, the text will attempt to draw lessons from historical development of the rules governing the carrier's liability in order to provide a broader perspective of mechanisms of maritime law development.

II. Roman Law

In Roman law the contract of carriage has not achieved the status of a distinct contractual form. In those times the lawyers dealt with it in the framework of the contractual forms known to them, such as deposit and hire of services. In addition, there was special regulation based on quasi-delict (*quasi ex delicto*) related to the liability arising from carriage of goods. Quasi-delict covered several types of harm, grouped together by no clearly identifiable principle classified as analogous to delictual obligations.

Under Digest 4.9, shipoweners (*nautae*),[5] innkeepers (*caupones*) and stable keepers (*stabularii*) were liable to compensate damage to the plaintiff where a delict of theft or wrongful loss had been committed by any of their employees in the ship, inn or stable.[6] The shipoweners,

---

Certain Rules of Law Relating to Bills of Lading, 1968 (entered into force on June 23, 1977). This Protocol is known as "the Hague-Visby Rules". For the matter of simplicity, in the further text we will use the Hague-Visby Rules and will not refer to the Hague Rules, which are still applied in a number of jurisdictions.

[3] United Nations Convention on the Carriage of Goods by Sea ('the Hamburg Rules'), signed in Hamburg on 31 March 1978 (entered into force on 1 November 1992), UN.Doc.A/Conf. 8915.

[4] The United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (the Rotterdam Rules) was adopted by the UN General Assembly on December 11, 2008, *available at* http://www.uncitral.org/pdf/english/texts/transport/rotterdam_rules/09-85608_Ebook.pdf Fig. 4.9: "I will grant an action against shipmasters, inn keepers and stable keepers if they fail to restore to any person any property of which they have undertaken the safe keeping".

[5] Dig. 4.9.2 provides that the term "*nautae"* refers to the person who manages the ship as *exercitor* (shipowner or charterer).

[6] *Actio Adversus Nautas, Caupones, Stabularios*: D. 4.9.1. Ulpianus, On the Edict, Book XIV. The praetor says: "When masters of ship, innkeepers, and the masters of stables have received property for safe keeping, I will grant an action against them

innkeepers and stable keepers were made liable for their employees' wrongdoing in the course of their employment, and their liability was strict: they need not have been at fault in any way. The rationale for this liability system was the need for protection of the parties who entrusted their goods into custody of shipowner, inn keeper or stable owner. The common feature that linked these three parties was the fact that the goods were entrusted into their custody; this fact implied that they had knowledge of what happened to the goods. Their liability which was based on quasi-delict, in nature, was vicarious liability apart from fault, or more precisely strict liability based on presumed negligence.[7]

The shipowner's liability was based on *custodia*, meaning the duty of due diligence to guard, care and keep safe the goods while they are entrusted to him and to deliver the goods in the same condition as he received them for carriage. The liability extended to cover omission to prevent damages (*culpa in non-faciendo*). The liability was strict in the sense that shipowner had a duty to restore the goods received in custody and was held liable for loss or damage regardless of his fault. This absolute liability was softened by allowing the shipowner to invoke as exceptions certain cases of *vis maior* such as ship accidents and piracy.[8]

The shipowner's liability was based on the receipt of the goods in custody (*receptum nautarum)* which was proved by a document issued by the master (*magister*).[9] Digest 4.9(3) provided that the master could make acknowledgement called *cheirembolon* (χειρέμβολον), which referred to taking cargo in custody by the master.[10] It can be presumed that this acknowledgment was in form of a document. Para.3 stated that even if the master did not make this acknowledgement, the shipowner would nevertheless be liable for what was received. This can be construed

---

if they do not restore it".

[7] Thomas AJ McGinn (ed), Obligations in Roman Law: Past, Present, and Future (Ann Arbor: University of Michigan Press, 2012), at 314.

[8] Reinhard Zimmermann, 'The Law of Obligations: Roman Foundations of the Civilian Tradition' (Oxford University Press, 1996), at 515.

[9] *Id.*

[10] D. 4.9.1.3, Ulp. *Ad edictum: Et sunt quidam in navibus, qui custodiae gratia navibus praeponuntur, ut naufulakes et diaetarii. si quis igitur ex his receperit, puto in exercitorem dandam actionem, quia is, qui eos huiusmodi officio praeponit, committi eis permittit, quamquam ipse navicularius vel magister id faciat, quod xeirembolon appellant. sed et si hoc non exercet, tamen de recepto navicularius tenebitur.*

as liability for the property received in custody which was evidenced by *cheirembolon*, or in the absence of this acknowledgment by other evidence. *Cheirembolon* was not a guarantee of safe arrival of the goods, as in such case this document could be construed as contract of carriage, instead of being just receipt evidencing that certain goods were received for carriage. This document represented the basis of liability for safe keeping. The owner of the goods had to prove the damage, and then the shipowner had the burden to prove what happened and that he was not liable.

III. *Lex Mercatoria*

Strict liability of the carrier continued to apply in the period after the fall of the Roman empire. This can be documented by texts of the statutes adopted during the Middle Ages as a part of *lex mercatoria.* For example, under Article XVII of the Ordinance of Trani, the carrier was strictly liable and was exempted from liability only in case of the loss caused by bad weather or from capture by pirates.

Article 67(2) of the Book of the Consulate of Sea (*Consulat de Mar)* provided for strict liability by stating that "any goods or possessions loaded aboard the vessel and entered in the ship's register, which are subsequently lost, will be the responsibility of the patron of the vessel and its owners must be compensated by him for their loss." This system of liability can be traced back to *receptum nautarum* of Roman Law.

In the Middle Ages common law followed the principles of *lex mercatoria* imposing strict liability on the carrier. The carrier was held liable "for every accident, except by the act of God, or the King's enemies…"[11] The position in the US was very similar: 'Common carriers by water, like common carriers by land, in the absence of any legislative provisions prescribing a different rule, are also, in general, insurers, and liable in all events, and for every loss or damage, however occasioned, unless it happened by the act of God, or the public enemy, or by some other cause or accident, without any fault or negligence on the part of the carrier, and expressly excepted in the bill of lading.'[12]

---

[11] *Forward v Pittard* 99 E.R. 953 (1785) 1 Term Reports 27 (per Lord Mansfield).

[12] The US Supreme Court, *Propeller Niagara v. Cordes*, *62 U.S.* 21 How. 7 7 (1858).

At the same time common law developed its own rules, such as the rules on bailment that applied to the carrier's liability. The carrier as a bailee was liable to the bailor if he would fail to deliver the goods in the same condition in which he received them.[13] This obligation of the carrier was closely related to his duty to act with due diligence and to take due care of the cargo.

IV. *19th. Century*

The system of strict liability formed the basis of most national laws regulating the carrier's liability in 19th century. The French Civil Code of 1804 subjected carriers to the same obligations as depositaries in a very similar way as under Digest 4.9. Article 1781 of the Civil Code stated that carriers were 'subjected, for the protection and preservation of the articles which are confided to them, to the same obligations as innkeepers, of which mention is made under the title "Of Deposit and Sequestration."' As it can be seen, the innkeepers are still there, but not the stable keepers. While the principle of liability based on fault was established as one of the general principles of civil law related to the contractual liability, the carrier's liability was based on a different principle: the principle of presumed liability. Article 1783 provided that carriers are 'responsible for the loss and average of things entrusted to them, unless they can prove that they have been lost and damaged by fortuitous circumstances, or superior force.'

In common law the system of liability based on the concept of bailment, combined with the exceptions of liability, has made the system of carrier's liability very similar to the one in civil law; both can be traced back to Roman law and both were shaped around the concept of custody. Under the general maritime law principles recognized by the early nineteenth century in both civil law and common law systems,

---

[13] Sir William Jones has divided bailments into five types: 1.*Depositum*, or deposit. 2. Mandatum, or commission without recompense. 3. *Commodatum*, or loan for use, without pay. 4. *Pignori acceptum*, or pawn. 5.*Locatum*, or hiring, which is always with reward. This last is *subdividedinto*, 1. *Locatio rei,* or hiring, by which the hirer gains a temporary use of the thing. 2. *Locatio operis faciendi*, when something is to be done to the thing delivered. 3. *Locatio operis mercium vehendarum*, when the thing is merely to be carried from one place to another (Sir William Jones, An Essay on the Law of Bailments, Hogan and Thompson, Philadelphia, 1836).

the carrier was held strictly liable for cargo damage or loss that occurred in the course of the conveyance, unless he could prove that the damage occurred as a consequence of one of the excepted causes (act of God, act of public enemies…). The only difference was that this system was classified as presumed fault under civil law, while common law simply focused on burden of proof

The strict legal regime of carrier's liability did not have a mandatory character. The carriers took advantage of the freedom of contract and used the bill of lading as a vehicle for avoiding liability by inserting in bills of lading numerous exoneration clauses. These clauses included not only circumstances over which the carrier had no control, such as acts of God or public enemy, but also the causes which were not beyond the control of the carrier, including the negligence of his master and crew, even allowing the carrier to deliver the cargo 'without regard as to where, when and how'.[14] Exoneration clauses enabled the carriers to achieve a position contrary to the one provided by law, so that the strict liability system virtually turned into a no liability system.

V. Introducing Seaworthiness into the Carrier's Liability System

One of the essential ingredients of the carrier's liability relates to his duty to make the ship seaworthy. The shipowner's strict liability is logically connected to his duty to make the ship seaworthy, as in order to ensure safety of the goods in his custody seaworthiness and cargoworthiness of the ship represent necessary elements of such duty. The duty of care of the goods goes beyond a simple watch and it extends to the duty to ensure that the goods are carried in a seaworthy ship, that the ship is properly equipped and have sufficient supplies, that her master and crew are qualified, and that the ship's space where the cargo is stored is suitable for that particular cargo. How a carrier can act with due diligence in caring for the goods in his custody if the ship is not seaworthy, if the hatch covers are leaking, if the ship holds are contaminated, if the master and crew are incompetent? So, there is a clear link between seaworthiness and liability for the goods received in custody.

---

[14] ' . . . *n'importe où, n'importe quand et n'importe comment'* (The Travaux Préparatoires of The Hague and Hague-Visby Rules, CMI, 52).

For the first time the duties of shipowner regarding seaworthiness have been expressly regulated during the Middle Ages. Some laws adopted during this period contain the first traces of liability for seaworthiness. For example, the Oleron Rules have one provision that implies the duty of shipowner to furnish proper equipment, which can be considered as a kind of duty related to seaworthiness.[15] The shipowner could partly avoid liability if the merchant did not object to the condition of the ropes, and the damage was caused by poor condition of ropes; in that case the damages would be divided between the shipowner and the merchant.

More detailed provisions are found in *Consulat de Mar,* which contained several provisions that resemble modern concept of cargo worthiness of the ship. Under Article 64 the shipowner was held liable for damage caused by water seepage coming through the deck. Shipowner's liability was strict, but he was exempted of liability where damage was caused by heavy seas.[16] The shipowner was also held liable if the cargo was damaged by rats, and there were no cats on board.[17] However, if the cats were on board a ship before the voyage started and they died afterwards, the shipowner was not held liable if he would buy new cats at the first port of call, because the damage was not caused by his fault.[18]

---

[15] Article X 'The master of a ship, when he lets her out to freight to the merchants, ought to shew them his cordage, ropes and slings, with which the goods are to be hoisted aboard or ashore; and if they find they need mending, he ought to mend them; for if a pipe, hogshead or other vessel, should happen by default of such cordage or slings to be spoiled or lost, the master and mariners ought to make satisfaction for the same to the merchants. So also if the ropes or slings break, the master not shewing them before hand to the merchants, he is obliged to make good the damage. But if the merchants say the cordage, ropes or slings are good and sufficient, and notwithstanding it happens that they break, in that case they ought to divide the damage between them; that is to say, the merchant to whom such goods belong, and the said master with his mariners.'

[16] 64-Waterlogged Cargo**:** 'The patron of the vessel is required to pay for the damage caused to the cargo aboard the vessel due to dampness caused by seepage through the deck, through the portholes, or due to lack of proper protection of the cargo from the elements. If, however, the cargo was damaged because the decks were swamped by heavy seas and not because there was seepage through the deck which was properly tarred, the patron is not obliged to pay for the damages to the cargo.'

[17] 67(1) -Cargo Damaged by Rats or Lost Through Other Causes: "If any property or merchandise aboard the vessel is damaged by rats, and there is no cat kept aboard the vessel, the patron is held responsible for the damages.

[18] 68-Merchandise Damaged Aboard the Vessel Due to Lack of a Cat "If any

Introducing specific provisions related to seaworthiness in some *lex mercatoria* texts was logically linked to the duty of due diligence of the shipowner to care and keep safe the goods in his custody. The concept of seaworthiness gradually entered the system of carrier's liability during 19th century. In fact, in marine insurance at an earlier stage, the seaworthiness has been recognized as one of implied warranties. As stated by Lord Wensleydale a 'ship is seaworthy when she is in a fit state as to repairs, equipment, and crew, and in all other respects, to encounter the ordinary perils of the voyage insured at the time of sailing upon it.'[19] Cargoworthiness has also been recognized in marine insurance, in particular with regard to bad stowage and overloading.[20] Some marine policies expressly stated unseaworthiness as an exception from covered losses. For example, in *Quebec Marine Insurance Co. v. Commercial Bank of Canada* marine policy contained an exception of losses from 'rottenness, inherent defects, and other unseaworthiness'.[21]

At that period law governing carriage by sea was less articulate with regard defining the concept of seaworthiness. The term 'seaworthiness' did not exist in the early literature on carriage by sea.[22] Abbott in his classic work '*A Treatise of the Law relative to Merchant Ships and Seamen*' does not expressly mention the term 'seaworthiness', but instead discusses the owners duty in preparing ship for the voyage that include duty 'to provide a vessel tight and staunch, and furnished with all tackle and apparel necessary for the intended

---

merchandise or cargo is damaged by rats while aboard a vessel, and the patron had failed to provide a cat to protect it from rats, he shall pay the damage; however, it was not explained what will happen if there were cats aboard the vessel while it was being loaded, but during the journey these cats died and the rats damaged the cargo before the vessel reached a port where the patron of the vessel could purchase additional cats. If the patron of the vessel purchases and puts aboard cats at the first port of call where such cats can be purchased, he cannot be held responsible for the damages since this did not happen due to any negligence on his part."

19 *Dixon v Sadler* (1839) 5 M&W 405. *See also Wedderburn v. Bell* (1807) 1 Camp., at 2.

20 *Weir v. Aberdeen* (1819) 2 B. & Ald. 320.

21 (1870) L.R. 3 P.C. 234.

22 The term "seaworthiness" is found in a number of marine insurance cases in the early 19th century. For the first time this term is used in statutory form in the Marine Insurance Act, 1906 which expressly regulated the warranty of seaworthiness (s.39).

voyage.' [23] This book also deals with the master's duty to provide ropes and dunnage, to take care in stowage of the goods, and to avoid overloading.[24] The term 'seaworthy' is used in a later edition,[25]but even in this edition the term 'seaworthiness' was used in a footnote referring to *Wedderburn v. Bell* case, which was a marine insurance case.[26] Some other books from the same period dealing with the carriage by sea and charter parties do not even mention the term 'seaworthiness'.[27]

The case law gradually developed the concept of seaworthiness in law governing carriage by sea. In one such case the US Supreme Court elaborated in detail the meaning of seaworthiness:

" carrier's first duty, and one that is implied by law, when he is engaged in transporting goods by water, is to provide a seaworthy vessel, tight and stanch, and well furnished with suitable tackle, sails, or motive power, as the case may be, and furniture necessary for the voyage. She must also be provided with a crew, adequate in number and sufficient and competent for the voyage, with reference to its length and other particulars, and with a competent and skillful master, of sound judgment and discretion; and, in general, especially in steamships and vessels of the larger size, with some person of sufficient ability and experience to supply his place temporarily, at least, in case of his sickness or physical disqualification. Owners must see to it that the master is qualified for his situation, as they are, in general, in respect to goods transported for hire, responsible for his acts and negligence. He must take care to stow and arrange the cargo, so that the different goods may not be injured by each other, or by the motion of the vessel, or its leakage..."[28]

The case law has gradually built the concept of seaworthiness preparing ground for its statutory regulation. In the context of carriage by

---

[23] Charles Abbot, 'A Treatise of the Law relative to Merchant Ships and Seamen' (E. and R. Brooke and J. Rider, Bell Yard, Temple Bar, and J. Butterworth, Fleet Street, London, 1802), at 178.

[24] *Id.* at 183.

[25] Lord Charles Tenterden, William Shee,"A Treatise of the Law relative to Merchant Ships and Seamen" (9th. Ed. William G. Benning and Co., Law Booksellers 43 Fleet Street, London, 1854).

[26] *See* note 19.

[27] For example, Henry M. Flanders, 'A Treatise on Maritime Law' (Little, Broown and Company, Boston, 1852) in sect.183 just mentions that 'where the owner contracts with the hirer….the vessel shall be staunch, strong, suitably provided…'

[28] The US Supreme Court, *Propeller Niagara v. Cordes*, *62 U.S.* 21 How. 7 7 (1858)

sea rules, the term "seaworthiness" was used for the first time in the Conference Form Bill of Lading, 1882.

VI. The Harter Act, 1893

For the first time the rules on seaworthiness were expressly incorporated in the Harter Act, 1893. By introducing the concept of due diligence as a minimum standard for seaworthiness, the Harter Act required the carrier to exercise great care to make the vessel seaworthy and, in return, rewarded the carrier who maintained a seaworthy vessel by exempting him from liability for certain causes of damage and loss.

The Harter Act was the first attempt to restrict the freedom of contract in relation to carriage by sea, by imposing mandatory liability rules on carriers that could not have been avoided by exemption clauses. The Harter Act exercised a strong influence on some other jurisdictions and established the basis of the international regime governing carrier's liability.

VII. The Hague-Visby Rules, 1924/1968

The international law governing contracts of carriage by sea has been influenced by attempts to balance relationship between shipowners on one hand and cargo interests on the other. The Hague-Visby Rules tried to establish a balance between the duty of the shipowner to make the ship seaworthy before and at the commencement of the voyage, his duty to care for the cargo during the voyage and the exculpatory exceptions which exempt the carrier of liability. Article 3 of the Hague-Visby Rules imposes obligation on the carrier to exercise due diligence to make the vessel seaworthy before and at the beginning of the voyage, as well as obligation to properly and carefully load, stow, carry, care for, and discharge the cargo. In return, Article 4 (2) contains a list of cases for which the carrier is not responsible, including the nautical fault of his master, crew and servant.

The Hague Visby Rules provide for a complex burden-shifting procedure. The initial burden of proof rests on the consignee, who must establish a prima facie case by demonstrating that the cargo was loaded in good condition under a clean bill of lading and delivered in bad

condition. Once the initial burden of proof is discharged by the consignee, the burden shifts to the carrier to prove that he acted with due diligence to make the ship seaworthy, which is an overriding obligation, and that the damage was caused by one of the exceptions set forth in Article 4(2). To escape liability, the carrier must bear the burden of explaining the cause of the loss or damage sustained by the cargo while in its possession. If the carrier shows that the loss was caused by one of these exceptions, the burden returns to the consignee to establish that the carrier's negligence was the real cause of the loss or at least it contributed to the damage. Finally, if the consignee is able to establish that the carrier's negligence was a contributory cause of the damage, the burden switches back to the carrier to segregate the portion of the damage due to the excepted cause from that portion resulting from the carrier's own negligence.[29]

Under article 4(1), 'whenever loss or damage has resulted from unseaworthiness the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under this article'. First thing the carrier should prove is the cause of loss or damage. If the loss cannot be explained, the carrier will not be able to rebut the prima facie evidence merely by proving that he acted with due diligence to make the ship seaworthy. To escape liability, the carrier must bear the burden of explaining the cause of the loss or damage sustained by the cargo while in its possession, i.e. what actually occurred and caused the loss of or damage to the goods.

VIII. The Hamburg Rules, 1978

The Hamburg Rules have regulated carrier's liability in a substantially different way as compared to the Hague-Visby Rules regime, with the clear objective at increasing the carrier's responsibility. Instead of a concept based on due diligence of the carrier in making the ship seaworthy before and at the beginning of the voyage, and instead of a list of cases for which the carrier is not responsible, the Hamburg Rules have clearly articulated the principle of presumed liability of the carrier. Article 5(1) establishes the principle of presumed liability of the carrier under which the carrier will be held liable unless he can prove absence

[29] *Steel Coils, Inc v M/v Lake Marion,* US Court of Appeals for the Fifth Circuit, May 13, 2003 (2003) AMC 1408.

of fault. The carrier can avoid liability if he proves that he has undertaken all reasonable measures to avoid the damage, or that it was impossible to undertake such acts.

The carrier is liable without exception for loss or damage caused by his fault or the fault of his agents and servants. The carrier can avoid liability if he proves that he has undertaken all reasonable measures to avoid the damage, or that it was impossible to undertake such acts. He must prove how damage actually occurred and that he was not liable for such event. For example, the carrier can prove that on certain day sea water penetrated the hatch cover seals, and that neither he nor his servants were negligent.[30]

IX. *The Rotterdam Rules, 2008*

The Rotterdam Rules are based on the Hague-Visby Rules system. The Rotterdam Rules retain the core elements of the liability regime as defined under The Hague-Visby Rules, in order to preserve the rich jurisprudence developed around The Hague-Visby Rules. They provide for the carrier's duty to make the ship seaworthy (Article 14), and a similar mechanism of transfer of burden of proof (Article 17). Still, the liability regime under the Rotterdam Rules is more favourable to cargo owners. Continuous duties related to seaworthiness of the ship, the abolition of nautical fault, presumed liability for fire, and increased amount of carrier liability are several illustrations of this approach.

With regard the system of liability the Rotterdam Rules follow the pattern of the Hague-Visby Rules by focusing on the burden of proof. The initial burden is on the claimant who has to establish a prima facie evidence against the carrier by proving that the loss, damage or delay occurred during the period of the carrier's responsibility.[31] Article 17 sets out a list of exceptions and contains an elaborate set of rules on burden of proof. The list of excepted cases corresponds to certain

---

[30] Based on the text of the Hamburg Rules, it may be concluded that the carrier would not be held liable in a situation similar to the one in the *Muncaster Castle* case (*Riverstone Meat Co Pty Ltd v Lancashire Shipping Co Ltd,(The Muncaster Castle*) [1961] AC 80) 7). In that case the carrier had engaged a reputable shipyard to conduct repair of the ship; this may be considered as sufficient to satisfy requirement of taking 'all reasonable measures'. The answer to this hypothetical question, however, may never be known, at least under English law.

[31] Article 17(1).

extent to the Hague-Visby Rules exceptions under Article 4(2). There is no need to prove any fault or breach of duty by the carrier; the carrier's liability is presumed and he has the burden of proof. In order to avoid liability, the carrier has to prove that the cause of the loss, damage or delay is not attributable to his fault or the fault of his master and crew.[32] The carrier can discharge this burden of proof by providing a prima facie evidence that he and persons for whom he is vicariously liable have discharged the duties imposed upon them under the Convention, or that the damage, loss or delay have been caused by some of events specified in Article 17.3, which contains a list of exceptions, similar to the one in the Hague-Visby Rules, with a notable absence of nautical fault.

Under the Rotterdam Rules, the cargo claimants must prove merely the probability of the causation of loss or damage by unseaworthiness. This "probability" operates as to the proof of causation related to unseaworthiness and not to the proof of unseaworthiness itself. In this way the drafters of the Rotterdam Rules followed the existing rule based on acknowledgement that it is usually very difficult for cargo claimants to obtain access to all relevant facts, which are needed to prove unseaworthiness of a vessel. The successful proof of a probability of causation of loss or damage of the goods by unseaworthiness shifts the burden back to the carrier, as the carrier will have to prove that he complied with his obligation to exercise due diligence regarding seaworthiness.

While Rotterdam Rules follow to certain extent the liability system of the Hague-Visby Rules, the existing extensive case law built on the basis of the Hague-Visby Rules may not be applicable to the Rotterdam Rules , as the liability systems are not really identical. This may lead to building a new case law based on the RR leading to potentially divergent interpretations in different jurisdictions.

X. International Conventions Compared

The close examination of international instruments reveals that they are all based on fault as the basis of liability. Under the Hague-Visby Rules, the obligation of the carrier to exercise due diligence

[32] Article 17(2).

to make the vessel seaworthy implies a duty of care of the carrier owed to the cargo owner; a breach of that duty constitutes negligence/fault for which the carrier is liable. In addition, Article 4(2) enumerates the list of excepted cases for which the carrier is not liable when the loss or damage occurred without his fault. Article 4(2)(q) even expressly mentions fault: "Any other cause arising without the actual fault or privity of the carrier…" The Rotterdam Rules are based on the same system, with some differences. On the other hand, the Hamburg Rules exempt the carrier from liability if he can prove that he "took all measures that could reasonably be required", i.e. if he can prove that he was not negligent. These instruments differ, however, in the way the systems are structured. The burden of proof follows the respective variations of the structure under these instruments.

At first glance it may seem that the allocation of burden of proof is different. It is not. Just the contents of proof may be different. Under all international instruments the cargo claimant has to make the first step by proving loss or damage. Then, under the Hague-Visby Rules, as well as under the Rotterdam Rules the carrier has the burden to prove that the damage was caused by some of excepted cases and that the ship was seaworthy. On the other hand, under the Hamburg Rules the carrier has to prove that he was not liable for loss or damage. The carrier can prove that in a very similar way as he does it under the Hague-Visby Rules and the Rotterdam Rules – first of all he would have to prove that loss or damage was caused by some event for which he is not liable; such event is very likely to be some of those excepted cases enumerated in the Hague-Visby Rules (except nautical fault) and the Rotterdam Rules. While the Hamburg Rules don't have express provision regarding seaworthiness, there is little doubt that the carrier would still have to prove that the ship was seaworthy, as that usually makes part of his burden of presumed liability.

The carrier's liability is said to be absolute and that of an insurer. This is just a myth, or more precisely, it is the past. The rules governing the carrier's liability contain a long list of exemption cases, which includes nautical fault of master and crew; the carrier should just prove that one of them has caused loss of or damage to the cargo. No such list exists in the general contract law. Besides, there is no any area of law whatsoever, or any kind of contract, where a party would be exonerated from liability for negligence of his employees. Moreover, even if the carrier is found liable, he is given the benefit of limitation of liability.

XI. Comparative Law Note

The legal basis of carrier's liability deviates from both civil law and common law principles on contractual liability. This is more clearly visible in civil law, but differences also exist in common law.

Civil Law

In civil law th liability for breach of contract is based on fault.[33] The recovery of damages can be awarded only if the breach of contract is caused at least by negligence.[34] The principle is: "no fault, no liability". The burden of proof is on the claimant. The party in breach can be exempted from liability where the breach resulted from a *force majeure* event. *Force majeure* operates independently of party agreement, which means that it will protect an obligee even if the contract does not contain a *force majeure* clause. There is an exception in case of objective liability which applies to limited areas of contract law where the party can be liable without fault (law typically imputes objective liability to situations it considers to be inherently dangerous, such as carriage of hazardous goods).

In case of carriage by sea, the carrier's liability deviates from the general principles of contractual liability and is classified as liability based on presumed fault, which is well recognized concept in civil law. This means that the cargo claimant should only prove that the cargo was lost or damaged, and the carrier has burden of proof that he was not liable for that damage or loss. Legislation that incorporated the Hague-Visby Rules in certain civil law jurisdictions make explicit reference to the principle of presumed liability.[35] French courts have applied this principle to the Hague-Visby Rules cases.[36]

Common law

In common law the discussion on presumed liability does not make much sense, because that kind of liability is alien to contract law.

---

[33] For example, Article 1147 of the French Civil Code, and Section 276 of the German Civil Code.

[34] Arthur Von Mehren and James Gordley, *The Civil Law System* (2nd ed, 1977), at 1106.

[35] Article 27 of the French Law of 18 June 1966 (*Loi* n°*66-420 du 18 juin 1966 sur les contrats d'affrètement et de transport maritimes*). The law was amended in 1979 following amendments of the Hague Rules 1868 and 1979.

[36] *Cour de Cassation, March 5, 1996* (1996) DMF 507.

Under common law the contractual liability for breach is based on non-performance, and it can exist regardless of fault. Contract law is "a law of strict liability, and the accompanying system of remedies operates without regard to fault".[37] The fundamental principle "contract liability is strict liability" is expressly stated in the Restatement of Contracts.[38] Common law has developed concepts of impossibility of performance and frustration, which operate in a way similar to *force majeure* and by which strict liability has been softened. Under the doctrine of impossibility, a party to a contract is relieved of the duty to perform when performance has become impossible or impracticable. The effect of frustration is that the contract is considered terminated at the time of frustrating event and no party is liable for damages. It should be noted that impossibility of performance and frustration are not related to fault and exoneration of a party from liability; they simply lead to the termination of the contract by discharging the parties from performing the contact.

In carriage by sea, common law is focused on burden of proof without considering the issue of fault. This makes less visible deviation of the system of carrier's liability compared to the general contractual liability. This deviation is difficult to notice because the cargo owner still has the initial burden of proof that the cargo was lost or damaged. From the perspective of the common law this is sufficient, since that represents evidence of non-performance of the contract. However, a difference still exists. Proving damage does not necessarily mean proving fault; and the carrier's liability is based on fault.

Differences and similarities

While the Hague-Visby Rules follow to logic of common law by focusing on burden of proof, the principle of presumed liability is incorporated in the way the burden of proof is structured; the burden of proof is on the carrier which means, in fact, his "presumed liability". In principle, the burden of proof of liability for breach of a contract is on the party who suffers damages from the breach, rather than on the party who committed the breach. In carriage by sea there is an inverse burden of proof, because the carrier has to prove existence of some of the circumstances that exempt him from liability. So, in the terms of civil

---

[37] Alan Farnsworth *Contracts* (Boston-Toronto, 1982), at 843.

[38] Restatement (Second) of Contracts 11. Introductory Note (1981).

law, the carrier is presumed to be liable. The common law, however, does not operate in terms of presumed liability and its main focus is on the burden of proof; that is the main difference.

Regardless of differences in approach, the result is the same. In both civil law and common law, the cargo claimant should first prove existence of loss or damage, and then the carrier has burden to prove that loss or damage was caused by some of excepted cases and that he acted with due diligence to make the ship seaworthy. In fact, the mechanisms of carrier's liability operate in identical way in both common law and civil law systems. They are just wrapped in different legal concepts bearing different labels, while the contents are almost identical. This is another illustration demonstrating how civil law and common law represent "two paths leading to the same goal".[39]

XII. Historic Lessons (Instead of Conclusion)

Maritime law is necessarily focused on the present and the future, since it has to look for solutions of the existing problems; however, only by looking back many of those issues can be properly understood. The system of carrier's liability is based on a bundle of different rules and principles. For a better understanding of this system, these rules and principles should be put in its historical perspective.

Analyses of the development of rules related to the basis of carrier's liability provides a valuable lesson on the way how the law developed through the history, adjusting to technological and legal developments, as well as to the needs of the parties. By looking at the Roman law rules on liability of *nautae*, we can now understand why the principles of the carrier's liability deviated from the general principles of the contractual liability. In Roman law the liability of *nautae* was not even based on contract, but on the custody of the goods. The character of the duty of care for the goods during voyage explains why the basis of liability is stricter from the general rules of contractual liability. The impact of *custodia* still remains and shapes the obligation of the carrier to care for cargo during the carriage and to deliver it to the consignee in the same condition as he received it from the shipper. This effect of *custodia* is reflected in a stricter liability of the carrier, as compared to

[39] Caslav Pejovic, *Civil Law and Common Law*: *Two Different Paths Leading to the Same Goal*, Victoria University Wellington Law Review (2001), at 817.

other kinds of contracts. The rationale for holding the carrier strictly liable is the principle that the party in custody of the goods must bear responsibility for their safety since the carrier is the only party that could exercise control over the goods during the carriage. Here are the roots of the principle of presumed liability of the carrier; regardless of how it operates in different legal systems.

The carrier's liability can also be distinguished from the general contractual liability at another level; the carrier has at disposal various instruments of protection against liability. The exemption of liability has the origin in Roman law which provided for the exoneration of carrier's liability in cases of perils of the sea and piracy. These exemptions of liability continued to apply through the historic development of carrier's liability and were greatly expanded in 19th century. Presently they cover a large number of excepted cases including nautical fault of master and crew. Besides, the carrier enjoys the benefit of limitation of liability, which can also be traced back to Roman law (noxal surrender). Nowadays this high level of carrier's protection presumably represents a kind of international public policy aimed at protecting the shipping business.

The concept of seaworthiness has not been created from the very beginning in the form that exists now in maritime law; it was constructed gradually starting from the concept of liability of *nautae* of Roman law based on the element of custody, and then during the Middle Ages various legislation were adding specific elements that constitute essential ingredients of seaworthiness, such as liability for the poor condition of cordage, ropes and slings, liability for leaking of seawater through the deck, lack of the cats aboard the vessel. These elements have gradually constructed the modern concept of seaworthiness. Instead of explicitly mentioning ropes, slings and leaking decks, the modern concept of seaworthiness now uses a more general language, while instead of cats on a vessel the modern concept of cargoworthiness relies on modern technologies, such as deratization, as a part of more generally defined duties of the shipowners.

With regard to modern regulation of carrier's liability, differences between various international conventions are not as great as they may seem, at least from the perspective of the basis of liability. While the texts of these conventions differ in terms of their drafting, and the way of balancing the interests of the parties, with regard the basis of the carrier's liability the final outcomes are not so different. Differences

can be found in different balances, styles and objectives of those conventions, or exceptions from liability, but the core elements of the character and basis of the carrier's liability based on presumed liability have been preserved through centuries.

The historic development of the system of carrier's liability through centuries demonstrates vitality of maritime law, as well as its flexibility and readiness to adjust to modern developments, while retaining its traditional spirit and fundamental concepts. This only confirms the words of the great French scholar Pardessus who once said that maritime law "has passed centuries without getting old".

REFERENCES

Books, Reports, and Other Non-periodic Materials

Alan Farnsworth *Contracts* (Boston-Toronto, 1982), at 843

Arthur Von Mehren and James Gordley, *The Civil Law System* (2nd ed, 1977), at 1106

Caslav Pejovic, *Civil Law and Common Law*: *Two Different Paths Leading to the Same Goal*, Victoria University Wellington Law Review (2001), at 817

Charles Abbot, 'A Treatise of the Law relative to Merchant Ships and Seamen' (E. and R. Brooke and J. Rider, Bell Yard, Temple Bar, and J. Butterworth, Fleet Street, London, 1802),

Henry M. Flanders, 'A Treatise on Maritime Law' (Little, Broown and Company, Boston, 1852)

Lord Charles Tenterden, William Shee,"A Treatise of the Law relative to Merchant Ships and Seamen" (9th. Ed. William G. Benning and Co., Law Booksellers 43 Fleet Street, London, 1854)

Reinhard Zimmermann, 'The Law of Obligations: Roman Foundations of the Civilian Tradition' (Oxford University Press, 1996), at 515

Sir William Jones, An Essay on the Law of Bailments, Hogan and Thompson, Philadelphia, 1836)

Thomas AJ McGinn (ed), Obligations in Roman Law: Past, Present, and Future (Ann Arbor: University of Michigan Press, 2012), at 314

This article is published in *The Asian Business Lawyer (ABL)* Vol. 20.
The publication of *ABL* Vol. 20 has been financially supported by KIM & CHANG

The Shipper's liability for the dangerous cargo under Japanese law
MARGO Case The Supreme Court March 25, 1993
NYK ARGUS CASE Tokyo High Court February 28, 2013

SHUJI YAMAGUCHI[*]

ABSTRACT

The Tokyo High Court in NYK ARGUS Case decided that the shipper should be responsible to categorize and judge if the substance is categorized as the flammable substances. If it is not clear, the shipper should perform the evaluation test.

The Japanese Commercial Code will be amended that ;

"If the cargo is flammable, explosive or any dangerous cargo, the shipper shall declare to the carrier its name, nature and necessary information to carry the dangerous cargo safely before delivery to the carrier"

In case, the shipper breaches the duty of the declaration, the carrier shall be entitled to claim the loss or damage to the shipper.

The shipper's liability shall be assumed negligence liability.

KEYWORDS: Dangerous cargo, shipper's liability, the shipper's duty of the declaration, negligence liability

[*] Okabe & Yamaguchi, Japan

Table of Contents

I. Fire Accident

What caused fire? No one knows before the accidents. But the research may identify the cause of the fire or sometimes not. Maybe Electric leakage. Maybe collision. Maybe cargo. It is quite dangerous to carry some cargo without knowledge. In order to avoid the ship accident, United Nations made "Recommendations on the Transport of Dangerous Goods, Manual of Tests and Criteria". It is divided into 9 classes.

1) Explosives
2) Gases
3) Flammable liquids
4) Flammable solids; substance liable to spontaneous combustion; substances which, on contact with water, emit flammable gases
5) Oxidizing substances and organic peroxides
6) Toxic and infectious substances
7) Radioactive material
8) Corrosive substance
9) Miscellaneous dangerous substances and articles, including environmental hazardous substances

They are seemingly very dangerous.

Based on the Recommendation, International Maritime Organization (IMO) provides 'International Maritime Dangerous Goods'(IMDG) Code. Japanese law listed the dangerous cargo. The dangerous goods are increasing. It may be quite difficult to identify the dangerous cargo by the name of the cargo on the invoice or the documents declared by the shipper. Because, the cargo names are not always the official chemical name, sometimes the name using at the trade, the name given by the maker, the name using just numbers etc.

For example, Calcium hypochlorite, $CaCl(ClO) \cdot H_2O$ or $Ca(ClO)_2$,

Chlorkalk or Karuki, Bleaching Powder, Sarasiko in Japanese.

They are the same dangerous chemical in different names, which is very popular and famous.

II. "MARGO"

A. The Accident

The "MARGO" was a general cargo ship registered at Panama with 8951 DWT. She had a fire in No. 1 Hold at 0205 on July 9,1978. After an explosion occurred at 1440, she took refuge in Durban Port in South Africa. After entering Durban, she had several explosions and fires in the holds at 2105 on July 11 and after 900 on July 14 (hereinafter called "The Accident"). The Accident caused the damage to the hull and the cargoes on board the vessel. Croatia Line time chartered the vessel from the owner on April 17 1978. Nippon Soda Co. Ltd. Produced the "High level Sarashiko", more than 60% purity, which was on board the vessel. Nippon Soda Trading Co. Ltd was the 100% subsidiary of Nippon Soda, and sold the High Level Sarashiko to Tenant Trading in May 1978. And Croatia Line contracted the carriage of the cargo, the high level Sarashiko 445 cans (59kg per can) from Yokohama to Alexandria. The carrier loaded the Hinosan creamy liquid (EDDP) 66 drums (200litters per drum) and the cargo at issue 445 cans on it. Then Hinosan creamy liquid 46 drum (20 litters per drum) were stowed on it. The Hinosan Creamy liquid is the agricultural Chemical (40％ Xylene, C8H10,50% Hinosan). The Accident happened as follows; The Hinosan was leaked from the drums by the bad weather and entered into the Sarashiko cans or both the Hinosan and the Sarashiko were leaked from the drums and mixed up and then caused

the fire. The Sarashiko has the nature that it will be decomposed rapidly and release oxygen and heat and burn explosively with flammables when it absorbs water, is mixed with acid, organic matter, deoxidizing matter, or heated or given heavy shock. Xylene is flammable and its flashing point is 25 C.

At the time of loading, the carrier was received the declaration from the shipper's agent that the cargo should not be touched by organic, deoxidizing matter like oil, carbon, sulfur etc. The shipping agent also gave the warnings about the cargo," the strong oxidizing matter, which will burn rapidly if it is touched by flammables". Nippon Soda labeled the drum as Flammable solid, Dangerous with Water, and " Not to be touched directly with Flame, Heat, Acid, Grease, Oil, Cloth and other flammables." By the accident, Croatian line suffered the loss and commenced proceedings against Nippon Soda and its subsidiary.

B. The Court Judgment

Tokyo High Court held that both the cargo owners and the carriers were liable for 50:50. On March 25, 1993, The Supreme Court overturned the High Court judgment. "If the cargo was declared as the dangerous cargo, the ocean carrier shall be responsible to research the nature, the level of the dangerous cargo and the necessary safe way to carry and stow the dangerous cargo and stow properly in order to avoid the accident. When the carrier could be able to know the dangerous nature and its level of the dangerous cargo and the way to handle the dangerous cargo, the maker or the seller of the dangerous cargo shall not need to declare the danger." "The carrier was noticed from the declaration of the shipper's agent that the cargo was the high level Sarashiko and had the flammable nature and could easily have known the dangerous nature and level and the way to handle it by referring to IMCO Code."

III. NYK ARGUS

NYK ARGUS is a container ship registered at Panama with 75484 DWT built in 2004. (NYK ARGUS Details) She left Kobe port on Sep 28,2004 and entered Nagoya, Tokyo, Shimizu. She left Singapore for Southampton on Oct 8, 2004. At 1155pm on Oct 19, fire alarm in No.3

hold rang and the temperature in the hold rose. CO2 gas was injected to No. 3 hold and sea water was showered to the hold. About 11 am on Oct 20, no smoke was noticed and the temperature was going down. The cause of fire was identified the dangerous cargo NA-125 stowed in 100 50kg fiber drums and PSR 80 stowed in 40 10kg cartons. They were piled 3-4 drums or cartons in the same line and loaded onto in the same container. The possibility the container was stowed in the same condition shall be 0.277%. Unlucky! It can happen. Only Once in 361 times. NYK ARGUS can stow 6492 containers. 18 containers were in the same condition. The container was stowed at Bay 23 Line 8 2nd layer in the No.3 hold, which was 10-15cm from the No.3 fuel oil tank. The fuel oil tank was heated 50-60 Degrees C for about 55 hours. If the cargoes are dangerous cargoes, they should be stowed "on Deck" or" at least 3m from the heat source. So only if the container were stowed at the next line or the second bottom line or anywhere other than this palace, the accident might have been avoided.

The cargo interest and the shipowner commence proceedings against the shipper based on the shopper's failure to declare the dangerous cargo in tort. The shipper used NVOCC as the carrier so that there was no contract between the shipper and the shipowner/ the ship manager. Of course there was no contract with the damaged cargo.
Under Japanese law, the person who caused loss or damage to any other parsons with intent or negligence shall be liable for loss or damage caused (Civil Code Art. 709).

The shipper argued that they were not negligent because they did not know the cargoes were the dangerous cargoes listed in UN list as the maker did not mentioned in the MSDS (Material Safety Data Sheet) about the UN list.

Under Japanese Law, the name of the material, the nature, the dangerous or toxic substance, how to treat when urgent, how to handle, carry, stow or dispose should be written in the MSDS and it will be issued when the material is sold or presented to any third party. In the MSDS, PSR-80 was described." It may be easily decomposed or exploded by fire, shock, friction or any other heat". It should be blocked by the light and kept in the tightly closed container at cold and dark place. However, it was not mentioned about the UN list No.

IV. Tokyo District Court Decision

The Tokyo District Court (July 22, 2010) dismissed the claimants' claim. It is held that the cause of fire was the shipper's (defendant's) cargo. Both Na-125 and PSR -80 (Diazo Components) are flammable dangerous cargoes. NA -125 is 2-Diazo-1-Naphthol-5-Sulphone acid sodium. PSR-80 is Ester compound of 1,2-Naphtho-quinone-(2)-diazido-5-sulfonic acid with Pyrogallol-acetone condensation. The Law of the liability for Accidental Fire provides that the person caused the accidental fire shall be liable for the loss or damage incurred to the third party if he is grossly negligent. In this case, the maker did not mention the cargoes were dangerous cargoes.

The shipper had transported NA 125 using the shipping companies 5 times without any accident and PSR 80 24 times without any accidents. The shipper was informed by the producer that the cargoes were not dangerous. In such situation, the shipper, a mere trading company, was not in the position to doubt the maker's information and inspect the cargoes by themselves. Therefore, the shipper was not grossly negligent when he failed to declare the cargoes as dangerous.

V. Tokyo High Court (Feb 28, 2013)

The Tokyo High Court decided that the shipper was liable for the fire because they were in the position to check if the cargoes were the dangerous cargoes, which should be declared to the carrier by UN Rules. The shipper could have noticed the danger of the cargoes if they requested the laboratory to check them. Japan is the signatory of SOLAS Convention, International Convention for Safety of Life at Sea. IMDG Code (International Maritime Dangerous Cargo) was required at the amendment in 2002. The Japanese dangerous Cargo rules are based on SOLAS Convention and IMDG Code.

Flammable substances are one of dangerous goods. If the shipper make the contract of international carriage of goods by sea about the cargo which may be considered as flammable substance, one of the dangerous goods, the shipper should be responsible to categorize and judge if the substance is categorized as the flammable substances provided in IMDG code and to which category it belongs in order to avoid the accident which may cause the loss or damage to the life and

or the goods of any third parties. If it is not clear from the name of the goods, the shipper should perform the evaluation test of danger of the goods.

In this particular case, the shipper had the MSDS issued from the maker of the cargo, which mentioned about the danger of the cargo but did not mention about UN Code.

The shipper should have noticed the danger of the cargoes as they were Diazo Components and they might be the Flammable substances provided in the MSDS Code. Therefore, the shipper should have the evaluation test and declare the cargo properly to the carrier at the time of the carriage contract. The shipper was negligent as the shipper failed to perform their obligation as the shipper to sort out the dangerous cargoes properly and declare it to the carrier if they were

The court was quite strict to the dangerous cargo and considered the shipper's duty very heavy to avoid the fire accident.

The shipper's liability was based on the negligence under Japanese law but it was regarded to be very close to the strict liability is the Tokyo High Court judgment.

The court ordered the shipper to pay the loss of about 1billion yen plus interest and costs.

The case was appealed to the Supreme Court. But the appeal was dismissed.

VI. Legal Liability of the Shipper

We are talking about the shipper's liability in tort above. Now, we consider about the legal liability of the shipper by the contract of carriage.

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

> consent shall become a danger to the ship or cargo, they may in like manner be landed at any place, or destroyed or rendered innocuous by the carrier without liability on the part of the carrier except to general average, if any.

Japan COGSA art 11 para. 2 has the similar article. It is considered as the assumed negligence liability in Japan. In France, the shipper's liability is negligence liability.

In UK, The shipper's liability shall be considered as strict liability. (Effort Shipping Co. Ltd v. Linden Management S.A House of Lord 1998) On Nov.18, 1990, the plaintiff' s vessel Giannis NK loaded a cargo of ground nut extraction meal pellets at the port of Dakar into hold No.4. Cargoes of bulk wheat pellets had been loaded into other holds at previous loading ports Lome in Togo and Abidjan in the Ivory Coast. The groundnut pellets were fumigrated after loading and SGS certificate was issued. The vessel crossed the Atlantic to her first port of discharge San Juan in Puerto Rico, where part of grain pellets cargo was discharged and then proceeded to Rio Haina in Dominica to discharge the balance of the cargo. She arrived on Dec 2 and was inspected by the agricultural authorities on Dec 6. Live insects and shed skins were found in the cargo and the vessel was quarantined. The vessel was ordered to leave the port with both the ground nut cargo and the wheat cargo still on board. The authorities stated that they found Khapra beetle.

Khapra Beetle was an unusual insect. It originated in tropical area and many countries, including Dominica and USA, where it was not endemic regarded it as so undesirable that they took serious steps to prevent its entry. The main objection to Khapra beetle was its voraciousness when in its larval form. In appropriate conditions the beetle could multiply rapidly and larvae would rapidly devour cargo or store of feedstuffs if they were present within it. Khapra beetle is one of the 100 worst insects.

The owners claimed that the ground nut cargo was dangerous cargo by reason of the fact that it contained Khapra beetle. They argued that the beetle constituted a physical danger both to the ship which was put into quarantine and needed fumigation before it could perform further service for other charterer and to the other wheat cargo on board which had to be dumped at sea. The Claim was for damages for delay, bunker expenses incurred during the delay, fumigation and other costs,

and an indemnity in respect of any liability they may have to the receivers in the Dominican proceedings.

House of Lord held; "it was settled law that the word dangerous in the expression "goods of a dangerous nature" had to be given a broad meaning; dangerous goods were not confined to goods of an inflammable or explosive nature or their like; and goods might be dangerous within the meaning of Art IV (6) if they were dangerous to other goods even though they were not dangerous to the vessel itself."

"There was no reason to confine the word "dangerous" to goods which were liable to cause direct physical danger to other goods; what made the cargo dangerous was the fact that shipment and voyage was to the countries where imposition of a quarantine and an order for dumping of the entire cargo was to be expected. In that sense the Khapra infected cargo posed a physical danger to the other cargo." Hague Rules "Art.IV (6). was freestanding provision dealing with a specific subject matter. It imposed strict liability on shippers in relation to the shipment of dangerous goods irrespective of fault or neglect on their part."

In USA, Senator Linie GmbH KG v. Sunway Line Inc. (2002 2nd Circuit) followed House of Lord. On April 28, 1994, a fire broke out in the forward hold of the Tokyo Senator as she made for the coast of Norfolk, Virginia. The vessel was bound from Pusan, Republic of Korea, where she had taken on a cargo of 300 drums of thiourea dioxide ("TDO") originally exported from Peoples Republic of China. At about 1030pm on April 28, the captain observed smoke coming from the hold number 2, in which the TDO container was stowed. The contents of the TDO container were emitting heat, smoke and chemical residue. After the fire had been brought under control, a fire expert, discovering that a number of TDO drums were charred, concluded that the fire had broken out within the TDO container. In a separate but related action in Southern District of New York, Judge Lynch noted that at least one of the thiourea dioxide drums spontaneously ignited. Other containers then caught fire"

The second circuit held; We conclude, as did the House of Lords in Effort Shipping Co.v Linden Mgt.SA.1998, with respect to the British Counterpart of section 1304(6), that enactment of section 1304(6) established a rule of strict liability for a shipper of inherently dangerous goods when neither the shipper nor the carrier had actual or constructive preshipment knowledge of the danger. This construction of

section 1304(6) is consonant with COGSA's goal of fostering international uniformity in sea-carriage rules and allocating risk between shippers and carriers in a manner that is consistent and predictable.

At the item of shipment in this case, TDO was not named as a hazardous or dangerous cargo in the International Maritime Dangerous Goods Code (IMDGC) or in the Department of Transport Hazardous Material Table. It was not until 1998 that TDO was specifically listed as a hazardous or dangerous material in the IMDGC and not until 1999 that TDO was listed as a dangerous cargo in the Code of Federal Regulation.

Therefore, the shipper's liability for undeclared dangerous cargos shall be strict liability in UK and USA.

The shippers should follow the IMDG Code and in Japan, Carriage and Stowage of Dangerous Cargo by Sea Rules based on the UN Rule.

If they are negligent to follow the rules, they are liable by breach of the contract of carriage for the loss or damage incurred to the carrier and also liable in tort for the loss or damage incurred to the third party including other cargoes.

In the MARGO case, if the shipper declared the name of the cargo known as dangerous and its nature, the producer or the seller shall not be liable.

According to the Tokyo High Court decision of NYK ARGUS, the shipper's negligence can be easily accepted because the shipper's responsibility to sort the dangerous cargo and declare to the carrier properly shall be very strict. It is almost strict liability.

Rotterdam Rules

Art 32. Special rules on dangerous goods

When goods by their nature or character are, or reasonably appear likely to become, a danger to persons, property or the environment:

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

(b) The shipper shall mark or label dangerous goods in accordance with any law, regulations or other requirements of public authorities that apply during any stage of the intended carriage of the goods. If the shipper fails to do so, it is liable to the carrier for loss or damage resulting from such failure.

Art 30. Basis of shipper's liability to the carrier

1. The shipper is liable for loss or damage sustained by the carrier if the carrier proves that such loss or damage was caused by a breach of the shipper's obligations under this Convention.
2. Except in respect of loss or damage caused by a breach by the shipper of its obligations pursuant to articles 31, paragraph 2, and 32, the shipper is relieved of all or part of its liability if the cause or one of the causes of the loss or damage is not attributable to its fault or to the fault of any person referred to in article 34.

The shipper's obligation to declare the dangerous cargo shall be strict liability under Rotterdam rules.

VII. Amendment of Commercial Code

Japan is amending the Commercial Code (Transport and Maritime Law). The draft was discussed at the meeting of Counsels for Ministry Justice.The Draft of Commercial Code Art. 572 provides; ' If the cargo is flammable, explosive or any dangerous cargo, the shipper shall declare to the carrier its name, nature and the necessary information to carry the dangerous cargo safely before the delivery to the carrier' In case the shipper breaches the duty of the declaration, The carrier shall be entitled to claim the loss or damage to the shipper. The shipper's liability for undeclared dangerous cargo shall be assumed negligent liability.

The Commercial Code shall be amended in the Diet accordingly maybe in this year.

VIII. Conclusion

After several accidents happened caused by dangerous cargoes, the laws and regulations concerning the shipper's liability are considered seriously for safety to the ship, the cargoes, the crews, the passengers on board.

Especially the shipper's liability under Hague Visby for undeclared dangerous cargo is construed as strict liability in UK and USA.

On the other hand, the Japanese Commercial Code which will be amended provides the shipper's liability for undeclared dangerous cargo shall be assumed negligent liability.

Generally, the shippers' responsibility and liability for the dangerous goods will be stricter now and in future.

REFERENCES

The Supreme Court Judgment held on March 25,1993 (Minshu 47-4-3079)
Tokyo High Court held on February 28, 2013 (Hanrei Jihou 2181-3)
Effort Shipping Co. Ltd. v. Linden Management S.A ([1998]1 Lloyd's Rep 337)
Senator Linie GmbH v. Sunway Line Inc. (2002 AMC 1217)

This article is published in *The Asian Business Lawyer (ABL)* Vol. 20.
The publication of *ABL* Vol. 20 has been financially supported by KIM & CHANG.

Study on Relevant Legal Issues Concerned with the Carriage of Dangerous Goods by Sea--from view of judicial cases in China

GUO Ping[*]

TABSTRACT

The carriage of dangerous goods by sea is an important part in the field of marine transport as well as in international trade. It is no wonder that there are some international conventions and national laws provide on the issues of dangerous goods directly and indirectly.

The paper expounds systematically the definition of dangerous goods on the basis of international conventions and Chinese legislation, the legal status of the shipper and the carrier of dangerous goods. Meanwhile, this paper collects 21 cases concerned with dangerous goods among more than 3000 cases related to disputes of contract of carriage of goods by sea held by various Chinese maritime courts and its higher courts between 2001-2015, including 54 multimodal transport cases. Most of these cases had been introduced to analyze the obligations, responsibilities and rights of contractual parties in the carriage of dangerous goods in China. Finally, the conclusions and recommendations for the carriage of dangerous goods are proposed accordingly.

KEYWORDS: Dangerous goods, IMDG, Contract of Carriage of Goods by sea

[*] Dr. GUO Ping, Professor of Law School of SUN YAT-SEN University, Director of Institute of International Maritime Law, Arbitrator of China Maritime Arbitration Committee(CMAC) and Dalian Arbitration Committee (DAC)

Contact Address : Law School of SUN YAT-SEN University, No.135, Xingang XiRoad, Guangzhou, 510275,P.R.China, Email address: 1282640870@qq.com.Tel: 86-13514243447.The paper is supported by National Social Science Fund Project(No.17BFX152)

Table of Contents

Forwarding

Since the middle stage of the 20th century, with the rapid development of world economics and the international trade, the transportation demands of dangerous products, such as petroleum and refined oil, liquefied petroleum gas (LPG), chemical raw material grows day by day. Among several different transport modes, the water transportation has the characteristic of lower-priced and is suitable for massive transportation, compared with the transportation by plane, by pipeline and by land. Therefore, dangerous materials through marine transportation increase rapidly. At the same time, with the enhancement of knowledge of people, more and more cargoes are considered as dangerous goods which beyond the scope of the traditional ideas, the shipping market of dangerous goods by sea expands rapidly and plays more and more status and functions in the development of national economy in each country.

On the late night of August 12, 2015, the dangerous chemical warehouse which was owned by Tianjin RUIHAI Logistic Limited Company got fire, then serious explosion occurred afterwards, 165 people died and 8 persons missing in this disaster. It is estimated

incompletely that the direct economic loss reaches up to 70 billion RMB, which excludes indirect economic loss. Safe transportation and storage of the hazardous goods becomes hot topics and draws attention of the whole society deeply and mostly in China. This article discusses several legal problems concerned with carriage of dangerous goods by sea on the basis of Chinese legislation as well as typical maritime cases.

I. Legal Definition about Dangerous Goods

Nowadays, with the development of technology in the world, more and more chemistry goods are made with synthetic methods. According to the estimation from the World Health Organization, that there are more than 600 thousand kinds of goods used in the industry and agriculture production only, which shall increase 3000 many kinds every year. Among these goods, some of them have the nature of detonation, flammability, poison, corrosion, radioactivity, pollution etc. which are certain dangerous or potential hazardous goods. It is conservatively estimated that various dangerous products may reach up to 30,000 kinds.

A. The views from some international conventions

1. International Conventions on Safety of Shipping- IMDG Code, SOLAS and MARPOL

In 1965, IMO formulated "International Maritime Dangerous Goods Code: IMDG Code". This code divides the hazardous goods into nine groups in detailed list which include explosives; gas (flammable gas, non-flammable non-toxic gas, virulent gas); flammable liquids; flammable solids or substances, or in contact with water to emit flammable gas; oxidized material and organic peroxide; poisonous substances and infectious substances; radioactive substances; corrosives and miscellaneous dangerous substances.

In addition, Chapter VII of International Convention on Safety of life at Sea as amended in 1974 (hereafter called: SOLAS 74), Annex III 'Regulations for the Prevention of Pollution by Harmful Substances Carried by Sea in Packaged Forms ' of Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from ships, 1973 (hereafter called: MARPOL73/78), International Code for the

Construction and Equipment of Ships Carrying Liquefied Gases in Bulk (IGC Code) etc. involve to classify and enumerate names and lists about hazardous goods.

Obviously, there is no definitely concept in some international conventions mentioned above, but only with the name and classification of dangerous goods.

2. International Conventions on the Carriage of Goods by Sea- 1924 Hague Rules and 1978 Hamburg Rules

Article 4(6) of Hague Rules does not define dangerous goods but provides from the view of right of disposal of carrier if dangerous goods are carried under the contract of carriage of goods by sea. The provision describes the goods with the nature of inflammable, explosive or any other hazardous nature as dangerous goods.

There is one special rule on dangerous goods in Article 13 of Hamburg Rules. However, there is no explicit definition on dangerous goods, it provides from the obligation and liabilities of shipper, such as the obligation to mark and label, provide correct information about dangerous goods etc.

3. New Development of International Conventions on the Carriage of Goods by Sea--- 2008 Rotterdam Rules

Although 2008 Rotterdam Rules does not come into force, the provisions on dangerous goods shall be noticed. Article 32 is the provision for special rules on dangerous goods, it says that when goods by their nature or character are, or reasonably appear likely to become, a danger to persons, property or the environment, the shipper shall inform the carrier and mark dangerous goods according to law, regulations etc. It does not define what is dangerous goods, however, it describe the dangerous goods from its physic nature. Compared with existing enforceable international conventions, Rotterdam Rules mentions firstly that if cargo becomes a danger to the environment, it should be considered as dangerous one. And also, it addresses that even if there is no actual danger existed, if only it appears likely and reasonably that goods become a danger to person, property or the environment, it also shall be considered as dangerous goods.

Therefore, it is the first for one international convention to describe dangerous cargo from the view of threat to the environment and its possibilities.

B. Chinese Legislation

There is no unified code concerned with dangerous goods, therefore some provisions related to the transportation, storage, management of dangerous goods are regulated in different laws, regulations and rules in China. For example, Chapter VI of *Maritime Traffic Safety Law* regulated the transportation of dangerous goods[1], Chapter VIII of *Ocean Environment Protection Law* concerned with the carriage of dangerous goods which have potential pollution risks to ocean environment, the structural equipment, the approval process for vessel going into/ out of port, the operation of washing, cleaning holds at ports etc., which are kept in coordination with the provisions of MARPOL 73/78. Article 32 to Article35 of *Port Law*, regulate storage, loading, discharging of dangerous goods at berth or port. And also some provisions concerned with dangerous goods can be easily found in *Regulation of safety Management on Dangerous Chemical Goods, Chinese Maritime Code, Management Ordinance for the Prevention and Curing Ocean Environmental Pollution from Ships*[2], *Rules on Dangerous Goods Transportation by Water Way*[3], *Management Regulation on Safety Supervision of Dangerous Goods Carried by Ships*[4], *Permission Certification Enforcement Rules on Safety Usage of Dangerous Chemicals*,[5] *Management Rules on License of Dangerous Chemicals Operation*[6], *Management Rules on Registration of Dangerous Chemicals*[7], *Management Regulation on the safety of*

[1] Which was promulgated by the *Standing Committee of the 6th National People's Congress* in 1983. It is in the progress of being amended in recent years.

[2] This regulation had been approved by the 79th meetings of National State Council, which came into force from March. 1, 2010.

[3] This rule was promulgated by the *Ministry of Communication and Transportation* on Nov. 4, 1996 and came into force from Dec. 1, 1996.

[4] This regulation was passed in the 15th meeting of Ministry of Communication and Transportation on Nov. 21, 2003, and came into force from Jan. 1 ,2004.

[5] which was passed by the *Bureau for Administration of Merchant Safety Supervision and Management* on Oct. 29, 2012, and came into force from May. 1, 2013

[6] The rule was passed by *the Bureau for Administration of Merchant Safety Supervision and Management* on May21, 2012, and came into force from Sep. 1, 2012.

[7] The rule was passed by the *Bureau for Administration of Merchant Safety Supervision and Management* on May 21, 2012, and came into force from Aug. 1, 2012.

dangerous goods at port[8]etc.

1. *Regulation of Safety Management on Dangerous Chemicals (RSMDC)*

Article 3 of RSMDC defined dangerous chemicals as including the exploder, the compression gas and the liquefied gas, the flammable liquid, the flammable solid, pyrophoric material and those flammable goods meet wet, the oxidant and the organic peroxide, noxious substances and the corrosion etc. The dangerous chemicals list on the national standards titled with 'Hazardous Goods Commodity Table' (GB 12268); those highly toxic chemicals lists and those excluded by 'Hazardous Goods Commodity Table' shall be ascertained and published jointly by the Economic and Trade Integrated Management Department of State Council and the Departments of Public Security Bureau, the Ministry of Environmental Protection, Health, Quality Inspection and Testing Bureau, the Ministry of Communications and Transportation.

2. *Rules on Dangerous Goods Transportation by Water Way (RDTW)*

Article 3 of RDTW provides that those cargos have the nature of detonation, flammable, poisons, corrosion and radioactivity, may cause easily the personal casualties and property damages and needs to protect specially in the process of transportation, loading, unloading and in the storage, are considered as hazardous goods.

Almost the similar provision can be found in article 36 of *Management Regulation on Safety Supervision of Dangerous Goods Carried by Ships.*

3. *Management Regulation on the Safety of Dangerous Goods at Port (MRSDP)*

Article 3 of MRSDP provides that dangerous goods mean those on the list of national standards 'Hazardous Goods Commodity Table' (GB12268) and IMDG, which have the nature of detonation, flammable, poisons, corrosion, radioactivity, may cause easily the personal casualties and property damages and need to protect specially in the process of water way transportation, port loading & unloading and

[8] This regulation was promulgated by the *Ministry of Communication and Transportation* on Nov. 27, 2012, and came into force from Feb. 1, 2013.

storage at port.

Article 63 of *Chinese Maritime Code* provides almost the same provision as article 13 of Hamburg Rules, and also article 307 of *Chinese Contract Law* provides that when consigning for transport such dangerous goods as inflammable, explosive, toxic, corrosive or radioactive materials, the shipper shall properly package, mark and inform the carrier according to the regulations and law.

From the view of Chinese legislation, it is clearly that there is no explicit definition on dangerous goods, almost all of laws or regulations just describe dangerous goods from its physic nature, that is whether its nature may cause personal injuries and property damages. And few of them addresses additionally that the dangerous goods shall be on the lists of national standards or IMDG Code.

Article 23 of *Management Regulation on Safety Supervision of Dangerous Goods Carried by Ships* provides that if the cargo which is not on the list of Dangerous Cargo Table (GB 12268) or on the list of IMDG is carried on board, it shall be declared to maritime administrative authorities on the reference of management requirements for import & export of dangerous cargo, and maritime administrative authority shall circulate the information to the port administrative authorities which located in the port.

Therefore, from the view of regulation related to administrative management, the cargo not on the list of IMDG or national standard table shall be deemed or treated as if it were dangerous cargo.

However, whether the cargo which is not on the list of IMDG shall be considered as dangerous comes the hot issue in judicial practice. It was the appeal case made by Shandong Province High People's Court with the verdict of No. 25 (2012) LuMinSi ZhongZi. The carrier, China Shipping Container Transportation Limited Company, transported chemical products consigned by Qingdao Huaying company and Shandong Sunshine Company from Tianjin Port to Santos, Brazil, the number of bill of lading was TSNSSZ900497 and TSNSSZ900592. During the navigation of voyage, the fire occurred in the holds. It was tested that the cargo was dangerous, but the shipper said nothing about the nature of the goods. And the carrier claimed against the shipper for the loss of USD 615028.99 as well as any other legal costs arising from it. It was surveyed that such kind of chemicals was not on the list of

IMDG Code. Qingdao Maritime Court, being the first trial court, considered that it was the disputes concerned with contract of carriage of goods by sea. Because those not listed on IMDG Code was not dangerous cargo, the actual shipper, who delivered the cargo to the carrier, had no obligation to inform the nature of goods, therefore, the maritime court refused the claim from the carrier[9].

And then the carrier appealed to Shandong Province High People's Court.It was investigated that the actual shipper had notified to the carrier the real name of chemicals as the same as he declared to the customs and port authority, although the shipper did not stress the nature of goods was dangerous to the carrier, the carrier should know that such kind of chemicals could be stowed far from the hot place. In fact, the chemicals were stowed near bunker tank of the vessel. The high temperature was the proximate reason of fire in this case. Therefore, the appeal court considered that the carrier had the negligence on taking care of the goods, and support the judgment of the first trial court with various reasons. Therefore , the carrier shall bear the losses or damages suffered from the accident.

For in all, this paper insists that it is not the prerequisite condition being dangerous cargo to be listed on IMDG Code or national standard, but if only in the process of transportation, loading, unloading and storage, the goods by their nature or character are, or reasonably appear likely to become a danger, like flammable, explosive, corrosion, radioactive and so on, to persons, property or the environment, such kind of goods shall be considered as dangerous goods.

II. The Rights of Shipper for the Carriage of Dangerous Goods by Sea

A. Right for Requiring Safety Transportation of Dangerous Goods

The main purpose of the contract of carriage of hazardous goods by sea is shifting or transferring the cargoes safely from one place to another place. If such kind of goods suffer damage or loss of during the transportation, the main purpose of contract can't realize. Certainly it

[9] *See* Verdict of No. 66 (2010) QingHaiFa Haishang Chuzi

does not mean that it is unnecessary for the transport of ordinary cargo safely, there are much more requirements for the transportation of hazardous goods, and safe transportation of such kind of goods has more important and prerequisite significance compared with ordinary cargo. Because once accidents happen, hazardous goods might bring directly serious harm, damage or loss, not only on cargo itself ,but also on the ship, the health of person as well as the environment. The right which the shipper requests to transport safely has been provided by law, and also it has been made in contract as one of most basic and most important right, excepted that the carrier may invoke exemption clauses for the loss of or damage to the cargo.

B. Right to Claim against for Loss of or Damage to Dangerous Goods

When the carrier violates the provisions of contract of carriage of dangerous goods by sea or the law or regulations, loss of or damage to hazardous goods might occur, the shipper is authorized to claim against the carrier or the actual carrier, namely enjoys the right to claim compensation for damages to goods.

In the following case, that soybean meal was carried by vessel of HuaiYang, which was operated by Guangzhou Ocean Shipping Company, from one port of India to Nantong China. The receiver was Anhui Province Grain, Oil and Food Import & Export Company. According to the log book, the weather was fine and clean during the most of whole stage of loading. Once it rained, the crew closed holds cover promptly, wet cargoes by rain water were refused to be loaded on board. During the navigation and the stage after arrival at port of discharging, the holds had been ventilated by the crew but no any temperature testing arranged. And there was no evidence to indicate that soybean meal suffered the sea water. According to the survey report at loading port, the water content of soybean meal was 11.2% which is close to the provision of contact with 11%. And the water content in discharging port was 13.8% on the basis of survey report from Jiangsu Province Import and Export Commodity Inspection Bureau (National standard GB10380-89 is 13%). And at port of discharging, the cargo had been found out to be agglomerated, mildewed and carbonized. According to the requirements of IMDG, being the nature of dangerous goods, soybean meal shall be ventilated

and temperature tested during the voyage, and inert gas cooling measures should be used if necessary. It was investigated by the first trial court- Wuhan Maritime Court, the carrier failed to obey its obligation to taking care of such kind of goods, therefore the verdict was made to support the claims from the cargo owner. The carrier disagreed with the judgment, then appealed to Wuhan Province High People's Court which supported the first trial judgment on Dec. 24, 2009 with the verdict of No. 26 (2005) EJian ErMinZi. Further, the carrier appealed to the Supreme People's Court, who supported the judgment of first trial on Feb. 23, 2012 with the verdict of No. 17 (2012) MinJianZi.

III. The Obligation of Shipper for the Carriage of Dangerous Goods by Sea

The law or the international conventions have all made the similar stipulations on the general obligation of shipper, which includes the duty to pack or mark the cargo properly, to guarantee contents of bill of lading or any other cargo information accurately, to handle procedure and documents to some authorities promptly and tender them to the carrier, to prepare the cargo and loading properly, to pay the freight or any other necessary expenses arising from transportation timely. The paper believes that, all of these general duties shall be suitable naturally for the hazardous goods, simultaneously, the shipper of hazardous goods shall have much more strict obligations which may be summarized as the followings: namely to pack the hazardous goods properly; to mark and label; to notify the carrier about preventive measure in writing as well as to provide the prompt information about official name and nature of dangerous goods.

A. Case concerned with Shipper's Packing Improperly

On September14, 2009, International Logistic Limited Company entrusted Tianjin Logistic Limited Company booked in one shipping company to transport glacial acetic acid in container from Tianjin Port to one port of Pakistan. One order bill of lading had been issued with No.MSCUTI1780663 which indicated that 13 containers had been loaded on board. When 13 containers transshipped in Shenzhen, two of

them were found to leak seriously. Afterwards two leaking containers had been disposed by the shipping company with the approval of Shenzhen Customs. According to the tally report, these two leaking containers had apparent good order with the seal and container door was closed before loading. The main disputes of this case were the reason of leaking. Although the shipper proved that the packing materials used for the hazardous goods with one appraisal sampling, it could not be proved that all packing of cargos were consistent with the appraisal sampling result. Therefore, the evidence from the shipper was just prima facie to conform the requirements of IMDG, the reason for leaking was improperly packing in fact. Because the shipper failed to follow the provision of law, the claim of carrier for disposal fees as well as other relative expenses was supported by Guangzhou Maritime Court with the verdict of No. 527 (2010) GuangHaiFa Chuzi on September 8,2011.

B. Case involved with Shipper's Stowing and Lashing Improperly

Another case concerned with the obligation of shipper to declare the nature of dangerous goods improperly. It was made by Shanghai Maritime Court with the verdict of No. 365 (2008) HuHaiFaShang ChuZi on June 24, 2009. The shipper, Ningbo Zhonghuajin Import & Export Company concluded the contract of carriage of goods by sea with CMA Shipping Company for the transportation of 1600 drums chemicals in two containers from Shanghai to Buenos Aires, Argentina. One order bill of lading was issued by the agent of CMA on April 28, 2007, it stated that shipper's load and count, dangerous nature ranked with 9 levels of IMDG. While the vessel CMA CGM L'ETOILE left South Africa for Rio De Janeiro Brazil, two containers marked with IPXU3272379 and ECMU1775319 were found leaking on June 3, 2007. While the vessel called at port of Rio, the survey had been arranged. According to the survey report, the reasons for leaking were lacking the clamping plank by the restraint of loads and lashing of drums improperly. Because two containers were loaded and stowed by the shipper himself, and there was no any evidence to prove that there was negligence of carrier for such kind of FCL cargo, therefore the shipper should be responsible for all expenses for disposal. The claim from the carrier was supported thereby.

C. Case Concerned with Declaration Incorrectly

The case was held by Shanghai High People's Court with the verdict of No. 156 (2009) HuGaoMinSi (Hai) ZhongZi on November 11, 2009.

The applicant, China BingGong Material Company (hereafter called: Bing Gong Company) disagreed with the judgment from Shanghai Maritime Court with No. 510 (2007) HuHaiFaShang ChuZi, appealed to Shanghai High People's Court against the defendant, FanCheng International Forwarding Limited Company (hereafter called: FanCheng Company). The fact was that FanCheng Company entrusted China Shipping Container Limited Company to transport fiber products in the container (No. CCLU4503561) from Shanghai to Istanbul. One bill of lading (No.8SHAIHA3A8510) was issued by the carrier on August 10, 2006. When the vessel was discharging in Beilun port of Ningbo, the smoke occurred suddenly from the fourth hold which caused the surface of nearby containers and bulkheads of hold with white solid substances. The port authority took measures to extinguish the fire. And all polluted containers were discharged in Ningbo for further cleaning and disposal. For the safety of vessel and voyage, the suspect container (No. CCLU4503561) was discharged at Ningbo. When the vessel called at Shenzhen, for the safety of other cargoes and the vessel, another 34 containers as well as the holds of vessel cleaned again. Afterwards, the vessel resumed the voyage according to the schedule. It was proved that the silicon rubber promoter loaded in the suspected container which had chemical reaction and then caused the happening of explosion. The suspect cargo was consigned by BingGong company to FanCheng Company with the name of Silicon Rubber BIS2.4 only. Because FanCheng Company refused to accept any dangerous cargoes and knew nothing about nature of Silicon Rubber BIS2.4, therefore, BingGong Company tendered one written declaration to announce that the shipped cargoes were not dangerous one, just with the nature of general chemical, and promised to bear all risks and liabilities if false information provided. Then FanCheng Company consolidated the suspect cargo together with others in one container (No. CCLU4503561) and one NVOCC bill of lading was issued on August 10, 2006 by FanCheng as the carrier, the shipper was BingGong Company. After compensation to the actual carrier, then FanCheng Company claimed against BingGong Company

for all expenses and risks arising from the accident, including the fees for cleaning, discharging, surveying and any other necessary fees in port of Ningbo and Shenzhen.

The first trial court found out that Silicon Rubber promoter was ranked with 5.2 dangerous cargo, according to the provisions of IMDG. If the temperature was up to 45 centigrade, the explosion might occur. Therefore, BingGong company failed to declare the real nature of goods was the main reason for the accident. And because there were two contract of carriage of goods by sea existed in this case, one was between BingGong Company and FanCheng, another was between FanCheng and China Shipping Company, therefore, FanCheng being the shipper should be responsible for all expenses and liabilities suffered by its carrier- China Shipping Company, and then FanCheng could recourse against its shipper-BingGong Company. The judgment of Shanghai Maritime Court was supported by Shanghai High People's Court.

IV. The Qualification of Carrier for the Carriage of Dangerous Goods

The basic condition for the qualification of carrier for the carriage of hazardous goods shall mean the engaged person must have and satisfy the lowest requests by law which constitutes one of ship seaworthiness. Because the transportation of dangerous cargo itself namely has strong technical nature and specialized characteristic, together with thinking of special risks from ocean, it is not difficult to understand that more complex and stricter requirements shall be satisfied for carrier of dangerous cargo. According to present effective marine transportation administrative rules and regulations, the legal requirements for carrier of dangerous cargo include personnel intelligence and ships intelligence. [10]

Personnel intelligence includes the following aspects. Firstly, the shipowner, operator and manager shall take necessary measures to protect the safety of human life, the property and ships; preventing and controlling ships pollution according to the law or regulations concerned with traffic safety and environment protection; finish

[10] *See* Article 16-22, and article 29-32 of *Management Regulation on Safety Supervision of Dangerous Goods carried by Ships.*

emergency plan and oil contingency plan to provide corresponding emergency rescues, equipment and to take actions if waterway traffic accident, hazardous goods divulging accident and oil spill accident occurs; participate and obtain insurance certificate or similar financial security according to national compulsory stipulations on the safety of vessel as well as preventing pollution from ships. Secondly, the master, crew shall have competent certificates and any other necessary training certificates issued by Maritime Safety Administrative Authorities; familiar all safe knowledge and operational process for the carriage of dangerous goods; understand the risks, the nature and safe precaution measures about dangerous goods carried; follow and obey emergency predetermined plan to take the corresponding action.

Ships intelligence includes that the ships, hull, structure, equipment, nature and layout shall have been kept in seaworthiness for the voyage together with valid certificates and documents required by law; and kept in such good order and conditions, according to law, rules , regulations, technical documents on the survey and examination of ship; the vessels engaged in international route shall also satisfy the relative provisions of international conventions; the ships shall conform to those safety technology documents related to stowage, isolation and transportation of hazardous goods, and carry those designated goods which have competent certificate issued by ship survey authorities; the vessels engaged in international shipping shall also satisfy the requirements of IMDG Code, while the vessel engaged in coastal navigation shall follow the provision of *Rules on Dangerous Goods Transportation by Water Way* (RDTW); all of carried dangerous goods shall be classified and stowed correctly to make sure the safety of vessel after loading on board. All dangerous cargo shall be refused to carry, to transport if they failed to follow the requirements on the packing and stowing of dangerous goods according to international and national rules.

From the discussion mentioned above, the ‘carrier’ shall be qualified and competent for the carriage of dangerous goods by sea according to Chinese Regulations. However, there are two kind of 'carrier' defined by article 42 of CMC-carrier and actual carrier. In shipping practice, it is quite common for the shipper to conclude the contract of carriage of dangerous goods by sea with one NVOCC company, whether such NVOCC being contractual carrier and actual

carrier who engages the whole or part of carriage of dangerous goods in fact shall be qualified according the requirements mentioned above?

one commentator proposes that only the actual carrier of hazardous goods shall be qualified legally, it is unnecessary to require contract carrier, NVOCC to have such intelligence.[11] In fact, article 16 of *Management Regulation on Safety Supervision of Dangerous Goods carried by Ships* provides clearly that only those persons engaged in the transportation of hazardous cargo, not only the shipowner, but also operator and manager of the ship, shall have such legal intelligence. The paper insists on that it is impractical and unreasonable to have such requirements for all contractual carrier or NVOCC, because both of them may not control vessel in the practice, neither participate or engage in the actual transportation.

V. The Obligation of Carrier for Dangerous Goods

Hague Rules, Hague-Visby Rules as well as CMC provides the basic obligations of carrier for ordinary cargo as the followings. Firstly, the carrier shall before and at the beginning of the voyage, exercise due diligence to make the ship seaworthy, properly man, equip and supply the ship and to make the holds, refrigerating and cool chambers and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and reservation. Secondly, the carrier shall properly and carefully load, handle, stow, carry, keep ,care for and discharge the goods carried; Thirdly, the carrier shall carry the goods to the port of discharge on the agreed or customary or geographically direct route without any unreasonable deviation. Fourthly, the carrier shall deliver the goods at designated discharging port as agreed time expressly. For the obligation of carrier for transportation of dangerous goods, it shall be as almost the same as those for ordinary cargoes.

In the case held by Shanghai Maritime Court with the verdict of No.185(2005) HuHaiFaShang Chuzi on Dec. 23, 2005 indicated that the carrier shall be properly and diligently to take care of dangerous cargo.

In this case, 5000 tons of Peruvian Fish Meal was carried by Anyangjiang vessel from port of Chimobote, Peru to port of Shanghai.

[11] NiXuewei, *Study on the Qualification of Carrier under the Contract of Carriage of Dangerous Goods by Sea*, (1) Zhujiang Waterway, at 36 (2005).

When the vessel arrived at Shanghai, it was inspected by Wusong Entry-Exit Inspection and Quarantine Bureau that about 1,005 tons of Fish Meal happened to agglomerate, changed color with bad smell. After PICC Shanghai Company compensated to the cargo owner for loss and damage, exercised its right of subrogation to claim against the carrier--COSCO Guangzhou.

After the investigation, the court found that the reason for the loss of or damage to the fish meal was that the cargo was stowed near the main engine room with the negligence of carrier, and the temperature reached up until the fire occurred. Therefore, Shanghai Maritime Court supported the claims from PICC Shanghai Company and the carrier-COSCO Guangzhou should be responsible for RMB 313,510.14 and its interests.

VI. The Right of Carrier for Carriage of Dangerous Goods

A. Refusing Carriage of Dangerous Goods

In the shipping practice, the carrier may exercise his rights to resist to transport the dangerous goods in following situation:(1) the ship itself is not suitable for the transportation of hazardous goods;(2) the carrier does not have competent qualification to transport hazardous goods;(3) the shipper violates the legal or contractual obligations or duties, such as fails to pack properly, to mark or label the dangerous goods, or fails to inform the real nature of goods to the carrier in writing[12].

It is not only the right of carrier to refuse carrying dangerous goods if the conditions satisfied mentioned above, but also it is the obligation of the carrier. According to article 21 of *Management Regulation on Safety Supervision of Dangerous Goods Carried by Ships*, failing to conform to the provisions of international conventions or national laws on safe packing and stowing of dangerous goods, loading and transporting of dangerous goods shall be refused."

Certainly, the right of carrier to refuse to carry dangerous goods shall be distinguished with carrier's violation behavior. If it is proved that the carrier exercises its refusal right unreasonable and unfair, such

[12] *See* Article 306 of *Contact Law*.

refusal should be considered as behavior of breach contract and the carrier shall be liable for all losses or damages arising from such breach.

B. Right of Emergency Disposal of Dangerous Goods

The emergency disposal right of hazardous goods refers in the perils of carriage of dangerous goods by sea, the carrier may have such goods landed, destroyed or rendered innocuous when they become an actual danger to the ship, the crew and other persons on board or to other goods, without any compensation[13]. It does not matter whether the shipper inform the carrier correctly the nature of goods or not, the carrier may exercise the right to dispose on dangerous goods. If the carrier is knowledge of the nature of the dangerous goods at the time of shipment, the expenses or losses arising from such disposal measures shall not prejudice to the contribution in general average, if any.

There was a dispute between A.P.Moller MAERSK Limited Company being the carrier and Shanghai Zhongnong International Trade Limited Company being the shipper on the fees of disposal and returning back dangerous goods. The case was made by Shanghai High People's Court with the verdict of No.182 (2009)HuGaoMinSi (Hai) ZhongZi on August 3, 2010. One kind of insecticide with name of DIAZINON was consolidated into two TEU containers, and carried from Port of Shanghai to Port of Odessa, Ukraine. The bill of lading was issued by APM MAERSK, two containers were FCL cargoes. And the number of two containers were No.POCU0554684 and No.TTNU3895187. The container of No.POCU0554684 was found leaking in Malaysia, and No. TTNU3895187 was found leaking in Italy. On August 1 2006, APM MAERSK was entrusted by the shipper to dispose No.POCU0554684 container immediately on the spot and the shipper tendered one Letter of Guarantee to bear all risks, liabilities and fees of disposal. On June 4, 2007, the cargo in the leaking container with Number of TTNU3895187 was ordered to be shifted and transferred into other two containers which were required by Italian Customs and was ordered to be returned back to China later. Therefore, the carrier had to deal with this leaking container as well as other two containers back to China. Afterwards, the carrier claimed all liabilities and fees arising from the accident against the shipper in Shanghai

[13] *See* Article 68 of *Chinese Maritime Code.*

Maritime Court, and the shipper argued that the loss of or damages to the leaking goods resulted from the negligence of carrier. Shanghai Maritime Court decided that there were no any evidence to prove there was negligence of carrier in disposal of leaking goods and the measures took by the carrier sounded reasonable in accordance with the order of Italian Customs. Therefore, claims from the carrier were supported. The shipper disagreed with the first trial judgment and then appealed to Shanghai High People's Court, and the first trial judgment was held on.

C. Exemption for Loss of or Damage to Dangerous Goods

According to article 51 of CMC, if the loss of or damage to the goods arising or resulting from the following causes, the carrier shall not be liable for: (1) act of the shipper, owner of the goods or their agents; (2) nature or inherent vice of the goods; (3) inadequacy of packing or insufficiency or illegibility of marks. Certainly, the carrier shall bear the burden of proof to exonerate from the liability for compensation.

In shipping practice, it is not seldom to find out that the shipper fail to declare the nature of dangerous goods intentionally or declare with lower rank or provide false information for saving money. Therefore, if only the carrier may prove the reason of loss or damage to dangerous goods, he may invoke the exemption clause provided by CMC.

The following case was made by Tianjin Maritime Court with the verdict of No. 179 (2004) JinHaiFaShang ChuZi on May 10, 2005. On October 2002, Zhongqi Kairui Trade Limited Company entrusted Pantaina Express Company to transport three containers with cargo of Tambourum from Tianjin XinGang to Lehavre. The cargo had been loaded on vessel of HANJIN Pennsylvania on October 29, 2002. While the vessel was on the route sailing from Singapore to Suez Cannel, the fire and the explosion occurred in holds of No. 4 and No.6 which caused seriously damages to the vessel as well as other containers in the holds. The shipper claimed against PICC Tianjin Company for losses. After compensation, being the insurer, PICC Tianjin Company exercised its subrogation right and claimed against the carrier, Pantaina Express Company as well as the actual carrier, Hanjin Shipping Company. The court found out that there was no evidence to prove that there were any negligence of carrier or actual carrier in taking care of

goods, neither the negligence of both carriers for the reason of fire, therefore, both carrier or actual carrier might invoke the exemption of article 51 of CMC, the claims from the insurer were dismissed by the court.

In the case of PICC Shenzhen Company v. Shenzhen WSA Lines Ltd, which was held by Guangzhou Maritime Court with the verdict of No.296(2003)GuangHaiFa ChuZi on May 24, 2004. Being the shipper, Huanyu Company delivered 200 boxes rechargeable battery to Shenzhen WSA Lines Ltd. as the carrier who was responsible for the transportation of goods from Hongkong to Dubai on the vessel of P&O NEDLLOYD, and one bill of lading (No. WSZABB0205072) was issued by the agent of Shenzhen WSA Lines Ltd. All rechargeable battery were consolidated with VCD/CD cleaner together in one container (No. NYKU6594634). In the operation of discharging in Dubai, some of cargoes had been found damaged more or less. Passi Marine Surveyors & Consultants Company was entrusted to investigate the accident. The conclusion of the survey report was that all battery (ranked with 8 levels under IMDG) were stowed on the bottom of container and all VCD/CD cleaner (ranked with 3.2 levels under IMDG) were handled on the top of battery without any isolation devices. During the navigation, the fire occurred and caused by the contacting of battery with leaking of or spilling out of liquid cleaner. And the battery suffered total loss with USD 73,920. Huanyu Company, being the insured, claimed against PICC Shenzhen Company for all risks. After compensation to the insured, PICC Shenzhen Company obtained the right of subrogation and claimed against the carrier. The court considered that the shipper failed to declare the nature of battery as dangerous goods and failed to inform the necessary precaution measures to the carrier, there was no fault for the carrier to stow it as ordinary cargo with other goods in one container, therefore, all the loss or damage to the goods shall be borne by the shipper himself, and the claim by insurer against the carrier was refused by the court.

If the dangerous cargo suffers damage for the reason of negligence of shipper, carrier or actual carrier respectively or jointly, the loss of or damage to goods shall be endured by the party in negligence or the party who fails to follow the legal obligations. However, the reasons to cause the loss of or damage to dangerous goods are various, especially the reason from co-conducts of both carrier, actual carrier and shipper

negligently or mixed negligence of all parties in some situations. The following case is one good example for mixed negligence on dangerous goods. The verdict with No. 20 (2003) HaiShang ChuZi was made by Beihai Maritime Court on May 23, 2003.

Guangxi Gongguan fireworks Industry as the shipper concluded one multimodal transport contract with Antong International Freight Forwarding Limited Beihai Company (Hereafter called: Antong Beihai Company) as the multimodal transport operator on September 10, 2002. Antong Beihai Company was responsible for transportation 16,000 boxes fireworks in one container from Qingshuijiang warehouse of shipper to Beihai port, and then further for carriage from Beihai Port to Hongkong and Hongkong to Hamburg Port by sea, and the shipper had paid all freight for whole voyages. Antong Beihai Company entrusted Beihai Chengdong Transportation Ltd. to arrange the land transportation from the warehouse of shipper to Beihai port. During the carriage of goods by land , the container trailer collided with several heavy cars carried by train when the trailer tried to across the railway line, which caused the container trailer damaged seriously as well as heavy cars. Because of the collision, all fireworks in the container burned and caused serious explosion, which caused the goods, the container as well as the trailer came into total loss. If was found that the driver of trailer speeded too fast when crossing the railway line and failed to declare to railway station administrative authority with the nature of dangerous goods, the court considered the fault of driver was the main reason, and if the goods carried in trailer was not dangerous good, the result of the accident would not be so seriously, therefore nature of the dangerous goods itself was the minor reason. That is typical case with mixed negligence of parties. The multimodal transport operator had the right to rearrange part of transportation to one local actual carrier according to the law of multimodal transport. Guangxi Gongguan fireworks Industry claimed against Antong Beihai Company for total loss of cargo RMB 276,135.96. According to the verdict of No. 19 (2003) HaiShang ChuZi on May 20, 2003, Beihai Maritime Court decided that Guangxi Gongguan firworks Industry as the shipper had informed the nature of goods to the multimodal transport operator and marked, labeled correctly according to IMDG, and the loss occurred at land, therefore *Contract Law*, not *Chinese Maritime Code*, should apply to this case. Because there was no any exemption clause existed under *Contract law* like those article 51 under CMC, if only loss of or

damage to the goods happened during the period of responsibility of multimodal transport operator, the operator should be liable for all loss. After compensation, the multimodal transport operator might have one recourse action against the local carrier for losses or damages.

Therefore, the total losses resulting and arising from the accident suffered by the multimodal transport operator shall be borne by the local carrier (land transport operator) with 60%, and 40% endured by multimodal transport operator himself only.

Conclusions

Although there is no explicit definition on dangerous goods not only from international conventions, but also from Chinese laws, the paper insists on that the standard to make decision whether one cargo is danger or not, shall be described by its substantive nature from the trend and development of international trade and shipping as well as international conventions. The real nature of the good shall be harmful to persons, properties, the vessel as well as the environment. And also it is not prerequisite condition for one dangerous good listed on IMDG or national table or not.

The carrier, actual carrier and shipper shall perform the obligations and liabilities according to laws, regulations, rules and contractual agreements. And also they may enjoy rights or invoke exception clauses provided by laws, regulations etc.

Different from those provisions of Hamburg Rules, it is not quite clear in China that whether the contractual shipper or the actual shipper who delivers the goods to the carrier, shall have the obligation to provide correct information as well as to mark and label dangerous goods properly to actual carrier, if any. Thinking of two different kinds of shippers are defined by CMC, the paper insists on that both contractual shipper and actual shipper have the obligations mentioned above. Meanwhile, the actual carrier shall be qualified and competent to carry dangerous goods by sea, therefore, the actual carrier shall have the right to know the nature of goods clearly and correctly to make sure the safety of carriage of goods by sea.

REFERENCES

International Maritime Dangerous Goods Code （IMDG）
International Convention on Safety of life at Sea （SOLAS）
Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from ships, 1973 （MARPOL73/78）
International Code for the Construction and Equipment of Ships Carrying Liquefied Gases in Bulk (IGC Code)
1924 Hague Rules
1978 Hamburg Rules
2008 Rotterdam Rules
Maritime Traffic Safety Law， PRC
Ocean Environment Protection Law，PRC
Regulation of safety Management on Dangerous Chemical Goods
Chinese Maritime Code, Management Ordinance for the Prevention and Curing Ocean Environmental Pollution from Ships
Rules on Dangerous Goods Transportation by Water Way
Management Regulation on Safety Supervision of Dangerous Goods Carried by Ships
Permission Certification Enforcement Rules on Safety Usage of Dangerous Chemicals
Management Rules on License of Dangerous Chemicals Operation
Management Rules on Registration of Dangerous Chemicals
Management Regulation on the safety of dangerous goods at port
Chinese Maritime Code，PRC
Contract Law，PRC
NiXuewei, 'Study on the Qualification of Carrier under the Contract of Carriage of Dangerous Goods by Sea', *Zhujiang Waterway*, 2005 (1), p36.

This article is published in *The Asian Business Lawyer (ABL)* Vol. 20.
The publication of *ABL* Vol. 20 has been financially supported by KIM & CHANG.

A Review and Update on the Law and Practice of Carriage of Cargoes that May Liquefy under Voyage Charterparty

Lianjun, Li[*]

[*] Li Lianjun is a partner and head of Shipping Litigation Department at Reed Smith Richards Butler, a well-known international law firm. He qualified as a solicitor in Hong Kong and England and Wales. Lianjun has wide experience in dealing with international trade, shipping and commodity disputes, documentary credit issues, ship finance and sale and purchase, international commercial and shipping arbitration. Lianjun received education from Dalian Maritime University, World Maritime University, Stockholm University and The University of Hong Kong. He is a fellow of the Chartered Institute Arbitrators and a panel or listed arbitrator in many arbitration institutions, including Hong Kong International Arbitration Centre (HKIAC), China International Economic Arbitration Commission (CIETAC), China Maritime Arbitration Commission (CMAC), Wuhan Arbitration Commission, South China Economic and Trade Arbitration Commission (Shenzhen Court of International Arbitration), Shanghai International Economic and Trade Arbitration Commission (Shanghai International Arbitration Centre), Qingdao Arbitration Commission, Xiamen Arbitration Commission, Changsha Arbitration Commission, Kuala Lumpur Regional Centre for Arbitration, Arbitration Centre Across the Straits and Rizhao and Singapore Chamber of Maritime Arbitration. He is also a Visiting Professor at Dalian Maritime University, Korea University and the International Shipping Law School of East China University of Political Science and Law. He is a council member of the China Maritime Law Association and serves as a member of Hong Kong Maritime and Port Board, the advisory body on Hong Kong shipping policy to the Government of Hong Kong Special Administrative Region of the People's Republic of China. He has also been highly recommended as a leading shipping lawyer by Chambers & Partners and Legal 500. He would like to express his thanks to his colleagues Jonathan Hooi, Edward Liu, Yiran Wen and Julia Liu for their assistance in preparing for this article. For the avoidance of doubt, the opinions herein represent the author's opinions only and do not represent any opinion from Reed Smith Richards Butler.

ABSTRACT

In the recent years, liquefaction of bulk cargo has attracted much attention in the shipping industry due to the loss of human life. This paper will review the current laws and regulations and practice relating to the carriage of cargoes that may liquefy, both under English law on carriage of dangerous goods and under the International Maritime Solid Bulk Cargoes Code (IMSBC Code). This paper will also review the relevant insurance position. The latest amendments to the IMSBC Code will also be examined.

KEYWORDS: Cargo Liquefaction, Cargoes That May Liquefy, Dangerous Cargoes, the IMSBC Code, Voyage Charterparty

Table of Contents

I. Introduction

In the recent years, the phenomenon of liquefaction of dry bulk cargoes has received increasing attention due to the number of relevant accidents and the loss of human life. More than ten vessels were lost due to the alleged cargo liquefaction since 2009, including MV Asian Forest, MV Black Rose, MV Jian Fu Star, MV Nasco Diamond, MV Hong Wei, MV Vinalines Queen, MV Sun Spirits, MV Harita Bauxite, and MV Trans Summer. Given the extent of the loss, liquefaction has now been regarded as a major hazard for bulk carriers.

Liquefaction is a phenomenon in which soil-like material abruptly

transforms from a solid draft state to an almost fluid state. Many common bulk cargoes, such as mineral concentrates, iron ore fines and nickel ore all entail the risk of liquefaction. Cargoes that are at risk of liquefaction contain at least some fine particles mixed with some water, although they may not appear visibly wet because the particles are held together by friction. During the voyage, the movement of the vessel may cause the frictional force to be lost, then the cargo may suddenly transform to a more liquid status like mud. The movement of the mud generates internal dynamic momentums called a "free surface effect" liken to the forces generated if one swirls a basin of water round and round. Such mud can flow across a ship's hold, move great weights around and apply great forces, posing huge threat to the vessel's stability. The risk of liquefaction is crucially dependent on how much water is in the cargo. The lowest moisture content at which liquefaction can occur is called the Flow Moisture Point (FMP). In cargoes loaded with moisture content in excess of the FMP, liquefaction may occur unpredictably at any time during the voyage.

Due to the unpredictability of liquefaction and the great weight of the liquefied cargo, capsizing and total loss of the vessel is not uncommon and such accidents happen rather fast. As a result, both shipowners and charterers must carefully handle the loading and shipping of cargo that may liquefy in order to avoid the tragedy of the loss of ship and consequent liabilities.

The major rule regulating the shipping of such cargo is the International Maritime Solid Bulk Cargoes Code (IMSBC Code) which was promulgated under the Convention for the Safety of Life at Sea (SOLAS 1974). The IMSBC Code sets out the internationally agreed provisions for the safe stowage and shipment of solid bulk cargoes, including cargoes that may liquefy. The relevant provisions regarding parties' obligations and responsibilities for loading and shipping bulk cargo including the cargo that may liquefy are compulsory under the SOLAS Convention and must be strictly observed. For example, certificates evidencing the moisture content of the cargo and the transportable moisture limit should be provided at the time of the shipment.

Apart from the IMSBC Code which is mandatorily applied, the parties are also required to comply with the terms of the carriage under the charterparty.

II. Law Relating to Carriage of Dangerous Cargo under Voyage Charterparty

Cargoes that may liquefy can in appropriate circumstances fall within the concept of "dangerous goods/cargoes" and the relevant terms of the charterparty need to be carefully considered when the parties agree to enter into a charterparty to transport this kind of cargo.

A. Meaning of Dangerous Cargo

It is not possible to give an exhaustive definition of dangerous cargo. In a broad sense, that includes goods which, as a result of their inflammable, explosive, corrosive, noxious or other properties are likely to cause personal injury or physical damage to the ship or other cargo. The question is one of degree.

Article 4, r 6 of the Hague Rules defines "dangerous cargo" as "goods of an inflammable, explosive or dangerous nature". Article 32 of the Rotterdam Rules defines "dangerous cargo" as "when goods by their nature or character are, or reasonably appear likely to become, a danger to persons, property or the environment".

A different approach is taken in the International Maritime Dangerous Goods Code (IMDG Code) which divides dangerous cargo into nine major classes. Substances or articles are classified as "dangerous goods" if they meet the criteria prescribed in the IMDG Code for any of these classes. This is an example of an enumerated and narrow definition. The nine classes of dangerous goods under the IMDG Code are:

Class 1 - Explosives
Class 2 - Gases
Class 3 - Flammable liquids
Class 4 - Flammable solids and other flammable substances
Class 5 - Oxidizing substances and organic peroxides
Class 6 - Toxic and infectious substances
Class 7 - Radioactive material
Class 8 - Corrosive substances
Class 9 - Miscellaneous dangerous substances and articles

Under English law, the term is understood in a quite broad sense and may sometimes include not only physical danger but also non-physical dangers. A cargo may be dangerous if it is unlawful and likely

to subject the ship to delay, detention or seizure. In *Effort Shipping v. Linden Management (The Giannis NK)* [1998] 1 Lloyd's Rep. 337, Lord Lloyd of the House of Lords commented that

> *"the scope of the word 'dangerous' does not only require that the cargoes cause or become capable of causing direct physical damage to other cargoes. Even if the cargoes do not cause any physical danger to the vessel or other cargoes, but have legal danger in accordance with certain local laws and regulations, which cause damage or delay to the vessel or other cargoes. It seems pointless to argue that whether the cargo which has legal danger is dangerous cargo."*

It is also suggested that "dangerous goods" is simply a convenient description of the category of goods to which the obligation to give notice applies. Under common law, the shipper/charterer impliedly undertakes not to ship dangerous goods without notifying the carrier of their particular characteristics in advance. Depending on the exact contractual terms, carrier may have the right to refuse carriage of dangerous goods. If dangerous goods are allowed, upon receiving notice, the carrier should take sufficient precautions to make sure the safety of the carriage of such goods. Put simply, the common law obligation requires the shipper/charterer to provide sufficient information for the carrier to make an informed decision as to whether to carry the goods and, if he does so, to take the appropriate precautions to keep the hazards involved to an acceptable level.

1. Charterers' Duties in relation to Dangerous Cargoes

(i) Express charterparty provision

The most commonly used voyage charterparty, Gencon form[1], contains no express prohibition of dangerous cargoes. Where such a prohibition is agreed and inserted, the charterers will be liable for breach if dangerous goods are tendered for loading. When the provision takes the form of a list of specific cargoes followed by a general prohibition of dangerous cargo, the prohibition is not to be understood

[1] The Baltic and International Maritime Council Uniform General Charter (as revised 1922, 1976 and 1994).

as being limited to the types of specific cargoes enumerated.

Even when the master consents to the shipment of dangerous cargo with knowledge of its dangerous nature or characteristics, it does not mean that owner's rights under the charterparty are waived and indeed the master has no implied or usual authority to do so[2].

Moreover, if the breach is sufficiently serious, the owner may elect to terminate the charterparty upon learning of it, but if he affirms the charterparty, all terms of the charterparty will continue to apply to the carriage of the new cargo. It appears that if the tendering of the cargo is rejected by the owner, the charterer can, upon having tender rejected, find and tender another cargo, so long as it otherwise falls within the contractual description[3].

If the charter describes the cargo as having been subjected to a treatment designed to reduce the risks involved in the carriage, that requirement must be strictly complied with, and the charterer is in breach if even a small quantity has not been properly treated[4].

With respect to cargoes that may liquefy, carriers can ensure that cargo inspection, sampling and testing prior to loading is a contractual right under the charterparty by incorporating, for example, the BIMCO *"Solid Bulk Cargo Which May Liquefy"* clause.

The BIMCO clause reads as follows:

"(a) The Charterers shall ensure that all solid bulk cargoes to be carried under this Charter Party are presented for carriage and loaded always in compliance with applicable international regulations, including the International Maritime Solid Bulk Cargoes (IMSBC) Code 2009 (as may be amended from time to time and including any recommendations approved and agreed by the IMO).

(b) If the cargo is a solid bulk cargo that may liquefy, the Charterers shall prior to the commencement of loading provide the ship's Master, or his representative, with all information and documentation in accordance with the IMSBC Code, including but not limited to a certificate of the Transportable Moisture Limit (TML), and a certificate or declaration of the moisture content, both signed by the shipper.

---

[2] *See* Voyage Charters, 4th ed., at para6.46.

[3] *See* by analogy *Borrowman Phillips v. Free & Hollis* (1878) 4 Q.B.D. 500.

[4] *See General Feeds v. Burnham Shipping (The Amphion)* [1991] 2 Lloyd's Rep. 101; *The Nour* [1991] 1 Lloyd's Rep. 1.

(c) The Owners shall have the right to take samples of cargo prior to loading and, at Charterers' request, samples to be taken jointly, testing of such cargo samples shall be conducted jointly between Charterers and Owners by an independent laboratory that is to be nominated by Owners. Sampling and testing shall be at the Charterers' risk, cost, expense and time. The Master or Owners' representative shall at all times be permitted unrestricted and unimpeded access to cargo for sampling and testing purposes.

If the Master, in his sole discretion using reasonable judgement, considers there is a risk arising out of or in connection with the cargo (including but not limited to the risk of liquefaction) which could jeopardise the safety of the crew, the Vessel or the cargo on the voyage, he shall have the right to refuse to accept the cargo or, if already loaded, refuse to sail from the loading port or place. The Master shall have the right to require the Charterers to make safe the cargo prior to loading or, if already loaded, to offload the cargo and replace it with a cargo acceptable to the Master, all at the Charterers' risk, cost, expense and time. The exercise by the Master of the aforesaid rights shall not be a breach of this Charter Party.

(d) Notwithstanding anything else contained in this Charter Party, all loss, damage, delay, expenses, costs and liabilities whatsoever arising out of or related to complying with, or resulting from failure to comply with, such regulations or with Charterers' obligations hereunder shall be for the Charterers' account. The Charterers shall indemnify the Owners against any and all claims whatsoever against the Owners arising out of the Owners complying with the Charterers' instructions to load the agreed cargo.

(e) This Clause shall be without prejudice to the Charterers' obligations under this Charter Party to provide a safe cargo. In relation to loading, anything done or not done by the Master or the Owners in compliance with this Clause shall not amount to a waiver of any rights of the Owners."

As will be discussed below, the BIMCO clause expressly incorporate some requirements under the SOLAS Convention and the IMSBC Code like the production of written evidence of moisture content and give contractual effect to those requirements. Importantly, the master is entitled to refuse to load cargo or sail if he considers, in his sole discretion using reasonable judgement, that there is a risk to the

safety of the crew, vessel or cargo. Charterers are made responsible for all costs and claims arising out of their failure to comply with their obligations.

(ii) Implied duty to give notice

So far as cargo and ship safety are concerned, even absent express terms about safety, under English law, the shipper of cargo is under an implied obligation not to ship dangerous goods without giving sufficient notice to carrier which would enable them to take proper precautions to ensure that the goods loaded can be carried without causing damage.

In *Brass v. Maitland* (1856) 6 E. & B. 470, the cargo shipped, which were described as "bleaching powder", consisted mainly of chloride lime, a highly corrosive substance. The casks were defective so that the contents leaked and caused damage to other goods on board. The shipowners had no actual knowledge of the corrosive nature of the contents or of the defective condition of the casks. The court held that, unless the state of the casks and the dangerous and corrosive nature of their contents was something that the master ought reasonably to have been aware of, the shipowners were entitled to damages.

The duty has also been formulated in slightly different terms, namely that a shipper who does not give notice of the dangerous character of the goods shipped is taken to warrant that they are fit for carriage in the ordinary way, and are not dangerous[5]. This formulation amounts to much the same thing, but it makes it clear that, if the required notice is not given, the breach consists in the shipment of the goods itself, rather than the mere failure to give notice.[6]

The nature of the duty used to be subject to some debate. The issue is whether the duty to give notice is an absolute contractual duty or merely a duty to give notice of any dangerous characteristics of which the shipper was or ought to have been aware. Decisions, on balance, supported the former view, and the argument may now be regarded as settled by *The Giannis NK* [1998] 1 Lloyd's Rep. 337, in which the House of Lords held unanimously, although *obiter*, that the duty to give notice was absolute.

The position of a charterer who is not actually the shipper is not

[5] *See* in particular *Bamfield v. Goole & Sheffield Transport* [1910] 2 K.B. 94, 113.
[6] *See* Voyage Charters, 4th ed., at para6.49.

much different. A charterer will be liable if necessary notice is not given, even though he may not himself be the shipper.[7]

(iii) The extent of the notice required

The precise circumstances of giving (or not giving) notice vary greatly.

Sometimes the dangerous nature of the cargo is entirely withheld from the carrier, as in *Bamfield v. Goole & Sheffield Transport* [1910] 2 K.B. 94 where highly dangerous ferro-silicon was shipped under the description of "general cargo". Sometimes the carrier may even be actively misled about the danger, as in *The Kapitan Sakharov* [2000] 2 Lloyd's Rep. 255 where the presence of explosive goods inside a container was concealed from the carrier.[8] In such cases it is obvious that there has been a breach of the requirement to give notice.

However, in a great number of cases, the issue of breach is more a matter of degree. The guiding principle of whether a notice given is sufficient is that the information to be given by the shipper or charterer must be such that an ordinarily experienced and skilful carrier will be able to appreciate the nature of the risks involved in the carriage and to guard against them[9]. On the one hand, the carrier "has no right to expect any communication respecting the nature of the goods when he himself may easily discover it". On the other hand, the carrier is not expected to be, or to call in, an expert chemist, or to resort to "investigation inconsistent with the usual course of commercial business"[10], but he would, no doubt, be expected to consult the International Maritime Organization (IMO). IMO publications and cargo-handling manuals, and other sources of information regarding the characteristics of cargoes are normally consulted by shipowners.

Often it is known to the carrier that the goods have some normal characteristics which might be regarded as dangerous. The issue is essentially factual: whether the cargo presented had any special hazards

---

[7] *Atlantic Oil Carriers v. British Petroleum Co.(The Atlantic Duchess)* [1957] 2 Lloyd's Rep. 55, 95.

[8] *See* Voyage Charters, 4th ed., at para6.53.

[9] *See* Voyage Charters, 4th ed., at para6.53.

[10] *Brass v. Maitland* (1856) 6 E. & B. 470, at 482, 487, per Lord Campbell C.J. and *Compania Sud Americana de Vapores S.A. v. Sinochem Tianjin Import and Export Corporation (The Aconcagua)* [2010] 1 Lloyd's Rep. 1,at para. 62.

in addition to the well-known hazards inherent in the carriage of such cargo.

(iv) Carrier's right to refuse dangerous cargoes

The purpose of the notification of the dangerous characteristics of the cargo is to enable the carrier to take the necessary precautions to ensure safe carriage of the cargo, or to reject it—if he is not contractually obliged to carry it.

The question then arises as to the circumstances in which the carrier is entitled to refuse the cargo. If express prohibition of dangerous goods is contained in the charterparty, the carrier can justifiably refuse to carry the cargo. Absent of such express prohibition, the description of the cargo in the charterparty matters.

If the cargo is described only in general terms, the authors of *Voyage Charters* are of the opinion that the carrier is entitled to refuse if the extra precautions required to ensure safe carriage will cause unreasonable delay or expense[11]. Where the cargo has been described specifically but presents unusual risks beyond those usually associated with a cargo of the charterparty description, it appears uncertain whether the carrier is entitled to refuse the goods arguing that they fall outside the charterparty description, or whether he is obliged to carry them after having received the appropriate notice.

Ultimately, the issue is whether the cargo tendered is a reasonable cargo having regard to the terms of the charterparty and all the relevant circumstances of the case. When it appears impossible to carry the goods safely, the carrier is justified in refusing them.

2. Recent Cases on Dangerous Cargo

Some recent cases relating to dangerous cargo touched on indemnity claim under bill of lading incorporating the Hague or Hague-Visby Rules. The relevant indemnity provision in the Hague or Hague-Visby Rules, Article IV r 6, provides that:

> "*Goods of an inflammable, explosive or dangerous nature to the shipment whereof the carrier, master or agent of*

[11] *See* Voyage Charters, 4th ed., at para6.60.

> *the carrier, has not consented, with knowledge of their nature and character, may at any time before discharge be landed at any place or destroyed or rendered innocuous by the carrier without compensation, and the shipper of such goods shall be liable for all damages and expenses directly or indirectly arising out of or resulting from such shipment.*
>
> *If any such goods shipped with such knowledge and consent shall become a danger to the ship or cargo, they may in like manner be landed at any place or destroyed or rendered innocuous by the carrier without liability on the part of the carrier except to general average, if any."*

In *Bunge SA v. ADM Do Brasil Ltda (The Darya Radhe)* [2009] EWHC 2337 (Comm), the cargo of soy bean meal pellets loaded on board of the vessel was contaminated with rats. When the rats were discovered, the Brazilian authorities ordered routine fumigation of the vessel's holds, which resulted in extra expenses and delay. The carrier claimed damages against the shippers, alleging that the rats were introduced during loading, and thus the cargo constituted "dangerous cargo" for the purpose of indemnity under Art IV, r 6.

The central issue for arbitration was whether the rats were introduced with the cargo (as contended by the carriers) or whether they were present on board before loading or got on the vessel through means other than with the cargo (as contended by the shippers). The arbitrators found that (1) the carrier failed to prove that any of the shippers were responsible for the introduction of the rat and (2) as the rats did not pose physical danger to the cargo of maize or the ship itself, the cargo was not "dangerous" for the purpose of Art IV r 6. The court confirmed the arbitrators' decision.

Therefore, so far as Hague and Hague-Visby Rules are concerned, the meaning of "dangerous" is restricted to physical danger and non-physical danger such as the risk of delay does not suffice.

In *Compania Sud Americana de Vapores SA v. Sinochem Tianjin Import & Export Corp (The Aconcagua)* [2009] EWHC 1880 (Comm); [2010] 1 Lloyd's Rep 1, calcium hypochlorite, a dangerous cargo under the IMDG Code, was shipped in containers. The bill of lading specified that the chemical shipped had a critical ambient temperature before ignition around 60 degrees centigrade (i.e., it could self-ignite if heated beyond 60 degrees centigrade). During voyage, the calcium

hypochlorite self-ignited, causing an explosion that damaged the vessel and other cargo.

After settling the claim by the shipowners, the charterers (claimant) claimed indemnity against the shippers for breach of bill of lading which incorporated Art IV r 6 of the Hague Rules. The claimant admitted negligent stowage of the container containing the chemical next to a bunker tank that was heated at some point during the voyage. However, by expert evidence it was established that temperature around the container could only rise to around 30 degrees centigrade as a result of the heating of the tank.

The court held that a prudent carrier at the time of the incident would have considered the cargo safe to carry in temperatures normally experienced on container ships and would not have known of expert opinions that the critical ambient temperature before ignition was below as low as 40 degrees centigrade if it was carried in large numbers of packages in containers. Thus, the court found that as the calcium hypochlorite in question possessed an abnormally low critical ambient temperature. The claimant did not have nor ought to have had knowledge of such abnormally dangerous character and never consented to carrying calcium hypochlorite of such a nature.

Therefore, the claimant would be entitled to indemnity under Art IV, r 6 unless it is shown that the loss resulted from breach of its overriding obligation of seaworthiness. The burden fell on the shipper to establish that the negligent stowage was a breach of the claimant's obligation and that it had causative significance to the loss. The shipper failed to do so because it could not prove that the cargo would not have exploded if stowed under normal conditions without being placed next to a heated tank. Moreover, even assuming that the heating had been causative, the claimant would be entitled to indemnity because the act of failure to care for the cargo (by stowing it next to a fuel tank) was an excepted peril under Art IV, r 2(a).

III. IMSBC Code Rules on Carriage of Cargoes that May Liquefy

The major rule for the safe carriage of solid bulk cargoes is the International Maritime Solid Bulk Cargoes Code (IMSBC Code), which became mandatory on January 1, 2011, under the International Convention for the Safety of Life at Sea, 1974 (SOLAS Convention).

Compliance with the IMSBC Code harmonizes the practices and procedures to be followed and the appropriate precautions to be taken in the loading, trimming, carriage and discharge of solid bulk cargoes when transported by sea.

Under the IMSBC Code, solid bulk cargoes are divided into three groups according to their level of risk in carriage:

- **Group A** – cargoes which may liquefy if shipped at a moisture content exceeding their Transportable Moisture Limit (TML).
- **Group B** – cargoes which possess a chemical hazard which could give rise to a dangerous situation on a ship.
- **Group C** – cargoes which are neither liable to liquefy (Group A) nor possess chemical hazards (Group B). Cargoes in this group can still be hazardous under certain circumstances (e.g., with a high-level moisture content).

A. General Requirements

All carriage of solid bulk cargo must comply with the following general requirements:

- **Information from the shipper**: Before accepting a cargo for shipment, the shipper must provide the master with valid, up-to-date information about the cargo's physical and chemical properties. The exact information and documentation required is listed in the IMSBC Code and includes items like correct Bulk Cargo Shipping Name and a declaration that the cargo information is correct.
- **Checking the cargo schedule**: Schedules in Appendix 1 of the IMSBC Code must always be consulted for individual cargoes. These describe each cargo's properties and detail the requirements for handling, stowing and carrying it safely.
- **Cargo space**: before loading a cargo, the carrier must inspect and prepare the cargo spaces pursuant to the specific requirements for the specific type of cargo involved (e.g., tendency to ship, dust hazards and flammability)
- **Loading plan**: Before loading or unloading, the master and the terminal representative must agree on a Loading Plan to

ensure that the permissible forces and moments on the ship are not exceeded.

- **Distribution and stability**: It must also be ensured that cargoes are properly distributed throughout the ship's holds to provide adequate stability and ensure that the ship's structure is not overstressed.

B. Specific Requirements for Cargoes that May Liquefy

SOLAS Convention requires that sufficiently in advance of loading, the shippers should provide the master in writing with information on any special properties of the cargo (e.g., the likelihood of shifting, and additional information for cargoes which may liquefy).

For cargoes that may liquefy, the most important part of the required cargo information is in the form of certificates that indicate the moisture content of the cargo and its TML. Cargoes that may liquefy shall only be accepted when the actual moisture content is less than the TML[12]. TML is defined in the Code as 90% of the FMP, which is level of moisture content that is necessary for liquefaction to happen and can only be determined by laboratory analysis of cargo samples.

In brief, the IMSBC Code specifies the following duties of the shippers in relation to cargoes that may liquefy:

1. Identification of hazard

Before commencement of loading, the shipper must declare to the master in writing whether or not the cargo offered for loading is a cargo that may liquefy[13], as this is not necessarily apparent from the cargo name or from a visual inspection of the cargo.

In principle, any bulk cargo that contains at least some moisture and at least some fine particles is at risk of liquefaction. The IMSBC Code specifies that all such cargoes should be submitted for laboratory testing to establish whether or not they possess flow properties[14]. If such testing shows that the cargo possesses a flow moisture point, shippers must provide a certificate of moisture and of TML prior to loading, regardless of whether the cargo is specifically listed by name

[12] SOLAS, Chapter VI, Regulation 6, at para2.
[13] IMSBC Code, at para4.2.2.2.
[14] *Id.*, Appendix 3, at para2.1.

in the IMSBC Code as a cargo that may liquefy (i.e., whether the cargo is listed as a Group A cargo). Master may insist on the cargo being submitted for testing before accepting them on board.

2. Certification of moisture content

The declaration of moisture content must contain a statement from shippers that this is the average moisture content of the cargo at the time the declaration is handed to the Master prior to commencement of loading[15].

The moisture content determination must be carried out on truly representative test samples of the entire cargo[16]. This is an elaborate process requiring full access to the cargo and careful planning to ensure the moisture content of the test sample is truly the average moisture content of the entire consignment[17].

Sampling for moisture content must take place not more than seven days prior to loading. Additional check tests should be conducted if there is significant rainfall between sampling and loading[18].

Therefore, an important connotation of the moisture content certification requirement is that the entire cargo must be readily available at the loading port for sampling some time in advance to loading, and cannot be delivered by piecemeal throughout a protracted loading period.

Moreover, shippers are required to declare the moisture content separately for each cargo hold of the vessel, unless sampling has shown that the moisture content is uniform throughout the entire consignment. In this regard, attention should be paid to three situations:

(1) Unprocessed ores: Compared to concentrates, the moisture content in unprocessed ores such as iron ore fines and nickel ore can vary significantly throughout the consignment and thus a hold-by-hold moisture declaration for such cargo is required. Nevertheless, in practice, few if any shippers do declare a hold-wise moisture content even in highly non-uniform cargoes, and this may be a cause for concern.

---

[15] *Id.*, at para4.3.2.
[16] *Id.*, at para4.4.1 to 4.4.4.
[17] *Id.*, at para4.4.4.
[18] *Id.*, at para4.5.2.

(2) Multiple types of cargo: Separate certificates is also necessary if more than one type of cargo is loaded commingled in the same cargo hold, e.g., if loading is from different stockpiles, from a different source of supply, or with different exposure to rain.

(3) Cargo with unique characteristics compared to the bulk: If cargo comes from different sources, it is not sufficient for the average moisture content of all of the cargo in each hold to be below the TML – each distinct parcel of cargo must demonstrate moisture content below the respective TML. Thus, shippers must carry out separate sampling and certification for each substantial portion of material which appears to be different in characteristics or moisture content from the bulk of the consignment. Any portions with moisture content above the TML should be rejected as unfit for shipment. As such, it is not possible to compensate for the loading of a batch of excessively wet cargo by then loading additional drier cargo into the same cargo hold.

3. Declaration of TML

As discussed above, the TML is derived mathematically from a laboratory determination of the FMP. Several different test methods are available to determine the FMP: three of them are described in full details in Appendix 2 of the IMSBC Code and the competent authority of the exporting county may approve additional test procedures. In practice, the most widely used test is the flow table method[19]. Although the test itself is not complex, it contains a subjective element and thus should be conducted by an experienced analyst who is familiar with the early signs of liquefaction in a test sample and can reliably identify a flow state in the test sample based on the criteria specified in the IMSBC Code.

The frequency of the TML test required also differs for different types of cargo. For most processed ores, such as concentrates, due to their relatively stable and uniform characteristics, the TML does vary significantly between shipments and it is sufficient for shippers to carry out a TML test once every six months. However, if the composition or characteristics of the cargo are variable between successive shipments for any reason, a new TML test is required each time. As such, for

[19] *Id.*, Appendix 2, at para 1.1.1 to 1.1.4.

unprocessed ores such as iron ore fines and nickel ore which vary greatly in composition not only from shipment to shipment but also within each individual shipment, a fresh TML test is necessary for every single batch of cargo to be loaded.

Apart from information described above, the shipper must identify the laboratory used to conduct the tests on the cargo samples, the stock piles from which the cargo is to be loaded and confirm in writing that the samples tested and in respect of which certificates have been issued or declarations have been made originated from those stock piles. Where barges are used to transport cargo to the vessel, they must be capable of being individually identified by the master/ship/appointed surveyor.

C. Cargoes Not Listed in the IMSBC Code

Although the IMSBC Code provides a quite comprehensive regime for the safe carriage of solid bulk cargoes, the Code itself is not exhaustive. It is recognised that some cargoes that may liquefy are not listed in the Code and "many fine-particled cargoes, if possessing a sufficiently high moisture content, are liable to flow. Thus any damp or wet cargo containing a proportion of fine particles should be tested for flow characteristics prior to loading"[20].

For those cargoes not listed in the IMSBC Code, Section 1.3 provides the following requirements:

1. Before loading, the shipper must provide details of the characteristics and properties of the cargo to the competent authority of the port of loading.

2. Based on such information, the competent authority of the port of loading will assess the acceptability of the cargo for shipment.

- If the assessment results in categorisation of the cargo as Group A or B, advice is also to be sought from the competent authorities of the port of unloading and of the flag State and the three competent authorities will set preliminary suitable conditions for the carriage of this cargo.

[20] *Id.*, at para1.3.

- If the cargo is categorised as Group C or presents no specific hazards for transportation, carriage can be authorised by the port of loading and the competent authorities of the unloading port and flag state will be informed of the authorisation.

3. In both cases, the competent authority of the port of loading will give the master a certificate stating the characteristics of the cargo and the required conditions for carriage and handling. The competent authority of the port of loading will also provide the same information to the IMO.

D. Master's Obligations

Under SOLAS Convention, if having any concerns that the condition of the cargo might affect the safety of the ship, a master is under an overriding authority not to load the cargo or to stop the loading of the cargo. Loading should not be commenced until the master or the ship's representative is in possession of all requisite cargo information in writing as described above. Moreover, the master or his representative should monitor the whole loading process from beginning to end, ensuring compliance with the relevant requirements in the IMSBC Code and other applicable rules.

The master should pay special attention to when the moisture content certificates provided by the shipper's laboratory indicate a moisture level close to the TML. If the master is in any doubt of the moisture content, "can test" as described in section 8 of the IMSBC Code should be performed, but this is by no means to replace or supersede the requisite laboratory testing.

In addition to documentations and testing requirements, the IMSBC Code also requires the master and other seafarers ensure cargo spaces shall be inspected and prepared for the particular cargo which is to be loaded, and bilge lines, sounding pipes and other service lines within the cargo space shall be in good order. After loading, the master should instruct the seafarers to trim cargoes to reduce the likelihood of the cargo shifting and minimize the air entering the cargo.

E. Consequences of Non-Compliance

Failure to observe the mandatory requirements of the IMSBC Code requirements can lead to non-observance of the SOLAS Convention and of those statutory provisions implementing the SOLAS Convention in relevant jurisdictions. Where compliance with the IMSBC Code and/or the SOLAS Convention is part of the charterparty terms (e.g., if the abovementioned BIMCO Clause is incorporated), breach of the IMSBC Code will also amount to a breach of charterparty.

Above all, compliance with the testing and disclosure requirements contained in the IMSBC Code is the minimum requirement and an effective way to ensure the safety of carriage of bulk cargo that may liquefy.

IV. Insurance Position – Coverage Relating to Cargoes that May Liquefy

A. Shipowners' Insurance

If an unsafe cargo is loaded and shipped with knowledge of its unsafe nature or if it should have been apparent that it was unsafe, this may prejudice the insurance cover.

It is a common provision that the insurance coverage including P&I cover is subject to the full compliance of the relevant statutory requirements. Taking Gard as an example, Gard's Rule 8 provides that

"*it shall be a condition of the insurance of the Ship that... the Member shall comply or procure compliance with all statutory requirements of the state of the Ship's flag relating to the...safe operation...of the Ship"*. Therefore, compliance with the mandatory requirements under the IMSBC Code, the SOLAS Convention and other applicable statutory requirements is crucial to maintain the insurance coverage.

Non-compliance with those requirements may also trigger the common rule that cover is not available for claims arising out of or consequent upon imprudent, unsafe, unduly hazardous or improper trades or voyages. As stated in one of the International Group of P&I

Clubs circulars[21] *"...if a Member fails to comply with the [IMSBC] Code or local regulations when not in conflict with the Code, they should also be aware that they might be prejudicing Club cover. All of the Group Clubs have similar Rules which in essence exclude cover for liabilities, costs and expenses arising from unsafe or unduly hazardous trades or voyages".*

The usual approach of the clubs is to forewarn members that there is a grave risk of losing cover if the member knowingly carries unsafe cargo, for example where independent test results on samples show that the moisture content is in excess of TML. The risk of prejudice to cover is significantly greater if unsafe cargo is loaded without any checks, or from a country where there is a history of unreliable shippers' certificates.

Clearly, defence cover may be available for costs incurred in relation to a claim relating to dangerous cargo/cargo liquefaction, like survey costs incurred with prior approval from the club. Cover may also be available if a survey is subsequently used in the defence of a claim that is covered by P&I.

However, it is many clubs' decision not to afford cover for the costs of precautionary surveys, because the primary purpose of such surveys is regarded as to confirm that the cargo is safe for carriage rather than to minimise any liability on the part of the clubs.

It should also be noted that container ships, in addition to bulk carriers, also carry many dangerous goods and the costs of surveys to check safety of the numerous cargoes may not be covered. For similar reasons, P&I cover is unlikely to be available for costs of discharging an unsafe cargo.

B. Cargo Owners' Insurance

If it is proven that the cargo was lost due to the shippers or charterers' fault in shipping dangerous cargo, the cargo lost may not be covered by the cargo insurance policy. In practice, the vessel sinking which caused the cargo loss would normally be caused by the combined factors such as perils of seas and the nature of the cargoes. It will be a matter of the evidence to prove what the likely cause for the casualties.

---

[21] Although the International Group of P&I Clubs does not issue circulars itself, member clubs usually issue similar circulars on matters of common interests.

C. Co-insurance of arrangement between the Owners and the Charterers

It is not uncommon for the Owners and the Charterers to agree that the Owners would not claim against Charterers if the vessel has an insurance arrangement for the losses of the cargo and the vessel due to perils of seas. The question is whether such insurance will prevail the obligations of the charterers not to ship the dangerous cargoes. Given that the obligations of both owners and charterers to comply with the IMSBC Code are parament to the safety of the seafarers'' life at seas under SOLAS Convention, any deviation to those requirements should be invalid from legal policy view of points.

V. Amendments to the IMSBC Code

The IMSBC Code is updated every two years to respond to new issues arising from practice and to reflect expert opinions on how to carry bulk cargoes in the safest possible way. Since the IMSBC Code became mandatory in 2011, there have been 3 amendments. The most recent one, Amendment 02-13, came into effect on January 2015. On 1 January 2017, Amendment 03-15[22] will come into full force but contracting governments to the SOLAS Convention have been encouraged to implement those amendments in whole or in part on a voluntary basis since 1 January 2016[23].

Two significant issues in practice are (1) the reliability of the information supplied and (2) the accuracy of classification of cargoes. In light of the two problems, there have been some improvements to the IMSBC Code, but more is still necessary.

[22] Adopted in June 2015 by Resolution MSC.393(95) of the IMO's Maritime Safety Committee.

[23] IMO Circular DSC.1/Circ.71 – "Early Implementation of Draft Amendments to the IMSBC Code Related to the Carriage and Testing of Iron Ore Fines". It has been voluntarily adopted by the governments of Brazil, Australia and the Marshall Islands.

A. The reliability of information supplied

If the information provided about the cargo is not accurate or not reliable, it is hard to determine to what extent the masters of the vessel may safely rely on the documentations, given that they under an obligation to make independent judgment about the safety of the cargo and an overriding duty to refuse to load potentially dangerous cargo. It is difficult for the master to verify or independently assess the actual moisture content given the technicality of the test, except when the cargo is so wet that the moisture can be seen on the surface in the form of wet mud or puddles. However, especially during monsoon season or other periods of heavy rain, masters should be vigilant to overly-wet cargo, despite a "safe" declaration/certification.

The reasons for unreliable information are multiple. First of all, the reason for liquefaction has yet to be completely understood and there are many complications in a cargo liquefaction accident. Even when information about the cargo is provided pursuant to all applicable rules, it may not be completely accurate or reliable due to shortcomings of the existing testing technology and such technical issues can only be solved through trial-and-error with scientific development. However, it is sometimes reported that the guidelines in the IMSBC Code are not strictly followed. It may be the case the information provided indicates that the moisture content of the cargo is within the safe range, but the actual moisture content exceeds the TML. This may be caused by poor or non-existent precautious surveys, low-qualify samples, incompetent surveyors and possible conflict of interests among surveyors, regulating authorities and the shippers.

In the IMSBC Code, competent authorities at port of loading etc. have the power to assess the level of hazards involved in particular cargoes and may authorise or impose conditions to their carriage. There have been issues in the past when the shipper and those authorities have been closely related, leading to conflict of interests.

To address these issues, in Amendment 02-13 to the IMSBC Code, it is added in the definition of "Competent Authority" in Section 1.7 that "The competent authority shall operate independently from the shipper". Moreover, the shippers are required to establish procedures for sampling, testing and controlling moisture content to ensure the moisture content is less than the TML when the cargo is on board the ship. These procedures shall be approved and their implementation

checked by the competent authority of the port of loading. As for surveyors, is also provided that the declaration of moisture content and certification of TML should be issued by "an entity recognized by the Competent Authority of the port of loading".

B. The accuracy of the classification of cargoes

On the other hand, the IMSBC Code is by no means a conclusive list for cargoes that may liquefy. It is reminded that in Section 1.3, precautions are required even for cargoes not listed in the Code. Schedules in respect of specific cargoes are constantly updated and new cargoes are added.

Many accidents in the past related to nickel ore and iron ore, which were not comprehensively covered in the IMSBC Code. Amendment 02-13 added an individual schedule for nickel ore. The forthcoming Amendment 03-15 puts much emphasis on iron ore: an individual schedule for iron ore fines (classified as Group A cargo) is added, the original schedule for iron ore is heavily revised in light of this and a new test procedure for determining TML of iron ore fines ("Modified Proctor/Fagerberg test procedures for Iron Ore Fines") is included.

However, new amendments are still necessary. In recent years, the safe carriage of bauxite attracted new attention. Bauxite is an aluminium ore and the main source of aluminium. It is mined in open-pit mines and then converted to alumina (aluminium oxide), which is further processed to pure aluminium. Bauxite is considered one of the most important cargo bulk trades and its main importer is China.

While bauxite is traditionally classed as Group C cargo (cargoes that do not liquefy, or possess a chemical hazard) under the IMSBC Code, such classification is qualified by the description of bauxite in Appendix 1 as "cargo with a moisture content of 0%-10%, with 70%-90% of it consisting of lumps varying in size between 2.5-500 mm and 10%-30% powder". Therefore, if the cargo contains a large proportion of powder, or if the moisture content is above 10%, subject to comprehensive laboratory tests, it may be arguably prone to liquefaction. At least, this means that what is routinely classified as a relatively "harmless" Group C cargo may in proper circumstances behave like a Group A cargo.

Despite that bauxite is normally shipped without any processing,

sometimes it is sieved to remove large lumps. Sieving involves using high-pressure water to force the ore into rotary sieves. The process not only increases the portion of fine particles, but also adds water to the cargo, both of which enhance the risk of liquefaction.

There have been suggestions that bauxite which contains a high moisture level and/or a high proportion of fine particles should be considered as Group A (cargo which may liquefy). Recently in September 2015, the IMO's Sub-Committee on Carriage of Containers and Cargoes approved a draft circular, which aims at warning ship masters not to accept bauxite for carriage unless:

a. the moisture limit for the specific cargo is certified as less than the indicative moisture limit of 10% and the particle size distribution as is detailed in the individual schedule for bauxite in the IMSBC Code;
b. the cargo is declared as Group A (cargoes that may liquefy) and the shipper declares the TML and moisture content; or
c. the cargo has been assessed as not presenting Group A properties.

The circular also notes that while bauxite is currently classified as a Group C cargo, there is a need to raise awareness of the possible dangers of liquefaction associated with bauxite.

According to the normal cycle of amendment, it is likely that rules relating to bauxite will be subject to amendment in 2017, but the content of such amendment is yet to be seen.

VI. Practice Issues to Deal with the Claims Arising from Sinking of the Vessels Carried on Board the Cargo Which May Liquefy

As mentioned previously, in recent years, a few vessels carried the cargoes which may qualify sunk in the middle of the oceans causing losses of the vessels, the cargoes and the human life.

Disputes have arisen what caused the losses of the vessel and whether Charterers are liable for those losses. In almost all the cases, the charterers contended that the masers were provided with the required cargo certificates in accordance with the IMSBC Code and the losses of the vessels were caused by Owners' own fault. On the

contrary, the Owners argued that the losses were caused by the misdeclaration of the cargoes by the shippers and the charterers and therefore, Charterers should be liable for the losses suffered by the Owners.

The relevant issues include:

(1) Whether the cargoes were in fact in compliance with the IMSBC Code. Because the vessels have lost in the middle of the oceans, it is impossible to redo the test of the cargoes. It is difficult to find the exact same cargo samples;

(2) Whether the cargoes have in fact liquefied. It is difficult to prove this because the vessels have sunk and the crew were missing or the crew were not able to give a reliable evidence;

(3) Whether the vessels were seaworthy and further whether the Owners' reactions and steps which have been taken were reasonable in the circumstances and whether Owners' action has broken the causation. A few incidents show that the Owners received the vessel's reports on the cargoes but then the vessels suddenly lost the contacts with the Owners.

The important question is also who bears the burden of proof. A court or an arbitration tribunal will much rely on the experts to explain how the vessels could sink in particular when there are no reliable eye witnesses. The quality of the experts and the factual witnesses have played a very important role in the dealing of the cargoes in practice. The court or the arbitration tribunal has to make its findings based on the evidence before it on the balance of the probability/

VII. Conclusion

Liquefaction risk is still possible. Although relevant regulations like the IMSBC Code are updated from time to time to respond to the issues arising from the practice, those improvements are largely made only after significant losses and casualties have occurred and necessarily lag behind the practice due to the nature of the rule-making process and the high-level of expertise involved. For the IMSBC Code,

the usual 2-year amendment cycle and the 2-year grace period before mandatory implementation mean that even for well-known risks (for example, iron ore), it will take at least four years before any amendments gain mandatory effect. Before such time, it is not safe to assume that everybody involved in the trade will take the same level of precautions even for known hazards.

For parties involved in the carriage of bulk cargoes, extra precautions beyond those mandatory requirements should always be taken to guard against the not-so-remote risk of tragic loss of ship, cargo and crew. Therefore, it is necessary for the individual countries in particular the exporting countries and the shipowning countries to take active steps to implement the most updated rules and regulations in order to safely carry the cargoes and safeguard the interests of seafarers.

REFERENCES

Books, Reports, and Other Nonperiodic Materials

Atlantic Oil Carriers v. British Petroleum Co. (The Atlantic Duchess) [1957] 2 Lloyd's Rep. 55, 95.

The Baltic and International Maritime Council Uniform General Charter (as revised 1922, 1976 and 1994).

Bamfield v. Goole & Sheffield Transport [1910] 2 K.B. 94, 113.

Borrowman Phillips v. Free & Hollis [1878] 4 Q.B.D. 500.

Brass v. Maitland [1856] 6 E. & B. 470, at 482, 487, per Lord Campbell C.J.

Compania Sud Americana de Vapores S.A. v. Sinochem Tianjin Import and Export Corporation (The Aconcagua) [2010] 1 Lloyd's Rep. 1, at para. 62.

Cooke, J., Young, T., Kimball, J., Lambert, L., Taylor, A. and Martowski, D. (n.d.). Voyage charters.

General Feeds v. Burnham Shipping (The Amphion) [1991] 2 Lloyd's Rep. 101; The Nour [1991] 1 Lloyd's Rep. 1.

The International Convention for the Safety of Life at Sea (SOLAS), Chapter VI, Regulation 6, at para2.

International Maritime Solid Bulk Cargoes (IMSBC) Code, at para4.2.2.2.

This article is published in *The Asian Business Lawyer (ABL)* Vol. 20.
The publication of *ABL* Vol. 20 has been financially supported by KIM & CHANG.

Developments of Maritime Law in China in 2015–2016

James Zhengliang Hu[*], *Siqi Sun*[**]

ABSTRACT

There were developments of the maritime law in China in the late 2015 and 2016 which mainly include, inter alia, the entry into force of international maritime treaties, i.e. the Maritime Labour Convention, 2006 (hereinafter referred to as "MLC") and the 2015 Amendment to the SOLAS Convention VI/2 in China; the promulgation of the governmental statutes regarding water environmental protection or macro-control on the merchant fleet structure by way of subsidiaries; the abolishment of the existing regulations; the promulgation of maritime judiciary interpretations and provisions of the Supreme People's Court; and the publication of the judgement of the "Archangelos Gabriel" salvage case retried by the Supreme People's Court. In addition, achievement was made in the research on the revision of the Chinese Maritime. In this paper, the authors introduce and explain the above developments.

KEYWORDS: Maritime Law; Development; China

[*] Ph.D., Professor of Law, Director of Institute of Maritime Law, Shanghai Maritime University; Lawyer & Partner, Shanghai Wintell & Co Law Firm.
Email: james.hu@wintell.cn.
[**] Ph.D. Candidate of Shanghai Maritime University. Email: 461413517@qq.com.

Table of Contents

I. The Entry into Force of International Maritime Treaties

A. The Maritime Labour Convention, 2006

MLC adopted by the International Labour Organization (ILO) in 2007 is deemed as one of the four pillar conventions among the international maritime conventions.[1] MLC was ratified by China on 29 August 2015 and came into force in China as of 12 November 2016. China has taken and is taking measures to comply with the Convention.

China is the third largest shipping country and the first largest seafarers' county in the world and thus the implementation of MLC in China has significant importance. After ratification of MLC, the Ministry of Transport and Ministry of Human Resources and Social Security of China have established a cooperative mechanism so as to improve the measures in the implementation of MLC. China

[1] The other three international maritime conventions are SOLAS, MARPOL 73/78 and STCW.

Classification Society (CCS) has been commissioned to issue the Statement of Maritime Labour Compliance since 2013.

The implementation of MLC in China shall significantly improve the Chinese domestic law relating to the protection of seafarers' rights and interests which can be divided into two categories. The first category is the Regulations on Seafarers of 2007 and other regulations on the administration of seafarers' affairs. Based upon these regulations, the basic rights of seafarers have been established regarding social security, health care, conclusion of labour contract, remuneration, vacation and repatriation. The second category is the Labor Law of 1994 and the Labor Contract Law of 2007 which establishes the general legal regimes governing the promotion of employment, labour contracts and collective contracts, working hours and vacations, remunerations, labour safety and sanitation, special protection for female workers and juvenile workers, professional training, social insurance and welfare treatment. Besides, the related legal regimes in China include labour security supervision, mediation and arbitration of labour disputes, national tripartite coordination mechanism for maritime labour relations and certification for seafarers. Where there exist special provisions regarding the seafarers' rights and interests such as those contained in the Regulations on Seafarers of 2007, the special provisions shall apply with priority over the general provisions contained in the Labor Law of 1994, the Labor Contract Law of 2007 and other basic laws.

Due to the features of the seafarers' employment and the need for international uniformity of law regarding the protection of the seafarers' rights and interests as envisaged by MLC, the current Chinese laws and regulations regarding the seafarers' rights and interests still need be improved. The authors thus anticipate that new regulations will be promulgated and some existing ones will be amended as necessitated by the protection of the seafarers' rights and interests and especially as required by MLC in the process of the implementation thereof.

B. The 2015 Amendment to the SOLAS Convention VI/2

The Maritime Safety Committee (MSC) of IMO adopted the 2015 Amendment to the SOLAS Convention regarding a mandatory container weight verification requirement on shippers at its 94rd session in 2015. Consequently, a shipper of an export good carried in a

container is required to provide the verified gross mass (VGM) of the container together with the goods carried therein. The Amendment came into force as of 1 July 2016. China is a member state of the SOLAS Convention and thus the Amendment has binding effect in China. The Ministry of Transport of China issued a notification on 6 June 2016 stating the detailed requirements to ships, shippers, carriers and port operators for the purpose of the implementation of the Amendment.

II. Statutes Relating to Water Environmental Protection

A. The Implementation of the Domestic Oil Pollution Compensation Fund

China is a party to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992 (1992 Fund Convention), but it applies only in Hong Kong. China has become the largest oil import country and the majority of the imported oils are carried by sea, which necessitated the establishment of a domestic oil pollution compensation fund in the name of Compensation Fund for Vessel-Induced Oil Pollution Damage by virtue of the Administrative Provisions Governing the Levying and Use of Compensation Fund for Vessel-Induced Oil Pollution Damage jointly promulgated by the Ministry of Finance and the Ministry of Transport on 11 May 2012 as approved by the State Council.

For the purpose of the implementation of the domestic fund, the Maritime Safety Administration (MSA) of the People's Republic of China issued the Guidelines on the Settlement of Claims against the Compensation Fund for Vessel-Induced Oil Pollution Damage (for trial use, hereinafter referred to as "Settlement Guidelines") and the Guidelines on Claims against the Compensation Fund for Vessel-Induced Oil Pollution Damage (for trial use, hereinafter referred to as "Claim Guidelines") on 3 July 2016. The Settlement Guidelines provide the scope of application, the circumstances of compensation and relevant expenses of compensation, the items, requirements and procedures of the settlement of claims against the Fund, and the specific rules of the emergency expenses, expenses incurred for controlling or removing pollution, direct economic losses caused to the

fishery industry and tourist industry, and the expenses incurred for the measures taken to recover marine ecology and natural fishery resources. The Claim Guidelines aims at assisting the claimants to file claims against the Fund and stipulate the scope of application, procedures of claims and the guidelines on specific claim items.

B. The Provisions of the People's Republic of China on the Prevention and Control of Pollution in Inland Water Environment from Vessels

The above Provisions were formulated in accordance with the Water Pollution Prevention and Control Law of 1984 as amended and other laws and administrative regulations and promulgated by the Ministry of Transport on 15 December 2015. The Provisions provide the discharging and receiving of vessel pollutants, emergency response to vessel pollution accidents, investigation and handling of vessel pollution accidents and legal liabilities.

C. The Implementation Plan for Vessel Emission Control Area in Pearl River Delta, Yangtze River Delta and Bohai Rim Area

For the purpose of protecting and improving the marine environment, enhancing the marine ecological civilization, the Ministry of Transport issued the above Implementation Plan on 2 December 2015. The Implementation Plan set up three vessel's pollutants emission control areas in the main sea areas within the jurisdiction of China, i.e. the Pearl River Delta, the Yangtze River Delta and the Bohai Rim Area. It provides the objectives of and principles followed in setting up the emission control areas, scope of application, specific boundary of each emission control area, control requirements and measures of implementation.

III. The Administrative Measures for Subsidies for Ship Dismantling and Standardization of Types of Vessels and its Supplementary Notice

After the financial crisis, the volume of the goods carried by sea slashed down and as a result there is a significant oversupply of

carrying capacity in both international maritime transport and the domestic water transport. In addition, there are various types of vessels in inland navigation affecting the passage capacity of navigable rivers and canals. For the purpose of reducing the oversupply of vessels' carrying capacity and improving the structure of the merchant fleet to have more vessels of lower ages by way of encouraging the owners of vessels to dismantle their old vessels, China has set up the regime of subsidies for ship dismantling by virtue of the Administrative Measures for the Special Fund for Subsidies for Dismantling and Renovation of Old Ships and Tankers of Single Hull issued by the Ministry of Finance on 24 February 2014. For the purpose of improving the structure of the merchant fleet to have more inland vessels of standard types by way of dismantling or reconstructing the vessels not in conformity with the standards of vessels promulgated by the Ministry of Transport, China has also set up the regime of subsidies for standardization of types of inland vessels by virtue of the Administrative Measures for the Fund for Subsidies for the Standardization of Types of Inland Vessels issued by the Ministry of Finance on 9 April 2014. The above subsidies are used as the governmental macro-control measures in regulating the shipping industry taken after the financial crisis. It also helps the shipowners, especially the small shipowners, to copy with the unfavorable shipping market situation by getting subsidies following dismantling of old vessels or reconstructing of inland vessels. The funds for subsidies are formed by the central or local financial budgets.

In order to improve the operation of the above subsidies, the Ministry of Finance issued the Administrative Measures for Subsidies for Ship Dismantling and Standardization of Types of Vessels on 9 November 2015 which replaces the Administrative Measures indicated in the preceding paragraph. The new Administrative Measures mainly stipulates the scope, application, examination, administration and supervision of subsidies. On 4 July 2016, the Ministry of Finance issued the Supplementary Notice of the new Administrative Measures for the purpose of further implementation of the regimes of subsidies.

IV. The Abolishment of the Regulations Governing Carriage of Goods by Waterways of 2000 and the Regulations on the Operation of Goods at Ports of 2000

China has a large-scaled market of domestic carriage of goods in coastal trade and in inland navigation. According to the *Statistical Communiqué of Development in Transport and Communication Industry in 2016*[2] issued by the Ministry of Transport, there were 10,513 coastal vessels with a total DWT of 63.79 million tons at the end of 2016. In 2016, the total quantity of cargo carried in coastal trade amounted to 2.01 billion metric tons. The inland waterways in China are as long as 127,100 km mainly in the Yangtze River located in the center from west to east, the Pearl River located in the south from west to east, the Heilongjiang River located in the north from west to east and the Beijing-Hangzhou Grand Cannel located in the east from north to south. Noticeably, the main inland waterways in the Yangtze River and the Pearl River are accessible by seagoing vessels and even large seagoing vessels. At the end of 2016, there were 147,200 inland vessels with total DWT of 133.61 million tons. In 2016, the total volume of cargo carried in inland navigation was 3.57 billion metric tons.[3] Meanwhile, China has the largest port scale in the world in term of the total turnover of ports. At the end of 2016, there were 30,388 operational berths of which 5,887 were located in the sea ports and 24,501 were located in inland ports. In 2016, the total turnover of ports was 13.2 billion metric tons of which the total turnover of sea ports was 8.46 billion metric tons and that of inland ports was 4.75 billion metric tons.[4]

Traditionally, the domestic carriage of goods in costal trade and that in inland navigation are collectively called "domestic carriage of goods by waterways" and were/are governed by same laws and regulations. The first Regulations Governing Carriage of Goods by Waterways was promulgated by the former Ministry of Communications in 1973 and amended in 1987, 1995 and 2000. According to the Regulations Governing Carriage of Goods by Waterways of 1973 and 1987, the carrier of carriage of goods by

---

[2] See the website of the Ministry of Transport http://zizhan.mot.gov.cn/zfxxgk/bnssj/zhghs/201704/t20170417_2191106.html as visited on 20 June 2017.

[3] *Id.*

[4] *Id.*

waterways included the port of loading, the port of discharge and the shipping company and therefore the operation of goods at ports was taken as a part of the carriage of goods by waterways. After the amendment in 2000, the Regulations Governing Carriage of Goods by Waterways was divided into two regulations, i.e. the Regulations Governing Carriage of Goods by Waterways of 2000 and the Regulations on the Operation of Goods at Ports of 2000.

Noticeably, Chapter IV "Contract of Carriage of Goods by Sea" of the Chinese Maritime Code does not apply to the domestic carriage of goods by waterways.[5] The law applicable to the domestic carriage of goods by waterways is the Chinese Contract Law of 1999.[6] However, the provisions of the Contract Law relating to carriage of goods prove to be too simple to have feasibility in practice and thus to properly regulate the domestic carriage of goods by waterways. Consequently, the Regulations Governing Carriage of Goods by Waterways of 2000 played a very important role in regulating such carriage.

However, the Ministry of Transport issued its Decision of Repealing 20 Transport Rules on 25 May 2016. As a result, the Regulations Governing Carriage of Goods by Waterways of 2000 and the Regulations on the Operation of Goods at Ports of 2000 were both abolished.

As to the reasons for the abolishment of the two Regulations, paragraph 2 of Art.2 of the Chinese Legislation Law as amended in 2015 provides: "The matters prescribed in the rules of departments under the State Council shall be matters for the implementation of laws or the administrative regulations, decisions or orders of the State

---

[5] Paragraph 2 of the Article 2 of the Chinese Maritime Code provides: "The provisions concerning contracts of carriage of goods by sea as contained in Chapter IV of this Law shall not be applicable to the maritime transport of goods between the ports of the People's Republic of China."

[6] There exist significant differences in the carrier's liability regime between the international carriage of goods by sea and the domestic carriage of goods by waterway. The basis of the carrier's liability is a strict liability in the domestic carriage, and the carrier cannot avail of any limitation of liability for loss of or damage to goods. Article 311 of the Chinese Contract Law provides: "The carrier is liable for damages in case of damage to or loss of the cargoes in the course of carriage, provided that it is not liable for damages if it proves that such damage to or loss of the cargoes is caused by force majeure, the intrinsic characteristics of the cargoes, reasonable depletion, or the fault of the consignor or consignee." By contrast, the carrier's liability and the limitation of carrier's liability under Chapter IV of the Maritime Code is based upon the Hague-Visby Rules.

Council. Without any basis in laws or the administrative regulations, decisions or orders of the State Council, the rules of departments under the State Council shall not set out any requirements that impair the rights or increase the obligations of citizens, legal persons and other organizations, nor increase the power or decrease the statutory duties of the department." Strictly speaking, the promulgation of the Regulations Governing Carriage of Goods by Waterway of 2000 and the Regulations on the Operation of Goods at Ports of 2000 did not come within the statutory functions of the Ministry of Transport under the State Council, nor were for the implementation of laws or the administrative regulations, decisions or orders of the State Council. Some provisions in the Regulations Governing Carriage of Goods by Waterway of 2000 including those regarding actual carrier, deviation, deck cargo etc. which were made by reference to those contained in Chapter IV of the Maritime Code did not have related provisions in the Chinese Contract Law and thus did not have any statutory basis of law of upper level. This seems that abolishment of the two Regulations was justified by the Chinese Legislation Law. On the other hand, however, the abolishment of the Regulations has resulted in no longer existence of the useful special provisions of waybill, transport record, actual carrier, carriage of deck cargo, dangerous goods, putrescible goods, live animals and plants, carriage in containers and unit Ro/Ro carriage in the carriage of goods by waterways as well as the practicable rules used in port cargo handling.

The countermeasures to the abolishment of the two Regulations need be taken. In the authors' point of view, such countermeasures may be: (a) from a long-term perspective, Chapter IV of the Maritime Code after revision thereof in the future should be made applicable to the contract of carriage of goods by waterways; (b) in the short term, the Supreme People's Court may formulate judiciary interpretations on the issues concerning the trial of cases of disputes over contracts of carriage of goods by waterways pursuant to the Contract Law and in light of the judicial practices; (c) as the most convenient and practicable way, shipping organizations such as China Shipowners' Association may formulate standard contract forms, forms of waybill and conditions of carriage to make the main contents of the Regulations Governing Carriage of Goods by Waterways of 2000 into the clauses of contracts for the parties to choose in shipping practice.

V. The Provisions of the Supreme People's Court Regarding Maritime Jurisdiction

A. The Provisions of the Supreme People's Court on the Scope of Cases to Be Entertained by the Maritime Courts

On 28 December 2015, the Supreme People's Court adopted the Provisions on the Scope of Cases to Be Entertained by the Maritime Courts (hereinafter referred to as "2015 Provisions"). According to the 2015 Provisions, the cases to be entertained by the maritime courts for the first instance shall include five categories, i.e. (a) cases of maritime tortious disputes; (b) cases of disputes over maritime contracts; (c) cases of disputes over exploration and exploitation and environmental protection of the sea and water areas adjacent to the sea; (d) other cases of disputes over maritime affairs; (e) maritime administrative cases and cases concerning special maritime procedures. By contrast to the Some Provisions of the Supreme People's Court on the Scope of Cases to Be Entertained by the Maritime Courts promulgated by the Supreme People's Court in 2001 (hereinafter referred to as "2001 Provisions"), the 2015 Provisions extended the scope of jurisdiction of the maritime courts.

First, the 2015 Provisions list the cases of disputes over exploration and exploitation and environmental protection of the sea and water areas adjacent to the sea as a separate category. This category covers various activities in the exploration and exploitation of the sea and water areas adjacent thereto including, e.g. exploration and exploitation of mineral resources from seabed, construction of wharfs, man-made islands and bridges, underwater project construction, scientific investigation of oceans, fishing and aquaculture, and include disputes over contracts on loan, financial leases, guarantees, letters of credit, mortgages or pledges of equipment and facilities used in such exploration and exploitation, disputes over right to use sea areas, and the disputes relating to the environmental protection of the sea and water areas adjacent thereto including liability for pollution of marine environment and damage to marine ecology as well as other tort liability arising from such exploration and exploitation.

By contrast, the 2001 Provisions only provided the cases of disputes over exploration and exploitation of the sea as within the category of other cases of disputes over maritime affairs and maritime

trade, including cases of disputes over exploration and exploitation of continental shelf (such as exploitation of offshore oils or natural gases), desalination and comprehensive utilization of sea waters, underwater marine projects, marine scientific inspection, etc.

Secondly, unlike the Notice of the General Office of the Supreme People's Court on the Jurisdiction of Maritime Administrative Cases promulgated in 2003 which provided that the maritime administrative cases were not be within the jurisdiction of the maritime courts,[7] the 2015 Provisions provide maritime administrative cases within the scope of cases to be entertained by maritime courts, including but not limited to: (a) cases arising from appeals against maritime administrative organs' actions involving vessels, goods, equipment and facilities, marine containers and other properties at sea or in water areas adjacent to the sea or in ports, qualification and legal matters relating to the corresponding auxiliary operations, freight forwarding, seafarer's competency and boarding services, protection of the fishery industry and environmental and ecological resources; (b) cases arising from the maritime administrative organs' refusal to perform administrative duties; (c) cases concerning requirement of the relevant administrative organs to assume the State's liability for compensation for loss due to their failure to carry out administrative actions or their exercise of the corresponding administrative functions that impair the lawful rights and interests of the applicants.

B. The Provisions of the Supreme People's Court on Issues Concerning the Jurisdiction over Maritime Actions

On the same date of 28 December 2015, the Supreme People's Court also adopted the Provisions on Issues concerning the Jurisdiction over Maritime Actions. The Provisions adjust the geographical jurisdiction of the Dalian Maritime Court and the Wuhan Maritime Court, and provide in detail the jurisdiction over maritime administrative cases

[7] The Notice said: "The administrative cases, the administrative compensation cases and the cases on examining applications by administrative organs for executing their respective specific administrative acts shall still be tried by the administrative tribunals of the people's courts at corresponding levels. The maritime courts and other special people's courts shall not try any administrative case or administrative compensation case, nor shall they examine or enforce any case in which an administrative organ applies to execute its specific administrative act."

and the trial of cases of objection to jurisdiction over maritime disputes.

As regards the jurisdiction over maritime administrative cases, the Provisions provide: (a) a maritime administrative case in the first instance shall be tried by a maritime court and a maritime administrative appeal case shall be tried by the administrative tribunal of a higher people's court at the place where the maritime court is located; (b) a maritime administrative case shall be within the jurisdiction of the maritime court at the place where the administrative agency taking the original administrative action is located; (c) a case that has been reconsidered by an administrative agency shall be within the jurisdiction of the maritime court at the place where the reconsideration agency is located; (d) an action against an administrative compulsory measure that is alleged to restricts personal freedom shall be within the jurisdiction of the maritime court at the place where the defendant or the plaintiff is located. If the place where the aforesaid administrative agency or the plaintiff is located is not within the jurisdiction of a maritime court, the maritime court at the place where the administrative enforcement action is taken shall have jurisdiction.

As regards the trial of cases of objection to jurisdiction over maritime disputes, the Provisions provide: (a) an appeal filed by a party against a ruling on objection to jurisdiction shall be reviewed by the higher people's court at the place where the maritime court is located; (b) where a legally effective ruling on objection to jurisdiction violates the special jurisdiction over a maritime case and needs correction, the people's court may retry the case according to the provision of Art.198 of the Civil Procedure Code of 2012.[8]

[8] Article 198 of China Civil Procedure Law provides: " Where the president of a people's court at any level discovers any error in any effective judgment, ruling or consent judgment of the court and deems a retrial necessary, the president shall submit it to the judicial committee for deliberation and decision. Where the Supreme People's Court discovers any error in any effective judgment, ruling or consent judgment of a local people's court at any level or a people's court at a higher level discovers any error in any effective judgment, ruling or consent judgment of a people's court at a lower level, the Supreme People's Court or the court at a higher level shall have the power to directly retry the case or specify a people's court at a lower level to retry the case."

C. The Provisions of the Supreme People's Court on Several Issues Concerning the Trial of the Relevant Cases Occurring in the Sea Areas Under the Jurisdiction of China

In order to safeguard China's territorial sovereignty and maritime rights and interests, to equally protect the lawful rights and interests of Chinese and foreign parties, to specify judicial jurisdiction and application of law in sea areas under the jurisdiction of China, and to correctly adjudicate the relevant cases occurring in sea areas under the jurisdiction of China, the Provisions on Several Issues concerning the Trial of the Relevant Cases Occurring in Sea Areas under the Jurisdiction of China (I) & (II) were adopted by the Supreme People's Court on 28 December 2015.

The Provisions (I) mainly provides the judicial jurisdiction over cases and application of law in cases occurred in the sea areas under the jurisdiction of China. For example, Art.3 of the Provisions (I) provides: "Where a Chinese citizen or foreigner commits any of such crimes as illegal hunting, killing of rare and endangered wild animals, illegal fishing of aquatic products in sea areas under the jurisdiction of China, he or she shall be subject to criminal liability in accordance with the Criminal Law."

The Provisions (II) mainly provides specific issues in the trial of the relevant cases occurring in the sea areas under the jurisdiction of China. For example, Art.1 of the Provisions (II) provides: "Where a party who suffers damage due to such accidents as vessel's collision and marine pollution files a claim for compensation for losses to fishery vessel, fishing tackles and aquatic products as well as loss of income against the infringing party, the people's court shall support such a claim."

VI. The Retrial of the "Archangelos Gabriel" Salvage Case by the Supreme People's Court

The retrial of the "Archangelos Gabriel" salvage case was held by the Supreme People's Court on 7 July 2016 publicly and the trial penal was chaired by a vice president of the Supreme People's Court. China is not a case-law country, but a judgement rendered by the Supreme People's Court may have guiding effect on the same or similar issue in

the cases tried by a lower court thereafter. Therefore, the judgment of retrial issued by the Supreme People's Court in this case has given rise to intense responses in the shipping industry and the maritime law circle.

In this case, M/T "Archangelos Gabriel" carrying 54,580 tons of crude oil got stranded in the waterways of Qiongzhou Strait in the South China Sea. After the stranding, her owners concluded an employed salvage contract with a local salvage company. For the purpose of preventing marine pollution, however, the local MSA decided to take compulsory measures of lighting the load to refloat the tanker. The measures were taken by the salvage company, but the salvage plan was thus compulsorily adjusted and as a result, a couple of tugs and divers mobilized by the salvage company were not put into use, but were in stand-by position during the salvage operation.

After completion of the salvage operation, the salvor claimed for salvage reward based upon all the mobilized salvage vessels including the stand-by tugs and the stand-by divers at the agreed rate. Guangzhou Maritime Court in the first instance upheld the agreed rate for the salvage vessels actually used in the salvage operation, but reduced the rate for the stand-by tugs and the stand-by divers by virtue of paragraph (2) of Art.176[9] and Art.180[10] of the Chinese Maritime Code. The shipowners filed an appeal with the High People's Court of Guangdong Province. The court of appeal upheld the amount of salvage reward

---

[9] Article 176 provides: "The salvage contract may be modified by a judgment of the court which has entertained the suit brought by either party, or modified by an award of the arbitration organization to which the dispute has been submitted for arbitration upon the agreement of the parties, under any of the following circumstances: … (2) The payment under the contract is in an excessive degree too large or too small for the services actually rendered."

[10] Article 180 provides: "The reward shall be fixed with a view to encouraging salvage operations, taking into full account the following criteria: (1) Value of the ship and other property salved; (2) Skill and efforts of the salvors in preventing or minimizing the pollution damage to the environment; (3) Measure of success obtained by the salvors; (4) Nature and extent of the danger;
(5) Skill and efforts of the salvors in salving the ship, other property and life; (6) Time used and expenses and losses incurred by the salvors; (7) Risk of liability and other risks run by the salvors or their equipment; (8) Promptness of the salvage services rendered by the salvors; (9) Availability and use of ships or other equipment intended for salvage operations; (10) State of readiness and efficiency of the salvors' equipment and the value thereof. The reward shall not exceed the value of the ship and other property salved."

determined by the court in the first instance, but held that the shipowners only needed to pay the salvage reward in accordance with the proportion which the salved value of the tanker bore to the total salved value of the tanker and the cargo oil onboard by virtue of Art.183 of the Chinese Maritime Code and therefore the shipowners did not need to pay the salvage reward which the salved value of the cargo oil bore to the total salved value.[11] The Supreme People's Court was of the view in its judgement that Chapter IX "Salvage at Sea" including Arts.180 & 183 of the Chinese Maritime Code was intended to apply to salvage based upon the "no cure, no pay" principle only, but not to employed salvage services and thus the determination of the amount of salvage reward under an employed salvage contract is subject the Chinese Contract Law. The Supreme People's Court held that it was wrongful application of law that the court in the first instance and the court of appeal applied Art.180 of the Maritime Code and adjusted the agreed rate in determining the amount of salvage reward for the stand-by tugs and divers. The Supreme People's Court applied Art.8 regarding the binding effect of a contract and Art.107 regarding liability for breach of contract of the Chinese Contract Law, but upheld the amount of salvage reward on the ground that the amount awarded by the court in the first instance and upheld by the court of appeal was not disputed by the parties.

An employed salvage contract refers to a salvage contract under which the salvage reward is normally calculated based on the salvage vessel(s), other equipment and the personnel used in the salvage operation at an agreed rate, no matter whether the salvage succeeds or not. Therefore, the salvage reward which the salvor is entitled to is not based upon the traditional "no cure, no pay" principle.

Several maritime law issues were involved in this case including, in particular, whether the International Convention on Salvage, 1989 and/or Chapter IX of the Chinese Maritime Code which is mainly based upon the Convention is applicable to an employed salvage contract and, if it is applicable, whether all the provisions of the Conventions and/or Chapter IX of the Code or only part thereof are applicable to an employed salvage contract. It seems clear in "Archangelos Gabriel" case that the court in the first instance and the court of appeal were of

[11] Article 183 provides: "The salvage reward shall be paid by the owners of the salved ship and other property in accordance with the respective proportions which the salved values of the ship and other property bear to the total salved value."

the view that Chapter IX of the Code would be applicable to an employed salvage contract, but the Supreme People's Court was of the opposite view that the whole Chapter IX of the Code would not be applicable to an employed salvage contract which should be subject to the Contract Law. The issuance of the judgement of the Supreme People's Court in this case caused a lot of arguments as regards the application of law in an employed salvage contract. Those who supported the judgement of the Supreme People's Court are of the view that employed salvage was not qualified as salvage, but as maritime labour service in modern maritime law and that the International Convention on Salvage,[12] 1989 was not intended to apply to an employed salvage contract. However, those who are against the judgement of the Supreme People's Court are of the view that Chapter IX of Chinese Maritime Code should apply to an employed salvage contract, except the provisions based upon the "no cure, no pay" principle and the provisions of special compensation.[13]

In the authors' view, the International Convention on Salvage, 1989 and Chapter IX "Salvage at Sea" of the Chinese Maritime Code are, generally speaking, applicable to an employed salvage contract because an employed salvage service clearly comes within the scope of application of Chapter IX of the Code as defined in Art.171 which provides: "The provisions of this Chapter shall apply to salvage operations rendered at sea or any other navigable waters adjacent thereto to ships and other property in distress" and the definition of salvage operation contained in Art.1 "Definition" of the Convention which provides: "(a) 'Salvage operation' means any act or activity undertaken to assist a vessel or any other property in danger in navigable waters or in any other waters whatsoever". Especially, paragraph 1 of Art.6 "Salvage contracts" of the Convention expressly provides: "This Convention shall apply to any salvage operations save to the extent that a contract otherwise provides expressly or by implication." On the other hand, however, as the salvage reward under an employed salvage contract is not based upon the "no cure, no pay" principle, the provisions of the Convention and Chapter IX of the Code which are based upon this principle are logically not applicable to an employed salvage contract including, e.g. Art.180 of the Code or paragraph 1 of Art.13 of the Convention providing the criteria for

[12] Yuzhuo Si *et al*: *Maritime Law*, Law Press, 2012, p.293.
[13] James Zhengliang Hu *et al*: *Admiralty Law*, Peking University Press, 2016, p.105.

fixing the reward and Art.183 of the Code or paragraph 2 of Art.13 of the Convention providing apportionment of salvage reward among the owners of the salved properties. The determination of salvage reward under an employed salvage contract is subject to the Contract Law where the contract does not contain express provisions.

VII. The Research on the Revision of the Chinese Maritime Code

The Chinese Maritime Code was adopted on 7 November 1992 and came into force as of 1 July 1993. The research project "On the revision of the Chinese Maritime Code" funded by the Ministry of Transport and led by the first author of this paper with the participation of professors of maritime law, maritime judges and maritime lawyers successfully passed the review organized by the Ministry of Transport in July 2016.

The research aimed at forming the basis for the revision of the Chinese Maritime Code in the near future. The research analyzed the significant developments in the maritime economy and trade and the related areas since the adoption of the Code in 1992, the changes of contents of the basic principles followed in the making of the Code, the lack of regimes governing marine pollution from ships and the existence of ambiguities, uncertainties and gaps in the Code.

The main proposals the research group put forward on the revision of the Chinese Maritime Code are as follows: (a) the scope of application of the Code after revision shall be extended to the carriage of goods or passengers and the vessels in inland waters adjacent to the sea; (b) Chapter IV "Contract of Carriage of Goods by Sea" of the Code after revision shall be applicable to the contracts of the domestic carriage of goods as whole, but shall contain necessary special provisions regarding the contracts of the domestic carriage of goods due to the differences between the international carriage and the domestic carriage which still exist and cannot be unified at this stage, and the hybrid regime regarding the carrier's liability shall be improved mainly by reference to those favorable provisions of the Rotterdam Rules; (c) a legal regime governing compensation for marine pollution damage from ships shall be established; (d) the provisions regarding masters and crew shall be improved mainly by reference to the MLC; (e) the other chapters of the Code shall be modernized to respond to the

developments in the shipping practice, international conventions, non-governmental rules, standard contract forms, or the domestic or advanced foreign legislations relating to the respective chapters of the Code.

VIII. Conclusions

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

(a) There were developments in several aspects of the Chinese maritime law in 2015–2016.

(b) The Maritime Labour Convention, 2006 and the 2015 Amendment of SOLAS Convention VI/2 came into force in China and China has taken steps in the implementation thereof;

(c) The promulgation of governmental statutes regarding environmental protection at sea and in the waters adjacent thereto indicates that China implements a more strict regime of preventing pollution from ships to protect the environment;

(d) As means of the governmental macro-control on the shipping market, the Administrative Measures for Subsidies Ship Dismantling and Standardization of Types of Vessels and its Supplementary Notice provide the detailed provisions of related subsidies;

(e) The abolishment of the Regulations Governing Carriage of Goods by Waterways of 2000 and the Regulations on the Operation of Goods at Ports of 2000 led to serious lack of statutory rules applicable to carriage of goods by waterways and operation of goods at ports;

(f) The Supreme People's Court adjusted and extended the scope of cases to be entertained by the maritime courts and their jurisdiction over maritime actions;

(g) The Supreme People's Court issued its jdugement of the

"Archangelos Gabriel" employed salvage case which caused arguments as regards the application of law to the employed salvage contracts in China;

(h) The research project "On the revision of the Chinese Maritime Code" was completed and formed a basis for the revision of the Chinese Maritime Code in the near future.

REFERENCES

Books, Reports, and Other Nonperiodic Materials

Yuzhuo Si *et al*. (2012). *Maritime Law*, Law Press

James Zhengliang Hu *et al*. (2016) *Admiralty Law*, Peking University Press

Periodic Materials

Internet, Electronic Media, and Other Nonprint Resources

Ministry of Transport. (2017). the Statistical Communiqué of Development in Transport and Communication Industry in 2016. Available at: http://zizhan.mot.gov.cn/zfxxgk/bnssj/zhghs/201704/t20170417_2191106.html

This article is published in *The Asian Business Lawyer (ABL)* Vol. 20.
The publication of *ABL* Vol. 20 has been financially supported by KIM & CHANG.

The Carrier's Liability of Compensation for Ship Unseaworthiness

Han Lixin · Du Jiangwei[*]

ABSTRACT

The ship seaworthiness is clearly stipulated in China Maritime Code [hereinafter the CMC] as a basic legal obligation. In practice, however, accidents caused by unseaworthiness occurred frequently. Once there are accidents of loss of or damage to goods caused by ship unworthiness, it will involve rights and obligations of each party and mainly include claims and compensation issues. This article will study and analyze the liability of compensation for ship unseaworthiness, combined with some real cases, hoping to provide some beneficial reference for maritime practice.

KEYWORDS: Ship Uunseaworthiness, The Liability of Compensation, Burden of Proof, Ships under Construction

[*] Han Lixin, Vice Dean of the School of Law in Dalian Maritime University, doctor, professor, doctoral tutor, the arbitrator of China Maritime Arbitration Commission, the arbitrator of China International Economic and Trade Arbitration Commission, the arbitrator of Dalian Arbitration Commission, etc. The main research direction: maritime law; Contact Address: Dalian High-tech Zone Linghai Road No. 1; E-mail: hanlixin@dlmu.edu.cn;

Du Jiangwei, postgraduate student majoring in maritime law in Dalian Maritime University, the main research direction: maritime law; Contact Address: Dalian High-tech Zone Linghai Road No. 1; E-mail: 18265355818@163.com.

Table of Contents

I. The Demand of Ship Seaworthiness under the Contract of Carriage of Goods by Sea

A. Articles of Ship Seaworthiness under the Contract of Carriage of Goods by Sea in the CMC

Under the contract of carriage of goods by sea, the obligation of ship seaworthiness is a basic legal obligation of the carrier. Article 47 of the CMC explicitly provides that: '*The carrier shall, before and at the beginning of the voyages, exercise due diligence to make the ship seaworthy, properly man, equip and supply the ship and to make the holds, refrigerating and cool chambers and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation.'* This provision is identical to Article 3(1) of the 1924 Hague Rules.

From the provisions above, the content of ship seaworthiness mainly includes three aspects: first, seaworthiness of the ship, namely the hull, structure and machinery equipment which can resist all kinds of predictable risks during the predetermining voyage. Secondly, the carrier must properly man, equip and supply the ship. To be specific, ships must be equipped with enough and qualified crew members, all kinds of necessary equipment and enough quantity and quality of qualified fuel oil, lubricating oil, material, food, water, etc., in order to

guarantee the ship to complete the scheduled voyage. Thirdly, the holds, refrigerating and cool chambers and all other parts of the ship in which goods are carried should be fit and safe for goods. The above three aspects are stipulations of seaworthiness in a generalized concept, among which the first one is also known as the narrow sense concept.

This article explicitly stipulates the criterion of ship seaworthiness, namely "exercise due diligence". Here, exercising due diligence is a matter of fact, it means there is no fault with the carrier. Therefore, carrier's obligation of ship seaworthiness is relative. In other words, the carrier just needs to exercise due diligence but does not have the obligation to make the ship absolutely seaworthy.[1]

According to the CMC, ships must be seaworthy before and at the beginning of the voyage. This suggests that the carrier will not be responsible for the violation of seaworthiness obligation if the loss of or damage to goods happened due to unseaworthy during the voyage.

For example, in the case *Qinhuangdao Golden Sea Grain Oil Industrial Co., LTD. v. Qinhuangdao Yudonghang Shipping Co., LTD. and Linhai Yongquan Shipping Co. LTD,*[2] Tianjin Maritime Court held that holds of "*Yongquan 2*" existed serious corrosion. Plate Keel at the bottom of the vessel had a longitudinal fissure length of about 400 mm, the trace was old and was stoppered by a wood plug. In addition, the ship was ratified that it had the ability to resist wind up to level eight. Nevertheless, when it met with a six-level wind, the hull started to breakdown and holds began to fill with water. These facts all proved that the ship was unseaworthy at the beginning of the voyage, and the carrier violated the duty of cargo worthiness. Therefore, the court held that the defendant should be liable for compensation.

B. A Comparison with the Seaworthiness Obligation under the Charter Party

1. Seaworthiness under Voyage Charter Party

The first paragraph of Article 94 of Chapter 4 Contract of Carriage of Goods by Sea in the CMC provides that: '*[t]he provisions of Article 47 and 49 of this law shall apply to the shipowner under voyage*

[1] Si Yuzhuo, *Maritime Law* (3rd edition, Beijing: Law Press, 2012), at 102.

[2] Accessed at http://www.sinotf.com/GB/136/1363/2009-10-19/3MMDAwMDA0MDM3MQ.html, September 26, 2016.

charter party.' Article 47 of this law stipulates the seaworthiness obligations of the carrier under the liner shipping. Therefore, the carrier's seaworthiness obligation under the liner shipping also applies to the shipowner under the voyage charter party. In other words, under the voyage charter party, the shipowner shall, before and at the beginning of the voyage, exercise due diligence to make the ship seaworthy.

2. Seaworthiness under Time Charter Party

Article 132 of Section 2 *Time Charter*, Chapter 6 *Charter Parties* in the CMC provides that: '*At the time of delivery, the shipowner shall exercise due diligence to make the ship seaworthy. The ship delivered shall be fit the intended service. Where the shipowner acts against the provisions in the preceding paragraph, the charterer shall be entitled to cancel the charter and claim any losses resulting therefrom*.'

Compared with the liner shipping, the difference of seaworthiness obligation under time charter reflects in the time issue. Under the liner shipping, the carrier shall before and at the beginning of the voyage, exercise due diligence to make the ship seaworthy. While under the time charter, the shipowner shall exercise due diligence to make the ship seaworthy only at the time of delivery. If the shipowner does not fulfill the seaworthiness obligation at the time of delivery, the charterer is entitled to cancel the charter party and to claim any losses resulting therefrom. In addition, the first paragraph of Article 133 stipulates that: '*During the charter period, if the ship is found at variance with the seaworthiness or the other conditions agreed upon in the charter, the shipowner shall take all reasonable measures to have them restored as soon as possible*.' This provision, in fact, provides that the shipowner shall maintain the seaworthiness of the vessel during the charter period. The seaworthiness is a generalized concept in this article.

Where the ship is found at variance with the seaworthiness or the other conditions agreed upon and consequently cannot be operated normally for 24 consecutive hours due to the shipowner's violation to maintain his seaworthiness obligation, the charterer is entitled to treat the vessel off-hire, unless such condition was caused by the charterer himself.

3. Seaworthiness under Bareboat Charter Part

Article 146 of Section 3 *Bareboat Charter*, Chapter 6 *Charter Parties* in the CMC stipulates that: '*At the time of delivery, the shipowner shall exercise due diligence to make the ship seaworthy*.' Therefore, the shipowner under bareboat charter party shall exercise due diligence to make the ship seaworthy at the time of delivery, to let the vessel be fit for the agreed service, including its hull, machinery and equipment. Also, if the shipowner acts against the seaworthiness obligation, the charterer shall be entitled to cancel the charter party and claim any losses resulting therefrom. This stipulation is identical to the provision under time charter.

For example, in the case *Shanghai Zhongxing Shipping Co., Ltd. v. Hainan Zhonghai Haishenghailian Shipping Co., Ltd*[3], although the defendant shipowner of "*Xinglonghai*" provided the seaworthiness certificate at the time of delivery, it only proved to be the prima facie evidence that the shipowner had exercised due diligence; however, the claimant charterer proved that the vessel "*Xinglonghai*" was unseaworthy due to problems with the equipment of the rudder system. At the same time, the inspection report shows that "*Xinglonghai*" is unseaworthy before delivery and it is not due to a potential defect. Shanghai Maritime Court accordingly held that the defendant shipowner violated the seaworthiness obligation to make the ship seaworthy at the time of delivery, and therefore the defendant shall assume the liability.

II. The Burden of Proof of Ship's Unseaworthiness and its Influence on the Carrier's Liability for Compensation

A. The Burden of Proof for Ship's Seaworthiness

According to Article 4(1) of the Hague Rules, if the carrier does not exercise due diligence to make the ship seaworthy, the carrier shall undertake liability for loss of or damage resulting from unseaworthy. If the carrier exercise due diligence to make the ship seaworthy, however, the carrier is not responsible for the loss or damage even if it is caused

[3] Accessed at http://www.cnshipnet.com/news/2/7743.html, September 26, 2016.

by unseaworthiness. It is undoubted that the burden of proving the exercise of due diligence shall be on the carrier. Article 4(2) of the Hague Rules stipulates 17 exceptions to the liability for loss of or damage to goods, the carrier who opts to rely on these exemptions shall bear the burden of proof. The carrier needs to prove the loss of or damage to the goods is not due to the actual fault or privity of itself, or without the actual fault or neglect of the agents or servants of itself.

Article 17 of the Rotterdam Rules stipulates the basis of liability of the carrier. According to this article, as long as the claimant proves that the loss, damage or delay, or the event or circumstance that caused or contributed to it took place during the period of the carrier's responsibility, the carrier shall be liable for compensation. While if the carrier can prove that the cause or one of the causes of the loss, damage, or delay is not attributable to its fault or to the fault of any other person referred to in Article 18, the carrier shall be exempted from liability. Additionally, if the carrier can prove that the loss, damage or delay is caused by one or more of the 15 exemptions in Article 17(3) of the Rotterdam Rules, the carrier can also be relieved from liability. However, if the claimant proves that the loss, damage or delay is due to the unseaworthiness of the ship, and the carrier cannot prove the unseaworthiness causing no damage or cannot provide evidence to prove that it has exercised due diligence to make the ship seaworthy, then the carrier shall still bear the liability for compensation.

CMC has no explicit provisions to stipulate the burden of proof as the international convention. In maritime judicial practice, we mainly adhere to the 'who claim, who undertake the burden of proof' principle. In the carriage of goods by sea, the cargo claimant may claim against the carrier that the loss or damage to the goods is caused by the unseaworthiness of the ship. Under the circumstances, the cargo claimant shall prove the goods were lost or damaged. Also, the claimant shall prove the loss or damage to the goods was occurring during the period of responsibility of the carrier. If the carrier wants to exempt from liability, he must prove that before and at the beginning of the voyage, he had exercised due diligence to make the vessel seaworthy or prove that the loss or damage to the goods falls within one of the exceptions listed in the CMC Article 51(1). It is noteworthy that Article 51(2) stipulates that: '*[t]he carrier who is entitled to exoneration from the liability for compensation as provided for in the preceding paragraph shall, with the exception of the causes given in*

sub-paragraph (2)[4], *bear the burden of proof*.' This provision is established mainly based on the balance between the ship interests and the cargo interests.

B. The Influence of the Nature of the Seaworthiness Obligation on the Liability for Compensation

According to Article 3 of Harter Act 1893, when and only when the carrier has exercised due diligence to make the ship seaworthy before and at the beginning of the voyage, may he invoke the listed wide exceptions[5]. This carrier's obligation was deemed as an 'overring obligation'. This Act created a huge influence on the international field of maritime law. The Hauge Rules 1924 was drafted by the reference of this Act. It is a common view in the field of international maritime law that under the Hauge/Visby Rules, the seaworthiness obligation of the carrier to exercise due diligence is an 'overriding obligation'.[6] This is because the wording of Article 4(1) of the Hague Rules indicates that '*Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy and to secure that the ship is properly. . . '*. Thus, so long as the carrier can provide evidence to prove he has exercised due diligence, even if the loss of or damage to the goods is caused by unseaworthiness of the ship, the carrier can escape liability. This provision emphasizes the importance of the seaworthiness obligation of the carrier, which can be identified as the premise of the carrier's exemptions.

On the issue of liability of compensation, the first question should be considered is whether the seaworthiness obligation is an overriding obligation or not. If it is, the relevant obligor cannot escape liability if the ship is unseaworthy. In China, there are different views on this issue. Some scholars consider that in the Hague Rules, the status of the duty to care for the cargo has been weakened and is no longer belonged to the category of overriding obligations. Only the duty to provide a

---

[4] Article 51 (1)(b), CMC: *Fire, unless caused by the actual fault of the carrier*.

[5] *See Benedict on Admiralty* (Matthew Bender, 7th edition, 2003), Volume 2A, Chapter II, n. 2-6.

[6] Yang Liangyi, *Bill of Lading and Other Shipping Documents* (China University of Political Science and Law press, Beijing, 2007), at 328-536.

seaworthy ship belongs to that category[7]. Some other scholars consider that the seaworthiness obligation does not belong to the overriding obligation, which mainly based on the second sentence of Article 4(1) in the Hague Rules: '*Whenever loss or damage has resulted from unseaworthiness the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under this Article.'* It indicates that, before relying on the exemptions, the carrier does not need to prove it has fulfilled its seaworthiness obligation. Only after the cargo claimant has proved that the loss or damage of the goods is caused by the unseaworthiness of the ship, the carrier needs to prove it has exercised due diligence. This conclusion is clearly contrary to the view of overriding obligation.[8]

The authors suggest that in the CMC, the seaworthiness obligation is a basic legal obligation, but it is not superior to other provisions on the so-called "overriding obligation". The reason is that Article 51 in the CMC does not contain the opening sentence of Article 4(1) of the Hague Rules[9], namely Article 4(1) of the Hague rules has not been absorbed into the CMC. As a result, seaworthiness obligation cannot be seen as an "overriding obligation" under the CMC.

Especially under the Rotterdam Rules 2008, Article 17 of this Convention reconstitutes the basis of the carrier's compensation liability and distribution of the burden of proof. According to Article 17(5), after the claimant proves that the ship unseaworthiness caused the loss of or damage to the goods, if the carrier proves that there is no causation between the ship unseaworthiness and such loss or damage, or he proves that he has exercised due diligence to make the ship seaworthy, the carrier can be exempted. In other words, the seaworthiness obligation of the carrier is no longer an overriding one under Rotterdam Rules 2008 as well.

---

[7] Zhu Zuoxian, Si Yuzhuo, The Overriding Obligation of 'Hague Rules', *Annual of China Maritime Law*, 2002:64.

[8] Jiang Yuechuan. 'Whether the Seaworthiness Obligation Is the Overriding Obligation of the Carrier', *Annual of China Maritime Law*, 2008:276.

[9] First sentence of Article 4(1) of the Hague Rules: Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy and to secure that the ship is properly manned, equipped and supplied, and to make the holds, refrigerating and cool chambers and all other parts of the ship in which goods are carried fit and safe for their reception, carriage and preservation in accordance with the provisions of paragraph 1 of Article 3.

III. The Influences of the Unseaworthiness of the Ship on Other Maritime Regimes

A. The Influence on the Compensation Liability of the Insurers under the Marine Insurance Regime

The provisions of the seaworthiness under the carriage of goods by sea do not completely apply to the marine insurance regime, and there are different seaworthiness requirements in different marine insurance contracts. Unseaworthiness is one of the exclusions of the ship insurance in the CMC. According to Article 244(1) of the CMC, the insurer shall not be liable for the loss or damage to the insured ship arising from unseaworthiness of the ship at the time of the commencement of the voyage. It means that once there is a fact of the unseaworthiness of the ship and the loss or damage to the ship arising from this reason, the insurer has no insurance liability.

But it is worth noting that Article 244(1) of the CMC also emphasized that the insurer cannot exclude the liability under a time policy if the insured has no knowledge of the unseaworthiness at the beginning of the voyage. Certainly, the burden of proof lays on the insured to prove he has no knowledge to the unseaworthiness of the ship. In practice, in the light of paragraph 1 of Part II of the PICC Hull Insurance Clauses (2009), unseaworthiness is also explicitly defined as an exclusion. However, the clause requires the insured to know or should know such unseaworthiness at the time of the commencement of the voyage. It indicates that the insurer must prove the following three points before excluding his liability, no matter in time hull insurance or voyage insurance: first, objectively speaking, there is a fact that the ship is unworthy; secondly, subjectively speaking, the insured know, or should know the unseaworthiness at the beginning of the voyage; thirdly, there is a causal link between the unseaworthiness and the loss or damage the insured claimed.[10]

For example, in the case *China Pacific Insurance (group) Co., Ltd. Tianjin Branch (appellant) v PengweiShipping Engineering Co., Ltd. (appellee), with the third party Bank of Tianjin, Dongli Branch for Dispute of the Contract of the Marine Insurance*[11], one of the

[10] Chu Beiping. 'The Excluded Liability of the Unseaworthiness in the Hull Insurance', *China Ship Survey*, 2016:25.

[11] Tianjin Maritime Court Final Civil Judgment, No.72 (2016).

contentious issues is that whether the insured event involved is caused by the unseaworthiness of the ship. The insurer, China Pacific Insurance (group) Co., Ltd. Tianjin Branch claimed that the period of the validity of the 'Seaworthiness Certificate of the Cargo Ship' expired on September 21, 2012, and the involved stranding event happened on November 20 and November 27 that year, which the certificate was already invalid and the ship was on the technical condition of unseaworthiness. Also, crew members on the involved ship had no Certificate of Competency. If the stranding event was true, then it had a certain causal link with the unseaworthiness of the ship. According to Article 3 of the involved insurance clause, the insurer shall not be liable for the loss or damage which is caused by the unseaworthiness of the ship (include the technical condition and the manning of the ship). The insured, Pengwei Shipping Engineering Co., Ltd, asserted that the Seaworthiness Certificate of the Cargo Ship was still valid when the stranding events happened. The ship was seaworthy when the first stranding event happened, and Register of Vessel of the PRC (Tianjin Branch) could prove that the Seaworthiness Certificate of the Cargo Ship was valid until December 21, 2012. The court of first instance held that though CPI Tianjin Branch asserted Pengwei Shipping Engineering Co., Ltd did not apply for the Renewal Certificate, it did not provide relevant valid evidence to support its assertion. Therefore, the claimant's assertion shall not be upheld. Meanwhile, CPI Tianjin Branch did not provide valid evidence to prove the unseaworthiness of the ship, even nothing to prove the causal link between the unseaworthiness and the second stranding event. Thus, whether the vessel "*Jingcai 66*" was seaworthy had no certain connection with the second stranding event. Eventually, the judge found that the ship was not unseaworthy so that the insurance company shall be liable for compensation. After trying the case on appeal, Higher People's Court of Tianjin held that the facts were clearly ascertained and the law was correctly applied in the first instance, and there was no violation of legal procedure. Thus, the appeal of CPI Tianjin Branch should be rejected and the original judgment shall be affirmed because of the lack of basis of grounds of the appeal.

As for the contract of marine cargo insurance, the CMC does not refer to the issue of seaworthiness of the ship. However, according to paragraph 1 of Part II of PICC Marine Cargo Insurance Clause 2009, 'Loss or damage caused by the intentional act or fault of the insured'

belongs to one of the exclusions of the insurer. Therefore, if the insured ships the cargo when he knows the ship is unseaworthy, such conduct constitutes the intentional act of the insured, which makes the insurer be entitled to assert this exclusion clause for a plea to escape the liability. Nevertheless, this provision is not only set for the issue of the seaworthiness of the ship, it needs to be clarified in the amendment process of the CMC.

B. The Influence on the Contribution to General Average

General Average [hereinafter GA] is a special legal regime of maritime law. In accordance with this regime, GA shall be contributed by all beneficial parties in proportion according to their own contributory values.

But if the GA event is caused due to a fault of one party or both parties to the contract of affreightment, other parties may use this as a defense during the process of contribution. If the carrier does not make the ship seaworthy, it is not entitled to exemption from liability. There are two opposite views about whether all beneficial parties to such GA event could be asked to share the loss or damage. The first view is that the GA cannot be established if it is caused by the failure of the carrier to exercise due diligence to make the ship seaworthy. Then other beneficial parties have no need to share the sacrifices and expenditures of the GA. The second view is that the GA shall still be established, though it is caused by the carrier who makes the ship unseaworthy. But under the circumstances, no GA adjustment shall be proceeded with. For instance, Article 2(3) of the Provision Rules for General Average Adjustment Adopted by the China Council for the Promotion of International Trade (Beijing Adjustment Rules) stipulates that: '*If the event giving rise to a claim submitted for adjustment as general average is due to a fault of one of the contracts of affreightment, for which he is not entitled to exemption from liability, no general average adjustment shall be proceeded with, but the case may be otherwise appropriately dealt with through consultation according to the circumstances involved.'*

The authors agree with the second view and consider that we should not take the cause of the danger into account when deciding whether the GA act exists and whether the GA event is established. In other words, even though the danger is caused by the carrier who fails

to take due diligence to make the ship seaworthy, the establishment of the GA cannot be affected. If the cause of the danger can decide the establishment of the GA act, then the captain or the shipowner will certainly consider the consequence of their acts when they take emergency measures against the peril[12], which is obviously against the aim of the GA regime.

The more traditional basic principle of the GA law is based on the principle that everyone shall be liable for his own fault. If the GA event is caused by the fault party who makes the unseaworthiness of the ship, this party cannot assert the contribution to general average to other innocent parties, whereas all interested parties can claim compensation for their loss or damage against the fault party. Since it is unable to ask other interested parties to contribute to the GA, it is no need to proceed to the GA adjustment either.

If the unseaworthiness of the ship is caused by the latent defects which have not been discovered after exercising due diligence, the carrier can still exempt his liability. Under the uncertain condition that whether the unseaworthiness is an exemption to the carrier, Article 197 of the CMC provides that: '*Rights to contribution in general average shall not be affected, though the event which gave rise to the sacrifice or expenditure may have been due to the fault of one of the parties to the adventure.*' This rule is a reference to Rule D[13] of The York-Antwerp 1974, which adopts the principle of the separation of the adjustment stage and contribution stage. To be specific, the adjustment can be done first; during the contribution period, if it has been proved that the carrier cannot be exempted from liability due to the unseaworthiness of the vessel, then innocent parties can raise a plea to refuse the contribution stage. But it is noteworthy that Article 197 is quite different to Rule D. The first half sentence of Article 197 of the CMC clearly defined rights to the contribution of "this party" (the fault party) shall not be affected, but does not mention innocent parties. Thus, it is not clear that whether the right of innocent parties to ask for the

---

[12] Hu Zhengliang, Han Lixin, *Admiralty Law (Revision)* (Peking University Press, Beijing, 2012), at 360.

[13] Rule D, York Antwerp 1974: *Rights to contribution in general average shall not be affected, though the event which gave rise to the sacrifice or expenditure may have been due to the fault of one of the parties to the adventure, but this shall not prejudice any remedies or defences which may be open against or to that party in respect of such fault*.

contribution to GA would be affected because of other parties' fault[14]? While Rule D only provides that rights to contribution shall not be affected, and does not clear define such rights belong to fault parties or innocent parties. The authors suggest that Rule D of the York-Antwerp 1974 should be referred to when applying Article 197 of the CMC, and we should amend this article in time in order to make it consistent with Rule D.

IV. Is There a Seaworthiness Obligation during the Trial Voyage of the Ship under Construction?

Article 3 of the CMC has clearly defined 'ship': '*Ship as referred to in this Code means sea-going ships and other mobile units, but does not include ships or craft to be used for military or public service purposes, nor small ships of less than 20 tons gross tonnage*.'

Whether the ship under construction belongs to the definition of ship regulated in the CMC? Whether the ship under construction should satisfy the requirement of the seaworthiness during its trial voyage? *The Ship "An Min Shan" in Trial Voyage case*[15] gives us the answer. In this case, the ship *"An Min Shan"* departed from Jiang Du shipyard wharf to the Flower and Bird Mountain sea area of Zhejiang Province in order to undergo sea trials. During the voyage, the whole ship lost power due to the motor failure. The ship "*Hua Hang Ming Rui No.16"* did not have enough time to avoid collision and collided with the stern rudder blade of the ship *"An Min Shan"*. The accident led to the damage of the ship "*An Min Shan*", the sinking of the ship *"Hua Hang Ming Rui No.16"*, partial collapse of the wharf of Dong Hua Company and a wharf worker drowned. The China Shipping Company insured the ship building insurance for the construction of the bulk cargo ship "*An Min Shan*" for RMB 280 million at CPIC Yangzhou Company. After paying partial coverage, the China Shipping Company litigated in Shanghai Maritime Court, requesting CPIC Yangzhou Company to pay the insurance indemnity of RMB 240 million. The presiding judge in Shanghai Maritime Court looked up all kinds of legal books and records, searched for nearly a hundred of domestic and foreign judicial cases, and finally made clear the application rule: the ship which is

[14] Jiang Yuechuan, *General Average* (Law Press, Beijing, 2009), at 233.
[15] The first instance of a commercial case at Shanghai Maritime Court, No.130 (2011).

under construction have not passed various kinds of technical inspections or went through the formalities of formal registration, hence it is difficult to constitute the meaning of 'ship' in the sense of the CMC. What is more, ships under construction do not qualified to engage in ship operations. Therefore, the trial voyage of the ship which is under construction is merely an activity related to "shipbuilding", not activities directly related to the "operation" of the ship listed in the CMC. As a result, the China Shipping Company does not enjoy the maritime liens or the limitation of liability for maritime claims.

In the authors' opinion, since the ship under construction does not yet belong to the "ship" defined in Article 3 of the CMC, there should be no seaworthiness requirements for the ship under construction. But considering on the trial voyage of the ship which is already build up, it is necessary to adjust the whole course of the trial voyage by adding the seaworthiness clause into the shipbuilding contract. The reason for this clause is mainly based on consideration in two aspects: First, when the ship is already build up, the trial voyage would be conducted on the open sea. If the ship is not seaworthy, it would pose a threat to other ships or other offshore installations. Also, it is highly likely to cause marine environmental pollution incidents in case of such accidents. Secondly, the CMC does not define the seaworthiness of a ship under construction during her trial voyage as a legal obligation. Once an accident happens, there is no basis for parties to define their rights and obligations. If the ship seaworthiness clause is clearly stipulated in the shipbuilding contract, it would provide convenience to settle the dispute among parties. Besides, in the CMC revision process, the particularity of the ship under construction should be considered. The issue of the seaworthiness of the ship under construction should be explicitly stipulated in the CMC so that it can be adjusted truly in the level of law.

V. Conclusion

As mentioned above, ship's seaworthiness obligations are not only important under the liner shipping and the tramp shipping, but also relate to the insurer's compensation responsibility in the field of marine insurance and crucial to the development of the contribution to the general average regime. The seaworthiness issues do exist on the stage

of the trial voyage of the ship under construction, and those issues should not be ignored. From the perspective of the development of science and technology, although the seaworthiness of the unmanned equipment has not been discussed in this essay, it is a new issue which deserves attention as well.

REFERENCES

Si Yuzhuo, *Maritime Law ,* 3rd edition, Beijing: Law Press, 2012.

Matthew Bender, *Benedict on Admiralty ,* 7th edition, 2003, Volume 2A.

Yang Liangyi, *Bill of Lading and Other Shipping Documents,* Beijing:China University of Political Science and Law press, 2007.

Zhu Zuoxian, Si Yuzhuo, The Overriding Obligation of 'Hague Rules', *Annual of China Maritime Law*, 2002:64.

Jiang Yuechuan. 'Whether the Seaworthiness Obligation Is the Overriding Obligation of the Carrier', *Annual of China Maritime Law*, 2008.

Chu Beiping. 'The Excluded Liability of the Unseaworthiness in the Hull Insurance', *China Ship Survey*, 2016.

Hu Zhengliang, Han Lixin, *Admiralty Law (Revision) ,* Beijing:Peking University Press, 2012.

Jiang Yuechuan, *General Average ,* Beijing:Law Press, 2009.

This article is published in *The Asian Business Lawyer (ABL)* Vol. 20.
The publication of *ABL* Vol. 20 has been financially supported by KIM & CHANG

ARTICLES

The Effect of GATS Commitments on E-Commerce in Qatar

Qatar University and Centre for Law and Development, College of Law / Qatar University*

Rawan Al-Louzi, Assistant Professor

ABSTRACT

The internet has changed the way in which companies and individuals conduct business, trade and communicate. Due to internet, transactions involving transmission of goods, services and payments are done online and known as e-commerce. The rapid growth of e-commerce and the simple access to mobile devices created new opportunities for international trade. Qatar is aware of the importance of e-commerce in terms of economic development, access to consumers, business efficiency and expanding trade and investment opportunities. However, the success of e-commerce certainly depends on the stability of the underlying legal framework. Qatar's e-commerce legal framework is not limited to national laws; e-commerce offers various ways for retailers to trade across boarders which make international commitments of high relevance and importance. At the international level, it is agreed that e-commerce is regulated by GATS in WTO. A consequence issue to be settled is how does Qatar's commitments under GATS affect e-commerce in Qatar. This article addresses Qatar's national framework for e-commerce and evaluates Qatar's GATS commitments according to the mode classification for e-commerce. The mode of classification determines whether Qatar's commitments under GATS in regard to e-commerce serve national consumer protection or promote market access.

KEYWORDS: Qatar, E-commerce, WTO, GATS, Commitments

* Contact Address: P.O. Box 2713, Doha - Qatar;
Email: rallouzi@qu.edu.qa; Telephone: +974 4403 6726.

Table of Contents

I. Introduction

The internet has changed the way in which companies and individuals conduct business, trade and communicate. Due to internet, transactions involving transmission of goods, services and payments are done online and known as e-commerce. E-commerce can be defined as using the internet to conduct business

This includes online buying and selling, electronic payments, electronic communications and other activities associated with online buying and selling of goods and services.[1] The rapid growth of e-commerce and the simple access to mobile devices created new opportunities for international trade.[2]

Qatar is aware of the importance of e-commerce in terms of economic development, access to consumers, business efficiency and expanding trade and investment opportunities.[3] However, the success of e-commerce certainly depends on the stability of the underlying legal framework. In 2010 Qatar issued the Electronic Commerce and Transactions Law. This law is mainly concerned with transactions that

---

[1] *Id.*

[2] Kommerskollegium, E-commerce - New Opportunities, New Barriers: A Survey of E-commerce in Countries Outside the EU, Kommerskollegium (2012), *available at* https://www.wto.org/english/tratop_e/serv_e/wkshop_june13_e/ecom_national_board_e.pdf.

[3] *See* Qatar National E-Commerce Roadmap 2015, *available at* http://www.motc.gov.qa/en/documents/document/qatar-national-e-commerce-roadmap-2015.

are conducted using electronic communication.

However, Qatar's e-commerce legal framework is not limited to national laws; e-commerce offers various ways for retailers to trade across boarders which make international commitments of high relevance and importance. At the international level, it is agreed that digital trade in services is regulated by GATS in WTO.[4] However, it seems unclear under which WTO agreement do digital products fall.[5]

This article aims at analyzing the status of e-commerce in Qatar at both the domestic and the international level. First it reviews the main provisions in Qatar's national law on e-commerce. It then moves to address e-commerce within the WTO. The article examines the historical development of e-commerce within the WTO, the nature of e-commerce, the relevant agreement being GATS or GATT as well as the commitments under the GATS. Finally, this article evaluates Qatar's commitments according to the mode classification under the GATS and their effect on e-commerce in Qatar.

II. Electronic Commerce Law in Qatar

Qatar recognises that e-commerce is becoming more of a business imperative than ever before.[6] E-commerce has transformed business worldwide bringing what is now known as the world's most successful and popular businesses including Amazon, Uber and Netflix. Qatar's government is aware that Qatar already has some key ingredients to a favourable e-commerce environment such as high levels of income.[7] Aiming to enhance this environment in 2010 the government adopted the Electronic Commerce and Transactions Law (ECT Law).[8] The ECT Law consists of 73 articles that govern e-commerce in Qatar. The following address the main articles of the ECT Law.

---

[4] *See* Appellate Body Report, United States – Measures Affecting the Cross Border Supply of Gambling and Betting Services, para 215, WT/DS285/AB/R (April 7, 2005).

[5] *See* Rolf Weber & Rainer Baisch, *Tension between Developing and Traditional GATS Classification in the IT Markets*, 43 (1) Hong Kong L.J. 77, 110 (2013).

[6] *See* Qatar National e-Commerce Roadmap 2015, *available at* http://www.motc.gov.qa/sites/default/files/e-commerce_roadmap_2015_en.pdf.

[7] *Id.*

[8] Decree Law No. 16 of 2010 on the Promulgation of the Electronic Commerce and Transactions Law, (Sep. 28, 2010).

A. Definitions

The law does not provide a definition of e-commerce per se. Rather in the first article the ECT Law provides and defines a term referred to as electronic transaction. According to the law an electronic transaction is "any deal, contract or agreement concluded or performed, in whole or in part, through electronic communication". Electronic communication is defined as "any communication of information by means of telecommunication".[9]

The law also defines each of "commerce services" and "electronic" separately. Commerce service is "a service normally provided for remuneration, or a service of a non-commercial nature, provided by means of any combination of an information system and any telecommunications network or telecommunication service, including electronic government service". As for electronic it is defined as "technology based on using electrical, electromagnetic or optical means or any other form of similar technological means".

B. Scope

The scope of the law is determined in article 2 and 3. According to article 2 the law applies to "transactions between parties who agree to conduct transactions using electronic communication".[10] However the law does not apply to any of the following documents and transactions:

1. Documents relating to family and personal status.
2. Documents that create interests in land.
3. Documents that are required by law to be authenticated by the Notary Public.
4. Negotiable commercial instruments in accordance with provisions of the commercial law.[11]

C. Requirements of Electronic Transactions

For an electronic transaction to be valid it requires both an offer and an acceptance.[12] According to article 4 of the ECT Law in terms of

---

[9] Article 1.
[10] Article 2.
[11] Article 3.
[12] Offer and acceptance are general requirements for all contracts under Qatar's Civil

contract formation or conducting transactions, the offer or acceptance of an offer can be expressed, in whole or in part, by means of electronic communications. Moreover, using electronic communication is not accepted as a sole reason to deny validity or enforceability of a contract or a transaction.[13]

Under the requirements of electronic transactions, the ECT Law regulates data messages.[14] A data message is "information generated, sent, received, processed, stored or displayed by one or more information systems or by means of electronic communication".[15] A data message is considered from and attributed to the originator if it was sent by the originator itself, or if the data was sent by a person authorised to act on behalf of the originator, or if addressee properly applied a procedure previously agreed to by the originator for that purpose in order to ascertain whether the data message was that of the originator, or if the data message as received by the addressee resulted from the actions of a person whose relationship with the originator or with any agent of the originator enabled that person to lawfully gain access to a method used by the originator to identify the data message as its own.[16] In such cases the addressee may rely on the data message and act upon it.[17] However, the addressee is not entitled to such reliance if it knew or should have known after exercising reasonable care or used agreed procedure, that the data message received was subject to error resulting from the process of telecommunication.

Within the same section, the law also regulates when a data message is considered received and the different scenarios of receipt with acknowledgement or without.[18] In case the originator and the addressee have agreed on sending an acknowledgement of receipt, the law provides some rules regarding the form of that acknowledgement.[19] The law then proceeds to regulate the dispatch, dispatch time and dispatch place of the message data.[20] In regard to the place of dispatch, the data message is considered to be dispatched at the place where the

---

Law article 64.
[13] Article 4.
[14] Articles 5-19.
[15] Article 1.
[16] Article 5.
[17] Article 7.
[18] Articles 8 – 11.
[19] Article 10.
[20] Articles 14-16.

originator has its place of business.[21] If the originator has more than one place of business the place of dispatch is the place of the business that has a closer relationship to the underlying transaction.[22] If the originator has more than one place of business and the preceding rule does not apply, then the principle place of business shall be considered the place of dispatch.[23] Finally, if the originator does not have a place of business, the applicable place of dispatch shall be the place where the originator ordinarily resides.[24] The same mentioned rules apply to the place of receipt concerning the addressee.[25]

Moreover, it is important to note that according to the ECT Law a location is not considered a place of business merely because that is where the equipment or any other part of the information system is located.[26] In addition a business is not presumed to be located in a country only because the originator or the addressee makes use of a domain name or electronic mail address connected to that country.[27]

D. The Effect and Evidential Weight of Electronic Transactions

In this section, the law regulates the effect and the evidential weight of electronic transactions. Information included in the data message is considered valid, enforceable and has legal effect. [28] Moreover, when an information or a document is in the form of a data message, that satisfies any law requirement that the information or a document should be in writing.[29] In addition, whenever a law requires that certain information or documents should be presented, retained or stored such a requirement is satisfied by presenting, retaining or storing the concerned information or document in the form of a data message provided that certain conditions are fulfilled.[30]

Regarding the reliance on information or documents in the form of data message as evidence, the law indicates that it is not applicable to

---

[21] Article 16.
[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] Article 17.
[27] Article 18 of the ECT Law.
[28] Article 20 of the ECT Law.
[29] Article 21 of the ECT Law.
[30] Articles 23 and 24 of the ECT Law.

prevent the admissibility of information or a document because it is in the form of data message.[31] However, when it comes to assessing the evidential weight of information or documents in the form of data message, shall be had to the following:

- The process and circumstances under which the data message was generated, stored or communicated.
- The process and circumstances under which the integrity of the information or document contained in the data message was mentioned.
- The process and circumstances under which the originator of the data message was identified.
- Any other relevant process or circumstances.[32]

E. Electronic Signature

The same law also addresses electronic signatures.[33] For an electronic signature to have evidential weight; first the signature creation information should be identified with the signatory and no other person.[34] Second, the signature creation information should be at the time of signing under the control of the signatory and of no other person.[35] Third, any alteration to the electronic signature made after the time of signing should be detectable.[36] Finally, whenever the purpose of an electronic signature is to provide assurance as to the integrity of the information to which it relates, any alternation made to that information after the time of signing should be detectable.[37]

The law proceeds to regulate the certification service provided to support electronic signatures.[38] The law requests the certification service provider to act in accordance with representations made by it with respect to its practices, exercise reasonable care to ensure accuracy and completeness of all material representations made by it that are

[31] Article 25 of the ECT Law.
[32] Article 26 of the ECT Law.
[33] Articles 28-34 of the ECT Law.
[34] Article 28 of the ECT Law.
[35] Ibid.
[36] Ibid.
[37] Ibid.
[38] Articles 35-44 of the ECT Law.

relevant to the certification certificate throughout its duration and employ trust worthy systems, procedures and human resources in performing its services.[39]

F. Transmission and Storage of Information

This paper identifies the scope of the electronic commerce service provider's liability for the transmission and storage of information provided by the user of the service.[40] First in the case of transmission, the electronic commerce service provider shall not be held liable in case the service provider does not initiate the transmission, does not select the receiver of the transmission, does not select or modify the information contained in the transmission.[41]

Additionally, the service provided is not held liable for the automatic, intermediate and transient storage of the information provided by the service user whenever the storage was made for the purpose of making more efficient transmission of the information to other users of the service upon their request.[42] This is provided that service provider complies with the following:

- Does not make modification to the information.
- The conditions on access to the information.
- The applicable rules regarding updating the information which are recognised and used by similar service providers.
- Does not interfere with the lawful use of technology recognised and used by similar service providers to obtain data on the use of the information.
- Acts without delay to remove or disable access to the information stored when it actually knows that the information at the initial source of the transmission has been removed from the network or access to it has been disabled or that a court or a competent authority has ordered such removal or disablement.[43]

Finally, the law refers to the liability of a service provider that

[39] Article 35 of the ECT Law.
[40] Articles 45-50 of the ECT Law.
[41] Article 45 of the ECT Law.
[42] Article 46 of the ECT Law.
[43] Ibid.

provides hosting services.[44] According to the law such a service provider is not held liable if it does not have actual knowledge of unlawful activity or information associated with particular hosting services or is not aware of facts or circumstances which make it apparent that such activity or information is unlawful.[45] Also in case the service provider acts without delay to remove or to disable access to the affected services or information when it knows of the unlawful activity or information associated with particular hosting services.[46] Last, in case the user of the hosting service provider was not acting under the authority of the service provider or with its approval.[47]

G. Consumer Protection

The law provides provision dedicated to ensuring consumer protection in electronic commerce and transactions.[48] The first form of consumer protection is found in obliging service providers to make available to the users of its services and to any competent governmental entity, in the most easy, direct and accessible manner, the following information:

1. The name of the services provider.
2. The address of the service provider.
3. Contact information relating to the service provider, including its electronic mail address.
4. The details of the commercial register or any other equivalent means to identify the service provider, if the service provider was registered in trade or similar register available in the public.
5. The details of the competent authority that the service provider is subject to its supervision, where the provision of the service requires an authorisation or license from that authority.
6. Codes of conduct that the service provider is subject to and whether and how those codes can be viewed electronically.
7. Any other information that the Supreme Council deems necessary in order to protect the consumer of the electronic

[44] Article 47 of the ECT Law.
[45] Ibid.
[46] Ibid.
[47] Ibid.
[48] Articles 51-59 of the ECT Law.

commerce service.[49]

Moreover, the law specifies that in case the electronic communication constitutes or forms a part of an e-commerce service of a commercial nature, and is provided by a services provider, such a communication should satisfy the following requirements:

1. Be clearly identifiable as a commercial communication.
2. Clearly identify the person on whose behalf the commercial communication is made.
3. Regarding any promotional offers or competitions, the following requirements shall be satisfied:
   A. Be clearly and accurately identified.
   B. Clearly identify whether it includes any discounts, premium or gifts.
   C. Any conditions which must be met to qualify are not misleading or deceptive and presented clearly, unambiguously and are easily accessible.
4. Shall not violate public order or public morals.[50]

The law obliges the service provider in the process of electronically concluding a commercial contract, and prior to an order being placed, to clearly and comprehensively provide the consumer with the terms and conditions of the contracts, including the following information:

1. The technical steps required to conclude the contract.
2. Information regarding the service provider.
3. A description of the main characteristics of the service or goods.
4. The prices of services and goods, and whether they are inclusive of tax and delivery costs.
5. Arrangements regarding payment, delivery and implementation.
6. The validity of the offer and the price.
7. Whether the consumer has the right to cancel the order.
8. Whether the contract will be stored or retained by the service provider, the accessibility, storing, copying and retention of the

[49] Article 51 of the ECT Law.
[50] Article 53 of the ECT Law.

contract by the consumer and the means of that.[51]

Whenever a consumer places an order through electronic communications, a service provider shall comply with the following:

1. Make available to the consumer of the service appropriate, effective and accessible means which allow the consumer of the service to determine and correct input errors before placing the order.
2. Acknowledge receipt of the order to the consumer of the service without undue delay and using appropriate electronic means.[52]

Finally, the law entitles the consumer to rescind or terminate the contract within three days from the date of entering into the contract and as long as the service provider has not yet fully implemented the contract in a manner that serves the purpose of the contract during that time and the consumer has not used the goods or products which he/she received nor has received any benefits or value therefrom.[53] The consumer also may terminate the contract with a service provider where delivery or other performance of the contract is delayed for a period of 30 days and shall be entitled to a refund.[54]

Based on the above revision of the main provisions of the ECT Law, it is clear that the law covers more than just e-commerce business. The law is not restricted to buying and selling online. Rather it provides a comprehensive legal framework that regulates e-signature, e-transactions, e-documentation and online authorisation. However, the domestic rules are not the sole instrument regulating e-commerce in Qatar. Doing business in Qatar is also affected by international obligations arising from international treaties and agreements. On an international level, Qatar is a member of the WTO, which makes the legal framework of the WTO of high relevance to e-commerce in Qatar. Before analysing the effect of Qatar's commitments under the WTO on e-commerce in Qatar, it is important to look at how the WTO regulates e-commerce.

---

[51] Article 55 of the ECT Law.
[52] Article 56 of the ECT Law.
[53] Article 57 of the ECT Law.
[54] Article 58 of the ECT Law.

III. The History of E-Commerce in the WTO

During the negotiations of the General Agreement on Tariffs and Trade (GATT) and the General Agreement on Trade in Services (GATS), the idea of online ordering and e-commerce was still unknown.[55] At the end of 1993, the Uruguay Round was concluded, just before "Pizza Hut" and "NetMarket" claim to have concluded the first online transaction.[56] However, a year later the internet witnessed the launch of the online giants Amazon and eBay and that is when e-commerce is officially born.[57] Ever since the rapid spread of the internet e-commerce continued to expand constantly.

The fact that the establishment of the WTO and the growth of e-commerce overlap explain why digital trade is not directly covered by the legal framework of the WTO. Unfortunately, there are many uncertainties and gaps regarding the governance of digital trade within the WTO.[58] Shortly the WTO community recognised that the global e-commerce was growing and creating new opportunities for trade.[59] As a result, at the Second Ministerial Conference in May 1998, the minsters adopted the Declaration on Global Electronic Commerce.[60] This initiated the establishment of a Work Programme on E-Commerce which was adopted in September 1998.[61]

Since neither the GATT nor the GATS define the terms "e-commerce" and "digital trade", the Work Programme on E-Commerce came to describe e-commerce as "the production, distribution,

---

[55] The GATT and GATS were negotiated between 1987 and 1993 see https://www.wto.org/english/thewto_e/whatis_e/who_we_are_e.htm.

[56] The first things sold online were a pizza and a CD, although Pizza Hut claim to have done the first ever transaction, research suggest that the first ever transaction was actually done by an entrepreneur who ran a website called NetMarket, see M. Grothhuas, "You'll Never Guess What The First Thing Ever Sold on the Internet Was", Fast Company, available at https://www.fastcompany.com/3054025/youll-never-guess-what-the-first-thing-ever-sold-on-the-internet-was.

[57] E-Commerce began in 1995, when two major players in this market - Amazon and eBay – became active, see V. Kvint, The Global Emerging Market: Strategic Management and Economics Routledge: UK, at 403, 2009.

[58] See S. Baker and M. Shenk, "Trade and Electronic Commerce", Chapter 56 in P. Macrory, A. Appleton and M. Plummer (eds), Vol 1, The World Trade Organization: Legal, Economic and Political Analysis, Springer: New York (2005).

[59] See https://www.wto.org/english/tratop_e/ecom_e/ecom_e.htm.

[60] Ibid.

[61] Ibid.

marketing, sale or delivery of goods and services by electronic means".[62] Four WTO bodies are responsible for carrying out the Work Programme which are the Council for Trade in Services, the Council for Trade in Goods, the Council for TRIPS and the Committee on Trade and Development.[63]

The main achievements of the Work Programme are first as earlier discussed it provides a definition of e-commerce which can also be used to understand the meaning of "digital trade". Second it highlighted the necessity to act in the four mentioned areas of the WTO as set forth in paragraph 2-4 of the Work Programme document.[64] Paragraph 2 mandated the Council for Trade in Services to examine and report on the e-commerce treatment within the GATS with particular regard to key issues such as scope and classification, most favoured nation (MFN) and national treatment, transparency, market access and jurisdiction.[65] Paragraph 4 mandated the Council for Trade in Goods to clarify issues such as market access, licensing, custom duties and standards.[66]

Despite this promising start and explicitly stating that e-commerce will be kept as a "standing item on its (the Council) agenda"[67], no further work has been done and no gaps relating to e-commerce in the WTO has been filled.[68] The Work Programme could not reach consensus amongst WTO member States on how to define the notions of "e-commerce" and "digital trade", or even settle the classifications of these concepts within the WTO law.[69] Therefore, the persisting question is which agreement under the WTO is more relevant to e-commerce, is it GATT or GATS? This brings us to discuss the nature of e-commerce transactions.

---

[62] General Council, Work Programme on Electronic Commerce: Adopted by the General Council on 23 September 1998, 1.3, WT/L/274 (Sept. 30 1998).
[63] See https://www.wto.org/english/tratop_e/ecom_e/ecom_e.htm.
[64] General Council, Work Programme on Electronic Commerce: Adopted by the General Council on 23 September 1998, 2-4, WT/L/274 (Sept. 30 1998).
[65] Ibid.
[66] Ibid.
[67] Ibid, paragraph 1.2.
[68] R. Weber (1), Digital Trade and E-Commerce: Challenges and Opportunities of the Asia-Pacific Regionalism, Journal of Digital Trade and E-Commerce, 2015, Vol 10,321-347, p. 327.
[69] The Work Programme is described as merely served as awareness raising, see ibid.

IV. The Nature of E-Commerce Transactions

Usually, the contents provided by online trade lack physical attributes and is often provided on a temporary basis.[70] Additionally, items offered online are often similar to services' rendering.[71] Thus, e-commerce appears to be classified as trade in services.[72] Based on this assumption one would think that e-commerce should be solely regulated by GATS. However, at the same time, the digital revolution also affects trade in goods.[73]

In order to clarify the nature of e-commerce, e-commerce can be classified into non-complete e-commerce and complete e-commerce.[74] Non-complete e-commerce include trade in services and trade in goods.[75] While complete e-commerce include online trade in services, online digital products and online digital products that are also treated as goods.[76] Based on that, e-commerce can be divided into five categories:

1. The trade in services that are selected and purchased online while transferred by traditional ways.
2. The trade in goods that are selected and purchased online while transferred in traditional ways.
3. The trade in services that are selected, purchased and transferred online (such as e-banking).
4. The digital products trade while still can be treated as goods trade (such as digital books while downloaded in digital form and delivered physically).
5. The digital products trade that are selected, purchased, transferred and consumed online (such as digital books, software, music all supplied and consumed simultaneously).[77]

---

[70] Ibid, p.321.
[71] Ibid.
[72] Ibid.
[73] Ibid, p. 325.
[74] Xin Xu, Mode Classification for E-Commerce under GATS, International Conference on Business Computing and Global Informatization, 2011, 220-222, p. 220.
[75] Ibid.
[76] Ibid.
[77] Ibid.

Consequently, it is not quite correct to assume that all e-commerce transactions fall under the scope of GATS. Clearly, the framework of GATS and the unique properties of e-commerce are not exactly matched.[78] Thus not all kinds of e-commerce are suitably covered or must be covered by GATS. To conclude, some e-commerce activities are subject to the GATS while others maybe better regulated under the GATT.

V. GATS or GATT

In order to be able to determine the agreement that better regulates a certain style of e-commerce, it is important to address first the scope of application for GATS and GATT. GATS "applies to measures by Members affecting trade in services".[79] The GATS defines "service" as "any service in any sector except supplied in the exercise of governmental authority".[80] Despite the definition, the term service remains vague and it is not clear as to whether it encompasses electronically supplied services.[81]

Even the services sectoral classification list (W/120)[82], which contains a comprehensive list of all services and sub-services, does not directly refer to digital trade.[83] Nevertheless, the problem of GATS application is not per se due to the term "service" rather it is in the "positive list" approach.[84] This approach liberalise only those services which are directly mentioned in the W/120 list, so new services are not automatically covered by the GATS.[85] For a service to be added, member States have to actively agree on an obligation and notify new commitments.[86] Many new services have been added to the GATS

[78] Ibid.
[79] Article I of the GATS, available at https://www.wto.org/english/docs_e/legal_e/26-gats.pdf.
[80] Ibid.
[81] R. Weber, *op cit*, p.321.
[82] WTO, Note by the Secretariat: Services Sectoral Classification List, MTN.GNS/W/120 (July 10,1991).
[83] For more details see R. Weber & R. Baisch, *op cit*.
[84] R. Weber (2), Digital Trade in WTO-Law: Taking Stock and Looking Ahead, 5(1) AJWH 1-24 (2010), p. 8.
[85] Ibid.
[86] Ibid, p. 9.

since its conclusion in 1994. For example, some digital services are added to the "telecommunication services" category such as email, online information and data base retrieval etc.[87]

Trade in services under the GATS is classified in four modes of supply depending on the territorial presence of the supplier and the consumer:[88]

(a) Mode 1, cross border supply: the service provider is located in its own country and provides service to a customer located in another WTO member State.
(b) Mode 2, consumption abroad: the service is received by a consumer who comes from a different country in the country of origin of the service provider.
(c) Mode 3, commercial presence: the service provider establishes a business within the WTO member State making the commitment to liberalise trade in the respective service, and the service is delivered by this commercial presence to a customer within the same territory.
(d) Mode 4, presence of natural persons: the service provider is a natural person present within the territory of the WTO member State making the commitment to liberalise the trade in the respective service and the service is delivered to a customer within the territory of the WTO member State.

E-commerce are characterised as transactions that do not rely on the legal or natural presence of any party for the service to be delivered.[89] Therefore, both mode 3 and 4 are of limited relevance to e-commerce. On the contrary, what proves to be difficult is to classify a certain digital service as GATS mode 1 or mode 2.[90]

While trade is services seems obviously governed by GATS, the trade in digital products is not that clear. The goods that are selected and purchased online while transferred by traditional ways are not an

---

[87] Ibid, p. 11.
[88] See M. Trebilcock & R. Howse, The Regulation of International Trade, at 359-60 (2005)
[89] R. Weber (1), *supra*, at 324.
[90] See S. Wunsch-Vincent & A. Hold, Towards Coherent Rules for Digital Trade: Building on Efforts in Multilateral Versus Preferntial Trade Negotiations, in Trade Governance in the Digital Age, at 179, 183, (2012) (M. Burri & T. Cottier eds.)

issue since they are clearly fall within the of GATT. The problem lies with the digital products that are intangible goods such as e-books, downloaded or streamed music and films, e-tickets or software.[91] Whereas some of these digital products can also be delivered physically, in that case it is subject to the GATT, the situation is more complicated when the end product itself is delivered electronically.[92] Is a book downloaded online like a book bought from a bookstore? This problem arises due to the fact that neither the classification under the GATT nor the GATS classification provide any sort of guidelines as to how to classify digital trade.[93] Consequently, the question of whether digital products should be classified under the GATT or GATS remain unanswered.

It is agreed that digital products need to be processed on some kind of carrier media such as a mobile device like a smartphone or a tablet or a laptop.[94] While the legal classification of such a carrier media is not a problem, it is often difficult to tell when the carrier media ends and the digital product begins.[95] For example if a smartphone provides for online games and audio-visual content, which legal framework is applicable? If the online content is treated equally to its physical counterpart then it will be considered a good, hence subject to customs duties and protected by non-discrimination commitments.[96]

At the moment, WTO member States seem nowhere near reaching consensus on the correct classification of digital products within the WTO law.[97] Some countries are in favour of a classification under the GATT, like the reference in their name suggest, basing their arguments on the durability of digital products unlike services.[98] On the contrary, some countries prefer a classification under GATS, arguing that there is a big difference between products delivered electronically and those delivered physically.[99]

In an attempt to provide an answer to the mentioned classification

---

[91] R. Weber (1), *supra* , at 325.
[92] Ibid.
[93] R. Weber (2), *supra ,* at 3.
[94] R. Weber (1), *supra* , at 325.
[95] Ibid.
[96] Ibid.
[97] Ibid, at 26.
[98] S. Wunsch-Vincent, The WTO, The Internet and Trade in Digitl Products: EC-US Perspective 56 (2006).
[99] Ibid.

issue, and in reference to the previously explained 5 styles of e-commerce, one may conclude that category 2 and style 4 are better to be covered by GATT, while the rest is better regulated by GATS. Since the link between GATS and e-commerce is well established the next step is to look at the commitments under the GATS.

VI. GATS' Rules

Unlike the GATT, the GATS includes two sets of rules known as the "general obligations" and the "specific commitments".[100] The general rules encompass the two most important obligations which are the MFN obligation and the transparency obligations. These rules are similar to those included in the GATT.[101] The specific commitments include three types of commitments which are market access, national treatment and additional commitments such as regulatory commitments.[102]

As mentioned earlier, specific commitments are not compulsory assumed by the WTO members. Each member has to voluntarily enter into commitments in respect of specific services sectors and sub-sectors through the respective notification in the WTO. Thus, new services are not automatically covered by the GATS and therefore has a lower liberalisation effect than the approach applied under the GATT.[103]

Overall, GATS W/120 list has not substantially changed since 1994.[104] Although a number of Ministerial Conferences were held since that date, the outcome did not add substantive liberalisation measures to previously agreed commitments.[105] Hence, one can say that the W/120 list is somewhat outdated in a number of sectors and encompasses a lack of clarity as to the covered sectors.[106] This means that the current position of the GATS provides unreliable segmentation of covered and uncovered digital services as well as confusion regarding whether digital services fall under mode 1 or mode 2.

---

[100] See Trebilcock & Howse, *supra*, at 379-80.
[101] Ibid.
[102] Ibid.
[103] R. Weber (2), *supra ,* at 9.
[104] Ibid.
[105] Wunsch-Vincent, *supra*, at 84-85.
[106] R. Weber (2), *supra,* at 9.

Accordingly, assessing the effect of GATS on e-commerce in Qatar requires first to identify Qatar commitments in light of GATS: being the list of services Qatar is committed to. Second, under which mode the commitment fall: is it mode 1 or mode 2.

VII. Qatar's Schedule of Specific Commitments under GATS

Qatar's schedule of specific commitments under GATS include horizontal commitments and sector specific commitments.

A. Horizontal Commitments

The horizontal commitments include the following:

1. Limitations on market access

(i) As stipulated in Qatari laws, decisions and regulations, National services and goods or services and goods of national origin should have priority in purchases of Governmental, Semi-Governmental and Public-Sector Departments, as well as in purchases of national and foreign contractors, awarded contracts by the Government of Qatar or its affiliate bodies to fulfil in or outside the country. The priority referred to above is only applicable if the differential in price of goods or services of national origin is not in excess of 10 % compared to those of foreign origin (law nr. 6 of 1987).

(ii) With the exemption of banks, financial and insurance institutions and other sectors and sub-sectors which are not stipulated as areas of commitments with limitations on the number of service suppliers in the attached schedules, foreign commercial presence should be either through a Qatari Agent working in the same field of services or related to it (official agency contract must be registered with the Ministry of Finance, Economy and Commerce). Or through a partnership with the capital of Qatari Company.

(iii) Foreign commercial presence may be required to provide certain benefits in the form of technology transfer, research and development programs, technical or marketing assistance and educational or training of local manpower.

(iv) Unbound, except for measures concerning the entry and temporary stay of natural persons falling within the following categories:

- Managers
- Specialists, and
- Skilled technicians Presence of foreign natural persons as self-employers is not allowed.

2. Limitations on national treatment

(i) Possessing, buying, selling or dealing in Qatari shares are, presently, confined to Qatari natural or juridical persons. Foreigners are not allowed to invest in Qatari shares. The restriction on acquisition of Qatari shares by foreigners is made because of the small number of Qatari joint stock companies (around 20) and absence of organized stock exchange market.

(ii) Acquisition of land or real estate by foreign natural persons or foreign juridical persons are not allowed. Foreigners can acquire land for economic activities on long lease particularly for industrial use.

Foreign nationals or companies with foreign share holdings may be required to pay direct taxes on income derived from work or operations in Qatar, whereas local services suppliers or local Qatari companies may not be required to pay similar taxes (Law nr. 11 of 93). Foreign nationals or companies may obtain tax exemption for 5-10 years before making the investment.

(iii) National services industries and services may have some kind of incentives and assistance, like industrial land blocks, easy financial loans, market research and marketing programmes including the organization of exhibitions or facilitating its taking part in Qatari pavilion in international fairs and exhibitions, with free or lowered costs, establishing of marketing centres (inside or outside the country), and/or granting discount on the prices of its advertising programmes in national TV and national advertising agencies and some other incentives alike.

(iv) Unbound, except for measures concerning the categories of natural persons referred to in the market access column. Housing and social programmes and some aspects of free health care, are limited to Qatari citizens.

Basically, the aforementioned horizontal commitments are mainly related to Qatar's domestic rules and regulations regarding doing business in Qatar. They apply to all foreign businesses regardless of the nature of trade whether in goods or services, traditional or electronic. Therefore, the question of mode of supply in relation to these commitments can be considered irrelevant.

B. Sector-Specific Commitments

These commitments are made according to each service separately. The schedule indicates the extent of Qatar's commitment according to the four modes of supply. Since this paper is only addressing e-commerce then mode 3 and mode 4 are outside the scope of this paper. As mentioned earlier, that is because e-commerce does not rely on the presence of any of the parties to an electronic transaction. Under this section Qatar's commitments are as follows:

Service Sector	Limitations on Market Access	Limitations on National Treatment
Business Services: A) Professional Services, B)Accounting, auditing and bookkeeping services, C) Taxation services as follows: Business taxation planning and consulting, Business tax preparation and review services	Mode 1) Cross-border supply: None Mode 2) Consumption abroad: None	Mode 1) Cross border supply: None Mode 2) Consumption abroad: None
Architecture services	Mode 1) Cross-border supply: None Mode 2) Consumption abroad: None	Mode 1) Cross-border supply: None Mode 2) Consumption abroad: None
Medical and dental services	Mode 1) Cross-border supply: Unbound Mode 2) Consumption abroad: Unbound	Mode 1) Cross-border supply: Unbound Mode 2) Consumption abroad: Unbound

Veterinary services	Mode 1) Cross-border supply: None Mode 2) Consumption abroad: None	Mode 1) Cross-border supply: None Mode 2) Consumption abroad: None
Computer and Related Services a) Consultancy services related to the installation of computer hardware b) Software implementation services c) Data processing services d) Data base services	Mode 1) Cross-border supply: Unbound Mode 2) Consumption abroad: Unbound	Mode 1) Cross-border supply: Unbound Mode 2) Consumption abroad: Unbound
Research and Development Services a) R&D Services on natural sciences b) R&D Services on social sciences and humanities c) Interdisciplinary R&D Services	Mode 1) Cross-border supply: Unbound Mode 2) Consumption abroad: Unbound	Mode 1) Cross-border supply: Unbound Mode 2) Consumption abroad: Unbound
Other Business Services b) Market research services	Mode 1) Cross-border supply: None Mode 2) Consumption abroad: None	Mode 1) Cross-border supply: None Mode 2) Consumption abroad: None
c) Management consulting services	Mode 1) Cross border supply: Unbounded Mode 2) Consumption abroad: Unbounded	Mode 1) Cross border supply: Unbounded Mode 2) Consumption abroad: Unbounded
e) Technical testing and analysis services	Mode 1) Cross boarder supply: None. Mode 2) Consumption abroad:	Mode 1) Cross boarder supply: None. Mode 2) Consumption abroad:

	None	None
Communication Services b) Courier services Land based international courier services	Mode 1) Cross-border supply: Unbound Mode 2) Consumption abroad: Unbound	Mode 1) Cross-border supply: Unbound Mode 2) Consumption abroad: Unbound
Construction and Related Engineering Services a) General construction work for building b) General construction work for civil engineering c) Installation and assembly d) Building completion and finishing work	Mode 1) Cross-border supply: None Mode 2) Consumption abroad: None	Mode 1) Cross-border supply: None Mode 2) Consumption abroad: None
Environmental Services	Mode 1) Cross-border supply: Unbound Mode 2) Consumption abroad: Unbound	Mode 1) Cross-border supply: Unbound Mode 2) Consumption abroad: Unbound
Financial Services a) All insurance and insurance related services b) Non-life insurance services c) Services auxiliary to insurance (including broking and agency services) d) Banking and other financial services (excluding insurance)	Mode 1) Cross-border supply: None Mode 2) Consumption abroad: None	Mode 1) Cross-border supply: None Mode 2) Consumption abroad: None
Tourism and Travel Related Services a) Hotels and Restaurants (Including catering) Hotels Restaurants	Mode 1) Cross border supply: Unbounded Mode 2) Consumption abroad: None	Mode 1) Cross border supply: Unbounded Mode 2) Consumption abroad: None

	Mode 1) Cross boarder supply: Unbound Mode 2) Consumption abroad: None	Mode 1) Cross boarder supply: Unbound Mode 2) Consumption abroad: None

By looking at Qatar's sector specific commitments it seems that the type of commitment under mode 1 and mode 2 are almost identical in all services except for the last services related to hotels and restaurants. Before attempting to investigate the nature of commitment according to each sector, it is important to start by excluding the services that are irrelevant to e-commerce by being unable to provide them electronically. These can be construction and related engineering services as well as hotels and restaurants. As for the remaining services, they can be provided electronically and/or traditionally. If provided electronically then it is considered e-commerce and therefore is affected by the mode classification.

The importance of mode classification derives from the fact that complete e-commerce transactions are different from the original object standard that divides mode 1 or mode 2.[107] The mode of trade in services sets the degree of openness of the commitment made by Qatar under GATS. That is to say Qatar undertake different modes of trade in services. However, Qatar seems to have followed the same degree of openness by matching the commitment under mode 1 and mode 2.

In addition, the mode of trade in services determines the distribution of administrative and dispute jurisdiction between Qatar and the other WTO member State.[108] Looking at mode 1, trade is considered to have occurred in the country where the consumer is located and will then be subject to the legal system of such importing country.[109] On the other hand, looking at mode 2, trade is considered to have occurred where the service provider is located and will then be regulated by the legal system of the exporting country.[110] Thus if Qatar wants to protected the interest of its national consumers, it is then better

[107] Xin XU, *supra*, at 221.
[108] Ibid.
[109] Ibid.
[110] Ibid.

to classify the concerned e-commerce under mode 1.[111] If Qatar is more interested in requiring market access, it would be inclined to classify the concerned e-commerce under mode 2.[112]

Finally, the mode of trade in services determines the extent of restrictions made by Qatar. Each time Qatar reserved its right to establish barriers for trade in services under mode 1, the potential benefits of e-commerce may almost disappear.[113]

Although the ECT Law in Qatar mainly regulates e-commerce, it is not possible to disregard the international dimension of e-commerce and the effect of the WTO rules on e-commerce. However, until today the status of e-commerce under the WTO remain unclear. There seems to be some sort of agreement that e-commerce fall within the scope the GATS rather than GATT, this has to be re-assessed in light of digital products. Moreover, the complete e-commerce transactions are different from the original object standard that divides GATS' Mode 1 and Mode 2. Accordingly, Qatar should determine its point of interest being national consumer protection or market access in relation to e-commerce if Qatar decides to renegotiate its commitments under the GATS.

VIII. Conclusion

The main instrument that regulates e-commerce in Qatar is the Electronic Commerce and Transactions Law. The law provides comprehensive provisions that are sufficient to provide a solid legal framework to e-commerce in Qatar. However, e-commerce is rapidly expanding and cannot be limited to a country's territory. The international dimension of e-commerce makes it equally important to address Qatar's international obligations.

E-commerce is subject to the WTO legal framework. Although the WTO provide wide-ranging rules on trade in goods and services, it seems to be unclear and full of gaps when it comes to e-commerce. A number of question related to e-commerce and the WTO legal framework remain unanswered. While the different styles of e-commerce seem easy to comprehend, the application of digital products

[111] Ibid.
[112] Ibid.
[113] Ibid.

within the GATT and GATS prove to be unclear. Even if such an issue is overlooked, another persistent dilemma is related to the GATS mode of classification.

GATS encompasses general obligations as well as special commitments. This result in various forms of impact of GATS over a country's e-commerce legal framework depending on the countries degree of commitments. Looking at Qatar's commitments it seems that Qatar followed an almost identical approach in adopting mode 1 and mode 2 of the GATS classifications. The importance of understanding Qatar level of commitment is key to identifying Qatar's level of openness to e-commerce, the distribution of administration and dispute jurisdictions and the existence of any e-commerce barriers. Since it is not clear under which mode the e-commerce falls, Qatar has to then identify its main interest being consumer protection or market access. According to that identification, Qatar can then pick the mode that most suits its preference.

REFERENCES

Books, Reports, and Other Non-periodic Materials

Appellate Body Report. (2005). *Measures Affecting the Cross Border Supply of Gambling and Betting Services*. United States para 215

S. Wunsch-Vincent. (2006). *The WTO, The Internet and Trade in Digital Product*. EC-US Perspective 56

S. Wunsch-Vincent & A. Hold. (2012). *Towards Coherent Rules for Digital Trade: Building on Efforts in Multilateral Versus Preferential Trade Negotiations, in Trade Governance in the Digital Age*. M. Burri & T. Cottier eds.

Xin Xu. (2011). *Mode Classification for E-Commerce under GATS*. International Conference on Business Computing and Global Informatization

Zongqing Zhou. (2014). *E-commerce and Information Technology in Hospitality and Tourism*. Thomson Delmar Learning

Periodic Materials

R. Weber. (2010). Digital Trade in WTO-Law: Taking Stock and Looking Ahead. *Journal of Digital Trade and E-Commerce, Vol 5(1)*

Rolf Weber & Rainer Baisch. (2013). Tension between Developing and Traditional GATS Classification in the IT Markets. *Hong Kong L.J, 43(1)*

R. Weber. (2015). Digital Trade and E-Commerce: Challenges and Opportunities of the Asia-Pacific Regionalism. *Journal of Digital Trade and E-Commerce, Vol 10*

S. Baker and M. Shenk. (2005). Trade and Electronic Commerce. *The World Trade Organization: Legal, Economic and Political Analysis, Springer: New York, Vol 1*

Internet, Electronic Media, and Other Nonprint Resources

Kommerskollegium. (2012). E-commerce - New Opportunities, New Barriers: A Survey of E-commerce in Countries Outside the EU. Available at: https://www.wto.org/english/tratop_e/serv_e/

wkshop_june13_e/ecom_national_board_e.pdf.
Qatar National E-Commerce Roadmap. (2015). Available at: http://www.motc.gov.qa/en/documents/document/qatar-national-e-commerce-roadmap-2015.
Qatar National e-Commerce Roadmap. (2015). Available at: http://www.motc.gov.qa/sites/default/files/e-commerce_ roadmap_2015_en.pdf
The GATT and GATS. (1987). Available at: https://www.wto.org/english/thewt_e/whatis_e/who_we_are_e.htm.
https://www.fastcompany.com/3054025/youll-never-guess-what-the-first-thing-ever-sold-on-the-internet-was.
https://www.wto.org/english/tratop_e/ecom_e/ecom_e.htm.

Laws and Regulations

Article I of the GATS, available at https://www.wto.org/english/docs_e/legal_e/26-gats.pdf.
Decree Law No.16 on the Promulgation of the Electronic Commerce and Transactions Law, (Sep. 28, 2010).
General Council, Work Programme on Electronic Commerce, (Sept. 30 1998).
Qatar's Civil Law article 64.
The Regulation of International Trade, (2005)
WTO, Note by the Secretariat: Services Sectoral Classification List, (July 10,1991).

This article is published in *The Asian Business Lawyer (ABL)* Vol. 20.
The publication of *ABL* Vol. 20 has been financially supported by KIM & CHANG.

Unravelling Coordination and Cooperation in International Tax Law

Ajay Kumar[*]

ABSTRACT

The literature on international tax and law, it is replete with references to the use of the word coordination between nations in the division of international taxes. However this literature is plentiful with two other cognate words also - 'harmonization' and 'cooperation'. But by reading this literature one cannot easily understand the meaning of these terms. Especially in the legal literature on international taxation these words are used interchangeably, pointing to the understanding exhibited by those with a legal training. In fact, in the literature on game theory, these words are used to convey specific meanings about interactions. In coordination games since salience (Nash Equilibrium) could be with differing payoffs and this could be the result of framing effects. Therefore when one looks at these words, the history of the rules for tax division and efforts to change them, it becomes clear that lawyers need to be more cautious when using these words to describe the international tax interactions.

KEYWORDS: game theory, coordination, cooperation, harmonization, tax division

[*] Assistant Professor, University of Dubai. Contact Address: Dubai PO Box14143; Email: akumar@ud.ac.ae; Telephone:00971(0)45566955

Table of Contents

I. Introduction

The words 'convergence'[1] and 'cooperation' are ubiquitous in the literature on international tax division itself. However, scanning the literature (legal and economic) on international tax law, one is struck by the 'casual' way in which these concepts have been used. Despite these words alluding to certain attached behavior, such an analytical perspective has remained invisible in this literature. Perhaps, the economists would have known about the attached behavioral implications while using these words, and with the lawyers including these words into their vocabulary they have been unwittingly co-opted into this discourse. This nonchalance is but glaring, especially when two factors are taken into consideration.

First, the present day tax treaties follow the path set by economists (League of Nations); wherein, both 'quantification was discarded and primacy was accorded to sound economics[2] rather than tax law'[3]. Previous discussions on international tax division have shown that questions of territoriality, jurisdiction[4] or even equity[5] have been

[1] Convergence and coordination are used interchangeably here.

[2] The present international tax division is anchored to the twin principles of efficiency and neutrality. Refer, William B. Barker, *Optimal International Taxation and Tax Competition: Overcoming the Contradictions*, 22 Northwestern Journal of International Law and Business, at 162 (2002).

[3] Harold Wurzel, *Foreign Investment and Extraterritorial Taxation*, 38/5 Columbia Law Review, at 856-57 (1938).

[4] Asif H. Qureshi, *The Freedom of a State to Legislate in Fiscal Matters under General International Law*, 41/1 Bulletin for International Fiscal Documentation, at 16 (1987).

sidelined. Incidentally, this has helped to create a set of practices to limit taxing rights[6] and thereby double taxation[7], and sometimes leading to instances of non-taxation as well. Second, to a lawyer, tax treaties mean norms; and as generally understood, they mean a communicative 'rationality'[8] – validation of 'facts' through common understanding.[9]

Looking at the literature on Double Taxation Agreements (DTAs'), no concrete link between DTAs' and their influence to attract investments[10] has been established. Yet, there has been no real effort to question or redraw the principles upon which the present tax division is premised.[11] Also, it is known that double taxation could be avoided unilaterally. Thus despite no apparent benefits on offer,[12] the reasons for the perpetuation of the treaty network seems anomalous.

It is thought that the two expressions - 'coordination' and 'cooperation' as used in game theory - can offer a better explanation of what these terms mean while explaining behavioral regularity and also to offer explanations for the continuation of tax treaties. It is worth mentioning here that game theory is merely a tool to explain a social situation or regularity (decisions) that has been unyielding to analysis or explanation. Importantly, apart from being useful in explaining

---

[5] Klaus Vogel, *Worldwide vs source taxation of income – A review and re-evaluation of arguments – III*, 11 Intertax, at 393-97, 420 (1988).

[6] Klaus Vogel, *Double Taxation Treaties and their Interpretation*, 4/1 International Tax and Business Lawyer, at 8 (1986).

[7] Ibid., at 6

[8] Expressing common rather than special interests with an appropriate balancing of protection for both inclusive and exclusive interests; Refer, Myres S. McDougal, *The Prescribing Function in World Constitutive Process*, 6/2 Yale Studies in World Public Order, at 273 (1980).

[9] Jurgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, Cambridge: Polity Press & Blackwell Publishers, at 4-17 (1996).

[10] Lisa E. Sachs and Karl P. Sauvant, *BITs, DTTs, and FDI flows: An Overview*, in Karl P. Sauvant and Lisa E. Sachs (eds.), *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows,* Oxford University Press (2009), lix.

[11] Sol Picciotto, *The Current Context and a Little history*, in Sol Picciotto (ed.), *Taxing Multinational Enterprises as Unitary Firms*, Institute of Development Studies, at 4 (2017).

[12] Brue A. Blonigen, Lindsay Oldenski and Nicholas Sly, *The Differential Effects of Bilateral Tax Treaties*, 6/2 American Economic Journal: Economic Policy, at 17 (2014).

behavioral regularity,[13] game theory (models) also helps to bring out strategic interdependencies that rational players would exhibit in seemingly one-sided interactions like monopoly (price givers) and competition (price takers).[14] However, even if the parties choose their strategies, that alone does not determine the outcomes; the outcomes are a result of the interaction of strategies.[15]

In fact, even with norms it is this behavioral regularity that is witnessed and relevant. Generally, game theory facilitates the creation of norms by designing rules and sanctions that influence the behavior of strategic players.[16] Hence there is no claim made here that game theory would be an actual representation of the decision making process in the real world. This happens because the result expected or explanation depends on how many possibilities are put into model or the result sought. So there is the freedom to vary the rules of the game or introduce new games to achieve the result sought. Also, no attempt would be made here to introduce a new model for the analysis; reliance is placed on already existing models and explanations that they offer.

Therefore, the explanation offered through this paper will show that these common usages in the literature on international tax law and borrowed from game theory, needs to be approached cautiously or used with discretion. The principal focus of this paper is to help better interpret the behavior attached to international Double Taxation Agreements (DTAs). In doing so, it would also help to shed light on the contextual factors in explaining such behavior. Therefore, the purpose of this paper is modest; first, to offer a better understanding about the normative connotations of the said terminologies to the international lawyer. Second, to explain why a proper understanding of these terms is required for any attempt to recalibrate the present tax rules.

The first part would examine the use of the said terms in the international tax literature (both law and/ or from an economics perspective). This would help bring out the meaning understandable from the literature, and to also know whether there are variations in the

---

[13] Edna Ullmann-Margalit, *The Emergence of Norms*, Oxford University Press, at 84-85 (1977).

[14] Randal C. Picker, *An Introduction to Game Theory and the Law*, Coase-Sandor Institute for Law & Economics Working Paper No. 22, at 2 (1994).

[15] Francesco Parisi and Nita Ghei, *The Role of Reciprocity in International Law*, 36/1 Cornell International Law Journal, at 95 (2003).

[16] Eric Talley, *Interdisciplinary Gap Filling: Game Theory and the Law*, 22 Law and Social Inquiry, at 1066 (1997).

usage and explanation offered in the literature emanating from the differing academic disciplines. The second part would examine the meaning of these concepts in the literature on game theory and also their meaning. However, it must be noted that the word convergence is not used or analyzed, but coordination. This is done because the underlying reasons for resolving coordination games can be derived from the explanation offered by convergence. The third part would analyze the 'normative'[17] implications linked to these concepts. Finally the fourth part would explore the reasons and the appropriateness in calling the present tax regimes arising from tax treaties as coordination games. It would conclude with a note on the meaning of these concepts and other potential uses of this framework to analyze aspects of the international tax regime.

II. Coordination and Cooperation in Tax Literature

Before delving into the literature on international tax (economics) and international tax law, where coordination and cooperation have been used, it should be admitted that the said literature is enormous. Hence trying to review this literature exhaustively would be futile. As the purpose of this literature review is only to explicate the possible meaning/s comprehensible or even the confusion inadvertently caused to a reader, especially a lawyer untrained in economics, few such instances from both the identified disciplines are picked.

Generally, the word cooperation is seen used in reference to the interactions required between the tax administrators of two jurisdictions.[18] This has led to calls for the sharing of information between the authorities as the principal avenue for cooperation[19] in the international arena. In short, cooperation is largely limited to the interactions between the tax administrations of the different

[17] Here it used as distinct from conventions and means behavioural regularity linked to a feeling of obligation.

[18] John V. Surr, *Intertax: Intergovernmental Cooperation in Taxation*, 7/179 Harvard International Club Journal, at 182 (1966).

[19] Sijbren Cnossen, *Tax Policy in the European Union: A Review of Issues and Options*, CESifo Working Paper No. 758, at 11 (2002). Also, Arthur J. Cockfield, *Purism and Contextualism within International Tax Law Analysis: How Traditional Analysis Fails Developing Countries*, 5/2 eJournal of Tax Research [online journal], at 216 (2007).

jurisdictions.[20] Even the finding of practical solutions that facilitate investments from developed to developing countries by reducing tax barriers is referred to as cooperation.[21] The League Report stressed the desirability of avoiding double taxation through cooperation and admits, that for relieving double taxation one government would have to surrender tax revenues.[22] Thus acknowledging that cooperation is the preferred method to relieve double taxation, and also that presently cooperation is not the method used. Similarly, it is thought that jurisdictions could fight tax competition and benefit all by harmonizing tax laws – this is referred to as cooperation.[23] In short, it was hard to find the word cooperation in the examined tax literature except in relation to these instances. First, cooperation alludes to a better way of interaction between states, a better way to relieve double taxation and thereby benefitting all. Second, harmonization of tax laws has also referred to as cooperation. But while investigating the institutionalism (bilateralism) within the international tax regime, and principally the interactions between a capital importer and exporter both to tax or to avoid double-taxation, these interactions have been referred to as a coordination game.[24] Importantly, despite no systematic examination or explanation whether DTAs are cooperation games, the largely bilateral world of DTAs' (bilateralism) is referred to as cooperation[25] and the game inherent in this bilateralism is called coordination.

Coordination on the other hand is chiefly used to connote the allocation of rights to tax international income (minimal cooperation)

---

[20] This has been the position taken by the Fiscal Committee of the League of Nations and ben adopted by the OECD and UN as well.

[21] A J. Cockfield, *Purism and Contextualism within International Tax Law Analysis: How Traditional Analysis Fails Developing Countries*, 5/2 eJournal of Tax Research [online journal], at 202 (2007).

[22] Bruins, Einaudi, Seligman and Sir Josiah Stamp, *Report on Double Taxation Submitted to the Financial Committee*, League of Nations Doc. E.F.S. 73.F.19 18, at 40 (1923).

[23] Tsilly Dagan, *The Costs of International Tax Cooperation*, Working Paper no. 1-03, at 2 (2004).

[24] It has been called coordination because both the parties are willing to grant double taxation relief irrespective of whether the other governments reciprocate; Refer, Thomas Rixen, *The Institutional Design of International Double Taxation Avoidance*, Discussion Paper SP IV 2008-302, Wissenschaftszentrum Berlin für Sozialforschung at 3, 12 (2008).

[25] *Id.* at 1.

while applying national taxes to such income[26] or even methods to avoid double taxation.[27] This view of coordination is visible with similar research as well.[28] In fact it is said that coordination could be strengthened by legitimizing cooperation through administrative and professional networks, and through a 'network of international regulatory authorities'.[29] But, while discussing the economic effects of tax coordination in the context of the regional (EU) tax integration, coordination has been used as an alternative to harmonization.[30] Implying thereby that harmonization refers to a certain level of coordination.[31] Also, full coordination has been distinguished from minimal coordination – full coordination achieves a fiscal environment that is neutral with respect to the inter-jurisdictional flows and fair distribution of inter-jurisdictional distribution revenues. The latter means using targeted measures to prevent 'discriminatory fiscal practices' that harm another jurisdiction.[32] However, while referring to policy alternatives - coordination has been distinguished from harmonization as a difference in scope rather than kind.[33]

Economists while referring to the steps needed to maintain corporate tax revenue collections (within OECD) from dwindling,[34] conclude that coordination among states on all matters relating to the division of taxes can achieve this. Also, while discussing the choice of

---

[26] Sol Picciotto, *Coordination and Legitimacy in International Business Taxation*, Law and Society Association Annual Conference, at 4, 6 (2006) available at http://eprints.lancs.ac.uk/266/1/Coordination_and_Legitimacy_in_International_Business_Taxation.pdf.

[27] Wolfgang Schon, International Tax Coordination for a Second- Best World (Part – I), 1/1 World Tax Journal at 85 (2009)

[28] Tim Edgar, *Corporate Income Tax Coordination as a Response to International Tax Competition and International Tax Arbitrage*, 51/3 Canadian Tax Journal, at 1128 (2003).

[29] Picciotto, *supra* note 26, at 14.

[30] Peter Birch Sørensen, *Tax coordination in the European Union: What are the issues?*, 2001/8 Swedish Economic Policy Review, at 145 (2001).

[31] *Id.* at 148.

[32] Peggy B. Musgrave, *Fiscal Coordination and Competition in an International Setting*, in Lorraine Eden (ed.), *Retrospectives on Public Finance*, at 276 – 305 (1991).

[33] Doron Herman, *Taxing Portfolio Income in Global Financial Markets*, at 150 (2002).

[34] Michael P. Devereux, Ben Lockwood and Michela Redoano, *Do Countries Compete over Corporate Taxes?*, 2008/92 Journal of Public Economics, at 1211 (2008).

tax rate in the face of tax competition, it is said that unilateral setting of tax rates lead to externalities and thereby an inefficient equilibrium; so coordination is required to avoid this effect - in which states either cooperate or partially coordinate.[35] Similarly, while discussing methods to minimize tax competition and increase the welfare benefits, a coordinated increase or decrease of the taxes[36] is seen as being necessary. Importantly, coordination has also been viewed as being centrally (by a specific group) determined.[37]

In fact, coordination has been used to mean the opposite of tax competition[38] as well. However, in a legal analysis of the relevant principles of international tax coordination, coordination is not seen as harmonization[39]. Similarly, in international taxation as there are multiple tax rates, bases and the goal of efficiency to contend, coordination is seen as some sort of agreement or understanding among the jurisdictions to avoid double taxation of income generated in one jurisdiction but related to another as well[40]. This is in contrast to the argument raised which contrasts harmonization (identical tax bases and rate structures) and coordination (entirely uncoordinated tax systems with a broad range of differences in tax bases)[41]. Although it is said to be 'second best'[42], (referring to the ideal situation of either

---

[35] Michael Keen and Kai A. Konrad, *International Tax Competition and Coordination*, Max Planck Institute for Tax Law and Public Finance Working Paper 2012 – 06, at 29 (2012).

[36] Clemens Fuest and Bernd Huber, *Can Tax Coordination Work?,* 1999/56 Finanzarchiv N.F., Bd. at 443 (1999).

[37] *Id.* at 451.

[38] Peter Birch Sorensen, *International Tax Coordination: Regionalism Versus Globalism*, CESifo Working Paper No. 483, at 1(2001).

[39] Wolfgang Schön*, International Tax Coordination for a Second-Best World (I)*, World Tax Journal, at 85 (2009).

[40] *Id.* at 78.

[41] Assaf Razin and Efraim Sadka, *International Tax Competition and the Gains from Tax Harmonization*, vol. 37, no. 1 Economic Letters, (1991), pp 69-76. Also refer, Tim Edgar, *Corporate Income Tax Coordination as a Response to International Tax Competition and International Tax Arbitrage,* 51 (3) Canadian Tax Journal, 2003, p 1121

[42] Second best simply means, when all the paretian optimum parameters for achieving the best is impossible to attain, it is called the second best. Importantly, although sufficient conditions for welfare increase is the requirement over necessary conditions, even that need not lead to welfare. However, it has to be understood that optimum is not a straight forward concept to achieve, and might have to be achieved at different levels. Refer, R.G Lipsey and Kelvin Lancaster, The General

harmonization of tax rules among the jurisdictions or full competition as enhancers of efficiency) this is to be achieved through - double tax treaties[43].

But, while trying to understand the reasons for the slow pace in harmonizing international tax rates, convergence and coordination have been referred to as harmonization, and the author also alludes to different levels of harmonization[44]. Incidentally, tax harmonization is referred to as coordination, and the former is clarified as a certain degree of uniformity (without complete uniformity) of the tax system[45]. Finally, while proposing a simplification of the international tax structure, it has been opined that a revision in the allocation of the global tax revenues can be achieved through consensus and cooperation[46]. Therefore by parsing through some of this literature and the haphazard way in which these concepts have been used, one is bound to wonder about the similarities and differences between cooperation, coordination and harmonization. Especially the bounds demarcating them. However, it could be difficult for a lawyer to answer these questions by referring to legal texts. It is here that reliance is placed on game theory to explain the social interactions or the regularity of behavior (entering into bilateral DTAs') we witness in the international tax regime.

III. Coordination and Cooperation as Games

A cursory look at the literature on game theory makes it clear that coordination and cooperation are strategic interactions[47] whereby a difference is acknowledged. In such interactions, a strategy means the

---

Theory of Second Best, 24 (1) The Review of Economic Studies, 1957, pp 11, 17, 18, 33.

[43] Sorensen, *supra* note 38, at 86.

[44] Julie Roin, *Taxation without Coordination*, 2000/31 The Journal of Legal Studies, at S61 & S62 (2000).

[45] Carl S. Shoup, *Tax Coordination Is the Next Step*, 12/1 Challenge, at 5 (1963).

[46] Reuven S. Avi-Yonah, *Globalisation, Tax Competition and the Fiscal Crisis of the State*, 113/7 Harvard Law Review, at 1345 – 1349 (2000).

[47] Richard H. McAdams, *A Focal Point Theory of Expressive Law*, 86/8 Virginia Law Review, at 1651 (2000).

options or choices that are open to the players[48]. Strategy and strategic interactions become important where there is the possibility for two or more persons to interact and their respective decisions depend or is focused on what the other is expected to do.

Starting with cooperation - it is a term used to describe the result in a 'Prisoners' Dilemma' game when there is agreement (communication). But for this agreement, the selfish interests (dominant strategy/non-cooperative environment) of the persons could lead to outcomes that are worse/sub-optimal than those that the parties desire. Thus without an agreement, there is a possibility for both of them to be saddled with the worst possible outcome. However when they agree there is a possibility to enhance the welfare (collectively/socially desirable)[49]. Since we are not just talking about one person's benefit or self-interest here, its' called cooperation[50]. If the parties select precisely how they will cooperate from the set of possible solutions – thereby resulting in the incentives of both the parties being perfectly aligned it results in perfect cooperation[51]. Similarly, cooperation (collective benefits) could also ensue in divergent preference games (only preference different not strategies – battle of sexes) if the long term payoffs are maximized. But this gives rise to questions of information and distribution[52] as well.

For instance, in prisoners' dilemma games the parties had different preferences prior to the agreement, and they have acceded to a distribution that was not their first choice; if that is the case, then they would need to know the value of the available solution. This means, the equilibrium reached, specifies what messages are sent by the parties about the game, how they interpret the messages and the actions they take after they interpret it[53]. As a result, there needs to be an alteration

---

[48] Douglas G. Bairds. Robert H.Gertner and Randal C. Picker, *Game theory and the Law*, at 8 (1994).

[49] Jack L. Goldsmith and Eric A. Posner, *A Theory of Customary International Law*, 66/4, The University of Chicago Law Review, at 1115 (1999)

[50] Parisi and Ghei*, Supra* note 15, at 95.

[51] This could be the result of optimal contract enforcement mechanisms, institutional safeguards, relationships involving trust and reputation or where the possibility for adversarial possibilities is denied.

[52] James D. Morrow, *Modelling the forms of International Cooperation: Distribution versus Information*,48/3 International Organization, at 388 (1994).

[53] *Id.* .at 389 (For instance, if it's a Prisoners' Dilemma situation, then the Nash equilibrium should be Defect; however if it is cooperate, then it means that an

of the payoffs if the cooperation problem is to be resolved. We should also be cognizant that in instances of imperfect alignment of interests, it is possible to exploit the cooperative effort of the other[54] as well. It is a combination of these factors that give rise to regimes and the ensuing sanctions and monitoring. However, game theory at best only helps to explain why states cooperate or not, but does not help to explain the scope of their cooperation[55].

All of this holds true for the classic one-shot game, where there is only one round and the game is played simultaneously – called the TIT-FOR-TAT[56]. Such games lead to cooperation based on reciprocity – this means the persons plays the strategy played by the other[57]. But if there is the likelihood of the players meeting or interacting again, then the equilibrium can be considered as 'evolutionarily stable'[58] as well. This means, if the same game is played in multiple rounds then in such games cooperation would happen without any monitoring or sanctions because cheating by one person would attract cheating by the other in the next round – so the TIT FOR TAT is evolutionarily stable as well[59].

---

agreement has been reached and the person defecting then would be sanctioned making it costly to defect).

[54] Robert Axelrod & William D. Hamilton, *The Evolution of Cooperation*, 1981/27 Science, at 1319 (1981).

[55] Mark A. Chinen, *Game Theory and Customary International Law: A Response to Professors Goldsmith and Posner*, 23/1 Michigan Journal of International Law, at 152 (2001).

[56] In such games the strategy is to defect irrespective of what the other does; however if both the players defect, they end up worse than had they cooperated. But the fundamental problem here is there is no reason for a person to cooperate when non-cooperative behaviour is rewarded. It should be borne in mind that this is highly stylised game in that there are certain conditions to be fulfilled for these results to happen. First, only two actors, second only one opportunity to choose between Defect and Cooperate and third, they do not know of the choice made by the other.

[57] This can also called as interdependency and can create problems for cooperation because the actions of one person does affect the welfare of the other. However it does sustain the equilibrium of cooperation in a non-cooperative repeated game; Robert O. Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy*, at 68 (1984). In fact this can be viewed as a principle of morality of cooperation as well, not to free ride on public goods without contributing; Robert Sugden, *Reciprocity: The Supply of Public Goods through Voluntary Contributions*, 94/376 The Economic Journal, at 774, 775 (1984).

[58] Meaning even with the passage of time the person would no defect because the equilibrium is stable.

[59] Axelrod and Hamilton, *supra* note 53, at 1394.

This should continue as long as the game would be played infinitely, or until the final round is announced wherein cheating would be the optimal strategy in the last and the penultimate round, and so on backwards to the first interaction[60]. This means cheating would be the strategy if there is a time horizon. Thus because of its single equilibrium, it is straight-forward to formalize the strategic possibilities of this game. However, it is said that cooperation could also arise in what is called extensive form (sequential) of the Prisoners' Dilemma as well. Here the crucial difference is that the game (example an agreement and there would be repeat agreements) is played only once but they have opportunity to make more than one choice, and the players know of the choices or strategy of the other. This gives rise to 'conditional' cooperation; whereby, if there is defection by one party, that would be met with defection in the next round by the other[61]. So the threat of reciprocal retaliation prevents defection.

Thus a cooperation game means – the parties have changed their strategy from defect to cooperation based on agreement or reciprocity. This could be a result of the mutual benefit on offer, or the existence of effective sanctions for defection or there being no opportunity to defect. Therefore, the payoffs are a combined result of the strategies of the parties (Nash equilibrium[62]) – greater the level of cooperation, greater the pay-off. Thus the end result is a 'mutually' beneficial outcome either in the long-term or short-term.

Now coming to coordination games (Examples: Assurance or Stag Hunt, Hawk- Dove, Battle of the Sexes) and from the perspective of law, coordination means choosing to act (behavior) around 'focal points'[63]. This happens when the players have common interests which helps to coordinate[64] their behavior, but such games also have multiple equilibria (more than one path to the desired outcome). Which means, there is no single dominant outcome. Thus a coordination game can be explained as interactions where parties having conflicting preferences

---

[60] *Id* . at 1392.

[61] R. Harrison Wagner, *The Theory of Games and the Problem of International Cooperation*, 77/2 The American Political Science Review, at 333 (1982).

[62] This simply means none of the players would want to leave their prescribed strategy, if the other players stick to theirs.

[63] Certain choices or solutions that stand out/unique (in the absence of communication) from the rest by chance.

[64] McAdams, *supra* note 46, at 1651.

(dissimilar perhaps), but jointly wish to avoid certain outcomes[65] or want the same outcome. This simply means the interests of the players converge and the actions of one depends on the best moves of the other (sequential decision-making). Therefore, accepting or agreeing on some common measure or system based on which all the parties could coordinate becomes important. The coordination around focal points happen because they can interpret the problem identically because they share common background of knowledge and information[66] of the problem. So, once the expectations are aligned, despite there being multiple Nash Equilibria (there are pay-offs favoring either player, but this does not mean that the players could not agree on a variable payoff or a particular Nash Equilibrium), it is the best outcome for both the players[67]. This means, the equilibrium is self-enforcing and one in which self-interested actors might engage. Since, coordination games have multiple equilibria, predicting behavior based on pay-offs would be insufficient, hence history and culture would also have to be factored in[68] (framing effects). Therefore, an important point to note about coordination games is that it is not easy to resolve or select a choice (equilibria) on the basis of any normative theory.

Thus in coordination situations, as long as the expectations or payoffs are changed, self-interest would take care of the enforcement. But to have the right kind of expectation or to know how such expectations are to be changed to newer ones, 'common knowledge'[69] is required; this means all the parties must know each of them knows the expectations or possible gains deriving to each one of them. It can therefore be understood why this assumption is such an important aspect for coordinating differing beliefs of the players through law. Since law can play an important role in shaping the interactions between the players, creating common knowledge about the role law

---

[65] *Id*. at 1652.

[66] Andrew M. Colman, *Salience and Focusing in Pure Coordination Games*, 4/1 Journal of Economic Methodology, at 66 (1997).

[67] This equilibrium could be either be the result of pure or mixed strategies; meaning. that if it is the former, the player will always select the same option and in the latter the choice is made randomly.

[68] Richard H. McAdams, *Beyond the Prisoners' Dilemma: Coordination, Game Theory and the Law*, John M. Olin Program in Law and Economics Working Paper No. 437, at 4 (2008).

[69] This is central to any or every solution concept and is generally assumed in any model.

plays i.e., its content and how it is to be applied is crucial to the success of law created for this purpose. So even if there is a breakdown /asymmetry (whether it be of the rules of the game, the communication between the players, the number of players) about the complete information, and even that should be common knowledge. If this assumption is relaxed (does not hold) the coordination would not happen[70] because the expectations are not aligned.

Importantly, it should be understood that this coordination is not a random choice but an intellectual one and depends on the skill of the parties and context. Hence it is said to be inherently empirical - about how people *should* be affected by symbolic details and thereby coordinate their expectations[71]. So the rational player will address himself the empirical question, of how in the context of the game, how two rational players could achieve coordination. It is in such situations that predictions could be done about the choice of a focal point, by knowing more about the other people and their experiences. Although having no coercive power, the process of finding a focal point could be facilitated by 'communication' – 'cheap talk'[72], something in the context or by a third party as well. Importantly, with information about the form of the messages exchanged or how it is to be interpreted etc. – (successful communication), it leads to shared interpretation, leading to cooperation.[73] Additionally, there is no incentive to lie in a pure coordination game, unlike in cooperation, because they both want the result and they are indifferent about the selection of a particular focal point.[74]

IV. Normative Implications Conveyed by the Games

As has been clarified in the previous section, cooperation entails a give and take (payoffs) according to a plan or a communicated agreement (this again could be seen as a creature of the non-

[70] *supra* note, at 1056, 1077.
[71] Thomas C. Schelling, *The Strategy of Conflict*, at 98 (1980).
[72] Talk or communication which is costless, nonbinding and non-verifiable, but used as a strategy to influence the decision making.
[73] Morrow, *supra* note 51.
[74] Vincent Crawford, *A Survey of Experiments on Communication via Cheap Talk*, 1998/78 Journal of Economic Theory, at 286 (1998).

cooperative environment/context in which the parties find). Whereby, the parties simultaneously act, and curb their instinct to defect in the short-term for long term benefits and receive higher payoffs. However in the case of coordination, this is not the case. Coordination involves the selection or following a prominent focal point, and the parties agree to coordinate their actions (one plays according to the actions taken by the other) to avoid a payoff that makes the parties worse-off. Importantly, although the parties are indifferent to the payoff as long as they can avoid the worst.

Now to interpret these actions in legal terms; it is understood that the solutions from game theory are meant to design rules and sanctions to influence the behavior of strategic players. This means these solutions or the reasons for the behavioral regularity would be the basis for 'normative' rules. But, when the word norm is used, it could mean either legal or non-legal norms, and despite being critiqued, they are seen as ought statements.[75] However, all norms are not considered as norms in a 'legal' sense. Norms unsupported by 'normative attitudes' or moral beliefs are called conventions.[76] Normative attitudes are called 'obligations' and have been found to effect compliance even in the face of weak enforcement mechanisms.[77] They are viewed in the legal literature as helping to create community expectations and thereby make behavior predictable.[78] Importantly, the legal literature (law and economics) has failed to give reasons for the choice of certain preferences – reasons for social organization. This is especially true in the case of tax treaties – States enter treaties even when they seemingly offer no benefits that could not be achieved otherwise.

---

[75] Lawrence E. Mitchell, *Understanding Norms*, 49/2 The University of Toronto Law Journal, at 180 (1999).

[76] Richard H. McAdams and Eric B. Rasmusen, *Norms in Law and Economics, at 1577, 1578* (A. Mitchell Polinsky and Steven M. Shavel eds., *The Handbook of Law and Economics*, 2007). This is what is meant when it is said that coordination lacks normative value because it happens due to external or situational factors or conformance to a regularity, rather than any chance or skill; Edna Ullmann-Margalit, *The Emergence of Norms*, at 78, 84 (1977).

[77] Roberto Galbiatia and Pietro Vertovaba, *How laws affect behavior: Obligations, Incentives and Cooperative Behavior*, 2014/38 International Review of Law and Economics, at 55 (2014).

[78] Michael Bothe, *Legal and Non-Legal Norms – A Meaningful Distinction in International Relations?*, 1980/11 Netherlands Yearbook of International Law, at 66 (1980).

As Schelling notes, for game theory and especially coordination games to give rise to any normative claims they would have be based on empirical evidence.[79] In the absence of communication, the motivation for this behavior is invisible as well; hence empirical evidence or widespread practice is used as a short-hand to endow coordination behavior with normative force. Thus, this behavior would have to be ascertained through evidence; as explained earlier, it has been found to be an intellectual act of the parties - linked both to their skill and context.[80] This empiricism is required because it has been impossible to explain why persons opt for an equilibrium that does not yield them the best returns; or perhaps the parties subjectively know that there is a focal point which each have identified while opting for an equilibrium. Although empiricism may be useful to arriving at a norm, it is important to be cautious about over-relying on such empiricism. Even this empiricism does not explain why an equilibrium was chosen. However in the case of cooperative games, since there is only a single equilibrium, it is easier to provide a legal solution with normative value.[81]

Therefore, there is no normative backing for behavioral regularities emanating from coordination unlike cooperation. So coordination happens due to chance or circumstance, and as such the parties would comply even without the backing of law or sanctions.

V. Analysis and Conclusions

The above discussion clearly brings out the essential differences between the two games or usages – cooperation and coordination. However, a review of the international tax literature makes it clear that these terms merely refer to specific interactions within the international tax regime. But the literature does not explain what these terms

---

[79] Thomas C. Schelling, *The Strategy of Conflict*, at 98 (1980).

[80] Since research (evidence) has shown that DTAs' have no effect in attracting investments, the belief that signing of such treaties with capital exporters as a method to attract investments has proven to be misplaced. So the reasons for signing them lie elsewhere, similar would be the case of attracting investments. This not to say that DTAs help in cooperation.

[81] Richard H. McAdams, *Beyond the Prisoners' Dilemma: Coordination, Game Theory and the Law*, John M. Olin Program in Law and Economics Working Paper No. 437, at 4 (2008).

essentially mean or the behavioral implications conveyed by these terms. Importantly, when these terms are analyzed in relation to the present day tax treaties, some of the anomalies in using them become clear.

First, the present tax treaties are called coordination games. This means there is no normative (in the legal sense) backing for such agreements/ division because they are agreements based on focal points and not on the aggregate or personal welfare. Second, for such coordination there is no need to have a treaty signed because both the parties have an interest in the upkeep of this arrangement. This arises because of the framing effect or payoffs. Third, such a division may lead to the second best outcome, because the best could only be achieved through cooperation based on shared information about the payoffs (larger divisible pool). This view is contrary to the first best proposals in terms of achieving efficiency or harmonization. However, within the constraints, even this second best may (if based on focal points) be seen as being efficient. So the key question here in terms of policy is not about achieving the best pay-offs, but adopting the second best in terms of the social interactions possible.

However, the curious thing about the present international tax regime is that treaties lie at its heart. If, as claimed, the present international tax interactions are coordination games, then the purpose of a treaty, albeit a weak enforcement mechanism needs explanation. As mentioned in section 2, enforcement mechanisms are necessarily viewed as an accompaniment of cooperation games. In the case of international tax division, information about the exact place where the income is generated and the total amount of profits are crucial aspects to achieve a cooperative division. Incidentally, the reformulation of international tax revenue division itself is stuck due to a lack of information. But, these would not be necessary in a coordination game because it is dependent on focal points (avoidance of double taxation, tax evasion has been added recently) to reach an agreement. However, norms are followed because they are obligatory due to the normative attitudes attached, rather than enforcement. So it is necessary to explain both the treaty mechanism (weak enforcement mechanism) seen within the international tax regime and a lack of treaty breaches. A possible explanation to this could be that the parties to a tax treaty feel obliged to abide by it. But this again begs the question - how could focal points emanating outside the frame of subjective decision making give rise to

such normative attitudes? An explanation to this may lie in the fact that the present tax treaties may not be coordination games or such an understanding needs examination. But a discussion on whether the present tax treaties are coordination games is another question which is not dealt with here.

Therefore knowing what it means when tax treaties are said to facilitate coordination is important – it means the pay-offs are not everything (it may be as well), even though the Nash Equilibrium may be Pareto efficient. Importantly, this means the parties agree to an equilibrium from other equilibria, and the reasons for this remains unexplained (behavioral) or the reasons for such agreements could vary and payoffs would not be a factor.However, when the word cooperation is used the reference is more to the payoffs and its achievement through a formal agreement which the parties cannot renege, or there remains no other option. Therefore behavioral regularity arising from coordination lacks the endowment of a legal norm in its true sense. Finally, since these interactions populate the social organization/ regime of international tax law, an understanding, of these words has important implications for rewriting the tax rules based on fairness or equity. Such a rewriting when undertaken by creating a common understanding amongst the parties and the payoffs distributed, would be cooperative. That discussion would be for another time.

REFERENCES

Books, Reports, and Other Non-periodic Materials

Bruins, Einaudi, Seligman and Sir Josiah Stamp, *Report on Double Taxation Submitted to the Financial Committee*, League of Nations Doc. E.F.S. 73.F.19 18 (1923)

Doron Herman, *Taxing Portfolio Income in Global Financial Markets* (2002)

Douglas G. Bairds. Robert H.Gertner and Randal C. Picker, *Game theory and the Law* (1994)

Edna Ullmann-Margalit, *The Emergence of Norms*, Oxford University Press (1977)

Jurgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, Cambridge: Polity Press & Blackwell Publishers (1996)

Lisa E. Sachs and Karl P. Sauvant, *BITs, DTTs, and FDI flows, An Overview*, in Karl P. Sauvant and Lisa E. Sachs (eds.), *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows,* Oxford University Press (2009), lix

Peggy B. Musgrave, *Fiscal Coordination and Competition in an International Setting*, in Lorraine Eden (ed.), *Retrospectives on Public Finance* (1991)

Robert O. Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy* (1984)

Richard H. McAdams and Eric B. Rasmusen, *Norms in Law and Economics* (A. Mitchell Polinsky and Steven M. Shavel eds., *The Handbook of Law and Economics*, 2007)

Sol Picciotto, *The Current Context and a Little history*, in Sol Picciotto (ed.), *Taxing Multinational Enterprises as Unitary Firms*, Institute of Development Studies (2017)

Thomas C. Schelling, *The Strategy of Conflict* (1980)

Periodic Materials

Andrew M. Colman, *Salience and Focusing in Pure Coordination Games*, 4/1 Journal of Economic Methodology (1997)

Asif H. Qureshi, *The Freedom of a State to Legislate in Fiscal Matters under General International Law*, 41/1 Bulletin for International Fiscal Documentation (1987)

Assaf Razin and Efraim Sadka, *International Tax Competition and the Gains from Tax Harmonization*, vol. 37, no. 1 Economic Letters (1991)

Brue A. Blonigen, Lindsay Oldenski and Nicholas Sly, *The Differential Effects of Bilateral Tax Treaties*, 6/2 American Economic Journal: Economic Policy (2014)

Clemens Fuest and Bernd Huber, *Can Tax Coordination Work?,* 1999/56 Finanzarchiv N.F., Bd. (1999)

Carl S. Shoup, *Tax Coordination Is the Next Step*, 12/1 Challenge (1963)

Eric Talley, *Interdisciplinary Gap Filling: Game Theory and the Law*, 22 Law and Social Inquiry (1997)

Francesco Parisi and Nita Ghei, *The Role of Reciprocity in International Law*, 36/1 Cornell International Law Journal (2003)

Harold Wurzel, *Foreign Investment and Extraterritorial Taxation*, 38/5 Columbia Law Review (1938)

James D. Morrow, *Modelling the forms of International Cooperation: Distribution versus Information*,48/3 International Organization (1994)

Jack L. Goldsmith and Eric A. Posner, *A Theory of Customary International Law*, 66/4 The University of Chicago Law Review (1999)

John V. Surr, *Intertax: Intergovernmental Cooperation in Taxation*, 7/179 Harvard International Club Journal (1966)

Julie Roin, *Taxation without Coordination*, 2000/31 The Journal of Legal Studies, at S61 & S62 (2000)

Klaus Vogel, *Worldwide vs source taxation of income – A review and re-evaluation of arguments – III*, 11 Intertax (1988)

Klaus Vogel, *Double Taxation Treaties and their Interpretation*, 4/1 International Tax and Business Lawyer (1986).

Lawrence E. Mitchell, *Understanding Norms*, 49/2 The University of Toronto Law Journal (1999)

Mark A. Chinen, *Game Theory and Customary International Law: A Response to Professors Goldsmith and Posner*, 23/1 Michigan Journal of International Law (2001)

Michael Bothe, *Legal and Non-Legal Norms – A Meaningful Distinction in International Relations?*, 1980/11 Netherlands Yearbook of International Law (1980)

Michael Keen and Kai A. Konrad, *International Tax Competition and Coordination*, Max Planck Institute for Tax Law and Public Finance Working Paper 2012 – 06 (2012)

Michael P. Devereux, Ben Lockwood and Michela Redoano, *Do Countries Compete over Corporate Taxes?*, 2008/92 Journal of Public Economics (2008)

Myres S. McDougal, *The Prescribing Function in World Constitutive Process*, 6/2 Yale Studies in World Public Order (1980)

Peter Birch Sorensen, *International Tax Coordination: Regionalism Versus Globalism*, CESifo Working Paper No. 483 (2001)

Peter Birch Sørensen, *Tax coordination in the European Union: What are the issues?*, 2001/8 Swedish Economic Policy Review (2001)

R.G Lipsey and Kelvin Lancaster, The General Theory of Second Best, 24 (1) The Review of Economic Studies, 1957

R. Harrison Wagner, *The Theory of Games and the Problem of International Cooperation*, 77/2 The American Political Science Review (1982)

Randal C. Picker, *An Introduction to Game Theory and the Law*, Coase-Sandor Institute for Law & Economics Working Paper No. 22 (1994)

Reuven S. Avi-Yonah, *Globalisation, Tax Competition and the Fiscal Crisis of the State*, 113/7 Harvard Law Review (2000)

Richard H. McAdams, *A Focal Point Theory of Expressive Law*, 86/8 Virginia Law Review (2000)

Richard H. McAdams, *Beyond the Prisoners' Dilemma: Coordination, Game Theory and the Law*, John M. Olin Program in Law and Economics Working Paper No. 437 (2008)

Robert Axelrod & William D. Hamilton, *The Evolution of Cooperation*, 1981/27 Science, at 1319 (1981)

Robert Sugden, *Reciprocity: The Supply of Public Goods through Voluntary Contributions*, 94/376 The Economic Journal (1984)

Roberto Galbiatia and Pietro Vertovaba, *How laws affect behavior: Obligations, Incentives and Cooperative Behavior*, 2014/38 International Review of Law and Economics (2014)

Sijbren Cnossen, *Tax Policy in the European Union: A Review of Issues and Options*, CESifo Working Paper No. 758 (2002)

Thomas Rixen, *The Institutional Design of International Double Taxation Avoidance*, Discussion Paper SP IV 2008-302, Wissenschaftszentrum Berlin für Sozialforschung (2008)

Tim Edgar, *Corporate Income Tax Coordination as a Response to International Tax Competition and International Tax Arbitrage*, 51/3 Canadian Tax Journal (2003)

Tsilly Dagan, *The Costs of International Tax Cooperation*, Working Paper no. 1-03 (2004)

Vincent Crawford, *A Survey of Experiments on Communication via Cheap Talk*, 1998/78 Journal of Economic Theory (1998)

William B. Barker, *Optimal International Taxation and Tax Competition: Overcoming the Contradictions*, 22 Northwestern Journal of International Law and Business (2002)

Wolfgang Schön, *International Tax Coordination for a Second-Best World (I)*, World Tax Journal (2009)

Internet, Electronic Media, and Other Nonprint Resources

Arthur J. Cockfield, *Purism and Contextualism within International Tax Law Analysis: How Traditional Analysis Fails Developing Countries*, 5/2 eJournal of Tax Research [online journal] (2007)

Sol Picciotto, *Coordination and Legitimacy in International Business Taxation*, Law and Society Association Annual Conference (2006) available at http://eprints.lancs.ac.uk/266/1/Coordination_and_Legitimacy_in_International_Business_Taxation.pdf

This article is published in *The Asian Business Lawyer (ABL)* Vol. 20.
The publication of *ABL* Vol. 20 has been financially supported by KIM & CHANG.

CASE

Supreme Court Decision 2015Du55295 Decided March 16, 2017
【Revocation of Disposition Imposing Global Income Tax】

【Main Issues and Holdings】

[1] Whether the distributable retained earnings of a specific foreign corporation under Article 17(1) of the former Adjustment of International Taxes Act shall be calculated based on the earned surplus before appropriations computed under the generally accepted accounting principles in the resident state of the relevant foreign corporation (affirmative in principle), and in the exceptional case where the earned surplus before appropriations may be computed by applying Korean corporate accounting standards, the allocation of the burden of proving that the generally accepted accounting principles in the resident state of the specific foreign corporation are significantly different from Korean corporate accounting standards (held: the claimant)

[2] In a case where the tax authority imposed global income tax on B, a single-person shareholder who made a 100 percent equity investment in Foreign Company A located in the Virgin Islands, a tax haven, deeming the amount calculated based on the earned surplus before appropriations, etc. as indicated in the financial statements prepared by Company A to be the distributable retained earnings under Article 17(1) of the former Adjustment of International Taxes Act, the case holding that: (a) distributable retained earnings shall be computed based on the financial statements apparently prepared under the generally accepted accounting principles in the resident state of Company A; (b) nevertheless, the lower court determined the tax disposition to be illegal on the erroneous premise that distributable retained earnings shall be computed by applying Korean corporate accounting standards; and (c) in so doing, it erred by misapprehending the pertinent legal doctrine

【Summary of Decision】

[1] According to the text and language of Article 17(1), (4) of the former Adjustment of International Taxes Act (amended by Act No. 9914, Jan. 1, 2010) and Article 31(1) of the former Enforcement Decree of the Adjustment of International Taxes Act (amended by Presidential

Decree No. 23600, Feb. 2, 2012), as a matter of principle, the distributable retained earnings of a specific foreign corporation shall be calculated based on the earned surplus before appropriations computed under the generally accepted accounting principles in the resident state. Only when the generally accepted accounting principles in the resident state of the specific foreign corporation are significantly different from Korean corporate accounting standards may the latter be applied to the computation. In such a case, the burden of proving that the generally accepted accounting principles in the resident state of the specific foreign corporation are significantly different from Korean corporate accounting standards rests with the proponent of the claim.

[2] In the case where the tax authority imposed global income tax on B, a single-person shareholder who made a 100 percent equity investment in Foreign Company A located in the Virgin Islands, a tax haven, deeming the amount calculated based on the earned surplus before appropriations, etc. as indicated in the financial statements prepared by Company A to be the distributable retained earnings under Article 17(1) of the former Adjustment of International Taxes Act (amended by Act No. 9914, Jan. 1, 2010), the Court held as follows: (a) the said financial statements were prepared under the generally accepted accounting principles in the resident state of Company A at the time of their preparation; (b) there is no proof that the accounting principles applied at the time of the preparation of the financial statements are significantly different from Korean corporate accounting standards; (c) barring any special exigency, distributable retained earnings shall be calculated based on the financial statements apparently prepared under the generally accepted accounting principles in the resident state of Company A; (d) nevertheless, the lower court based its decision on the erroneous assumption that distributed retained earnings shall be calculated based on the earned surplus before appropriations computed by applying Korean corporate accounting standards; (e) on that erroneous premise, the lower court determined the tax disposition to be illegal on the ground that the income corresponding to the earned surplus before appropriations as indicated in the financial statements has yet to be accrued to Company A in the relevant fiscal year; and (f) in so doing, the lower court erred by misapprehending the pertinent legal doctrine.

【Reference Provisions】 [1] Article 17(1), (4) of the former Adjustment of International Taxes Act (Amended by Act No. 9914, Jan. 1, 2010), Article 31(1) of the former Enforcement Decree of the

Adjustment of International Taxes Act (Amended by Presidential Decree No. 23600, Feb. 2, 2012) / [2] Article 17(1), (4) of the former Adjustment of International Taxes Act (Amended by Act No. 9914, Jan. 1, 2010), Article 31(1) of the former Enforcement Decree of the Adjustment of International Taxes Act (Amended by Presidential Decree No. 23600, Feb. 2, 2012)

Article 17 of the former Adjustment of International Taxes Act (Specific Foreign Corporations' Retained Earnings Deemed Dividends)

(1) Where a national has invested in foreign corporations with their headquarters or principal office located in a state or region in which all or significant part of the income actually accrued to the corporation is non-taxable or the tax burden on the corporation is 15/100 or less of the income actually accrued to the corporation (hereinafter "tax haven"), the amount attributable to the national out of the distributable retained earnings as of the end of each fiscal year of the specific corporation having special relationship with the national out of the said foreign corporations (hereinafter the "specific foreign corporation"), shall be deemed dividends paid to the national;

(4) Necessary matters such as the scope of income actually earned, non-taxable income and its scope, distributable retained earnings, and computation of the amount of deemed dividend under paragraph (1) shall be prescribed by the Presidential Decree. *<Amended by Act No. 11606, Jan. 1, 2013>*

Article 31 of the former Enforcement Decree of the Adjustment of International Tax Act (Computation of Distributable Retained Earnings)

(1) Distributable retained earnings as stipulated in Article 17(1) shall be the amount obtained by deducting each of the following amounts from (except appraised loss under Subparag. 7; hereinafter the same), or adding the same to (only in case of appraised loss under Subparag. 7; hereinafter the same), the earned surplus before appropriations calculated under the generally accepted accounting principles in the resident state of the specific foreign corporation in question at the time of preparing the financial statements, after adjustments made to the matters provided under the Ordinance of the Ministry of Strategy and Finance; Provided, That where the accounting principles generally accepted in the resident state significantly differ from Korean corporate

accounting standards, distributable retained earnings shall be deemed to be the amount obtained by deducting each of the following amounts from, or adding the same to, the earned surplus before appropriations calculated under Korean corporate accounting standards, after adjustments made to the matters provided under the Ordinance of the Ministry of Strategy and Finance:

1. Dividends of profits (including interim dividends that have accrued from the appropriation of surplus earnings executed in the relevant business year) or distribution of surplus earnings, out of the amount of surplus earnings appropriated in the relevant business year;

2. Bonus, severance pay and any other outflow of incomes, out of the amount of surplus earnings appropriated in the relevant business year;

3. Obligatory reserve or obligatory appropriation of surplus earnings as determined by the Acts and subordinate statutes of the relevant resident State, out of the surplus earnings appropriated in the relevant business year;

4. The amount of surplus earnings set forth in subparagraphs 1 and 2 that have not been appropriated, out of those already taxed by being deemed to have been distributed to the relevant national under Article 17(1) of the Act before the date the relevant business year commences;

5. The amount of surplus earnings set forth in subparagraphs 1 and 2 that have not been appropriated, out of the surplus earnings (excluding the amount set forth in subparagraphs 6 and 7) accrued when Article 17 of the Act was not applied;

6. The amount of surplus earnings set forth in subparagraphs 1 and 2 that have not been appropriated, out of the appraised gains set forth in Article 29(3);

7. Appraised loss under Article 29(3);

8. The amount set forth in Article 34-2.

【Plaintiff-Appellee】 Plaintiff (Attorney Choi Soo-hee et al., Counsel for the plaintiff-appellee)

【Defendant-Appellant】 Head of the National Tax Service — Geumcheon District Office (Attorney Hwang In-seok, Counsel for the defendant-appellant)

【Judgment of the lower court】 Seoul High Court Decision 2015Nu45979 decided October 14, 2015

【Disposition】 The judgment of the lower court is reversed, and the case is remanded to the Seoul High Court.

【Reasoning】

The grounds of appeal are examined (to the extent of supplement in case of any indication in the supplemental appellate briefs not timely filed).

1. Article 17(1) of the former Adjustment of International Taxes Act (amended by Act No. 9914, Jan. 1, 2010; hereinafter the "International Taxes Adjustment Act") provides, "Where a national has invested in foreign corporations with their headquarters or principal office located in a state or region in which all or significant part of the income actually accrued to the corporation is nontaxable or the tax burden on the corporation is 15/100 or less of the income actually accrued to the corporation, the amount attributable to the national out of the distributable retained earnings as of the end of each fiscal year of the specific corporation having special relationship with the national out of the said foreign corporations (hereinafter the "specific foreign corporation") shall be deemed dividends paid to the national." Article 31(1) of the former Enforcement Decree of the International Taxes Adjustment Act (amended by Presidential Decree No. 23600, Feb. 2, 2012), which delineates the scope of distributable retained earnings by delegation from Article 17(4) of the International Taxes Adjustment Act, *supra*, provides, "Distributable retained earnings as stipulated in Article 17(1) shall be the amount obtained by deducting each of the following amounts from, or adding the same to, the earned surplus before appropriations calculated under the generally accepted accounting principles in the resident state of the specific foreign corporation in question at the time of preparing the financial statements, after adjustments made to the matters provided under the Ordinance of the Ministry of Strategy and Finance; Provided, That where the accounting principles generally accepted in the resident state significantly differ from Korean corporate accounting standards, distributable retained earnings shall be deemed to be the amount obtained by deducting each of the following amounts from, or adding the same to, the earned surplus before appropriations calculated under Korean corporate accounting standards, after adjustments made to the matters provided under the Ordinance of the Ministry of Strategy and Finance."

According to the text and language of the pertinent provisions, as a matter of principle, the distributable retained earnings of a specific foreign corporation shall be calculated based on the earned surplus before appropriations computed under the generally accepted accounting

principles in the resident state. Only when the generally accepted accounting principles in the resident state of the specific foreign corporation are significantly different from Korean corporate accounting standards may the latter be applied to the computation. In such a case, the burden of proving that the generally accepted accounting principles in the resident state of the specific foreign corporation are significantly different from Korean corporate accounting standards rests with the proponent of the claim.

2. Review of the reasoning of the lower judgment and the evidence duly admitted by the lower court reveals the following facts.

(1) The Plaintiff is a single-person shareholder who made a 100 percent equity investment in Cordia Global Limited (hereinafter "Cordia"), a foreign corporation located in the Virgin Islands, a tax haven.

(2) In its profit and loss statement (P/L) for fiscal year 2009, Cordia indicated USD 21,307,051 in net income (USD 41,736,678 in profit − USD 20,429,627 in expenses). USD 41,736,678 in profit was the remainder after deducting USD 2,840,000 in purchase cost, etc. from USD 44,576,678 in revenue from the sale of the shares of Rontex International Holdings Limited (subsequently renamed to Siberian Mining Group Company Limited), a listed corporation in Hong Kong. USD 20,429,627 in expenses was the sum of all expenses spent in the same fiscal year.

(3) The financial statements for fiscal year 2009 (hereinafter the "instant financial statements") prepared by Cordia indicates USD 19,935,559 as the earned surplus before appropriations.

(4) Based on the instant financial statements, the Defendant deemed USD 28,135,113 (KRW 32,591,714,899) to be Cordia's distributable retained earnings under Article 17(1) of the International Taxes Adjustment Act, which is the sum of USD 19,935,559 in earned surplus before appropriations, USD 1,100,000 in contingent liabilities, and USD 7,099,554 in loss from valuation of securities. By further adding USD 369,532,270 in earned income, the Defendant rendered the instant disposition on Jan. 13, 2012, imposing on the Plaintiff KRW 14,506,871,590 in global income tax for fiscal year 2010.

3. Examining such facts and the circumstances revealed in the record pursuant to the statutory provisions and the legal doctrine, as seen *supra*: (a) there is no de facto dispute between the parties over whether the instant financial statements were prepared under the generally

accepted accounting principles in Cordia's resident state at the time of preparation; (b) there is no proof that the generally accepted accounting principles applied at the time of preparing the instant financial statements significantly differ from Korean corporate accounting standards; and thus, (c) barring any special exigency, Cordia's distributable retained earnings shall be calculated based on the earned surplus before appropriations as indicated in the instant financial statements apparently prepared under the generally accepted accounting principles in Cordia's resident state.

Nevertheless, solely for the reasons indicated in its holding, the lower court erroneously assumed that distributable retained earnings shall be calculated based on the earned surplus before appropriations computed by applying Korean corporate accounting standards, etc., and on that erroneous premise, determined the instant disposition to be illegal on the ground that the income corresponding to USD 19,935,559 in earned surplus before appropriations as indicated in the instant financial statements has yet to be accrued to Cordia in fiscal year 2009. In so doing, it erred by misapprehending the legal doctrine on the scope of "distributable retained earnings" under Article 17(1) of the International Taxes Adjustment Act, thereby affecting the conclusion of the judgment.

4. Therefore, without proceeding to decide on the remainder of the grounds of appeal, we reverse the lower judgment, and remand the case to the lower court for further proceedings consistent with this Opinion. It is so decided as per Disposition by the assent of all participating Justices on the bench.

Justices Park Sang-ok (Presiding Justice)
Kim Chang-suk
Jo Hee-de (Justice in charge)

Supreme Court Decision 2012Da23832 Decided May 30, 2017
【Decision on the Recognition and Enforcement of a Foreign Judgment】

【Main Issues and Holdings】

[1] Standard of determining whether the requirements are met for mutual guarantee under Article 217(1)4 of the Civil Procedure Act

[2] Purport of the system of judgment of execution under Article 26(1) of the Civil Execution Act, and the meaning of "final and conclusive judgment of a foreign court, etc."

[3] Measures to be taken by a court in Korea as the country where the judgment is to be enforced, in cases where either or both the form and mode in which a specific performance decree is stated in a final and conclusive judgment of a foreign court, etc. are different from the form of disposition or the mode of statement in Korean judgments

Whether a Korean court may grant compulsory execution in cases where the terms of an agreement, as the object of a specific performance decree, are not sufficiently certain to make the precise act which is to be executed clearly ascertainable, so that their enforcement is difficult to be immediately compelled even in the United States of America, the country where the judgment was rendered (negative)

[4] In cases where a foreign court entered a decree of payment of attorneys' fees and legal costs of the suit, in addition to a decree of specific performance of obligation, the standard of determining whether to grant a judgment of execution on the decree of payment of attorneys' fees and costs

【Summary of Decision】

[1] For a final and conclusive judgment of a foreign court to be recognized, Article 217(1)4 of the Civil Procedure Act requires that "mutual guarantee exists or the respective requirements for recognition of final judgment, etc. in the Republic of Korea and the foreign country to which the foreign court belongs are not disproportionately off balance and are not substantially different in important points." Accordingly, the requirements for mutual guarantee of the recognition of judgments under Article 217(1)4 of the Civil Procedure Act shall be deemed fulfilled inasmuch as the respective requirements for recognition of like judgments in Korea and the other country are not disproportionately off

balance, the foreign requirements are not unduly more burdensome overall than those in Korea, and the two sets of requirements are not substantially different in important points. It is sufficient to find mutual guarantee by comparing the requirements for recognition based on the relevant foreign laws and regulations, case law, and customs and practices. A treaty with the other country is not necessarily required. Even in the absence of a specific precedent, it is sufficient insofar as the foreign court is expected to in fact recognize a similar judgment rendered by a Korean court.

[2] Article 26(1) of the Civil Execution Act provides, "Compulsory execution based on a final and conclusive judgment of a foreign court or an adjudication recognized to have the same effect (hereinafter "final and conclusive judgment, etc.") may only be conducted if a court of the Republic of Korea approves of the compulsory execution by a judgment of execution." The purport of the system of judgment of execution as stipulated in this provision is as follows: (a) in cases of compelling enforcement in Korea of the rights of the parties concerned as ascertained in a judgment rendered in a competent foreign court; (b) enforcement may be grounded in the foreign judgment without having to compel redundant proceedings in Korea, such as by bringing a new action; (c) rather the parties shall obtain a judgment of execution in Korea based on the deliberation and approval of whether compulsory enforcement of the judgment shall be granted; ultimately (d) leading to a result that reconciles the parties' demand for facilitation of enforcement of their rights with the state's exercise of its exclusive prerogatives over coercive enforcement and thereby striking an appropriate balance. From this perspective, a "final and conclusive judgment of a foreign court, etc." under the foregoing provision means a final judgment on a juristic relationship rendered by a competent judicial organ of a foreign country based on its authority under an adversarial system, the content of which is appropriate for compulsory enforcement, such as specific performance of an obligation.

[3] At equity, courts of the United States may, at its discretion, enter a decree of specific performance ordering the performance of the terms of the contract, in cases where damages cannot appropriately provide remedy to the obligee. To enforce a specific performance decree, the terms of an agreement, as the object of specific performance, must be sufficiently certain to make the precise act which is to be done clearly ascertainable (California Civil Code Section 3390 subdivision (e)). In

view of the legal nature of a specific performance decree, combined with the legislative purport of the provisions on the recognition and enforcement of foreign judgments under the Korean Civil Procedure Act and the Civil Execution Act, as a matter of principle, a court of Korea, as the country where the judgment is to be enforced, shall offer a legal remedy under the Civil Execution Act, which is the same as or similar to enforcement under the final and conclusive judgment of a foreign court, etc., even when the form and mode in which the specific performance decree is stated in a final and conclusive judgment of a foreign court or adjudication recognized to have the same effect (hereinafter the "final and conclusive judgment, etc.") are different from the form of disposition or mode of statement in Korean judgments.

However, a Korean court must not grant compulsory execution in cases where the terms of an agreement, as the object of a specific performance decree, are not sufficiently certain to make the precise act which is to be executed clearly ascertainable, so that their enforcement is difficult to be immediately compelled even in the United States of America, the country where the judgment in the instant case was rendered.

[4] In cases where a foreign court entered a decree of payment of attorneys' fees and legal costs of the suit, in addition to a decree of specific performance of obligation, determination whether to grant a judgment of execution on a decree of payment of attorneys' fees and costs shall be made separately and apart from the decree of specific performance and based on an examination of whether that part, by itself, meets the requirements under Article 27(2) of the Civil Execution Act..

【Reference Provisions】 [1] Article 217(1)4 of the Civil Procedure Act / [2] Article 26(1) of the Civil Execution Act / [3] Article 217(1)4 of the Civil Procedure Act, Article 26(1) of the Civil Execution Act, Article 25(1) of the Act on Private International Law / [4] Article 27(2) of the Civil Execution Act

Article 217 of the Civil Procedure Act (Recognition of Foreign Country Judgments)

(1) A final and conclusive judgment rendered by a foreign court or a judgment acknowledged to have the same force (hereinafter referred to as "final judgment, etc.") shall be recognized, if all of the following requirements are met: *<Amended by Act No. 12587, May 20, 2014>*

4. That mutual guarantee exists, or the requirements for

recognition of final judgment, etc. in the Republic of Korea and the foreign country to which the foreign country court belongs are not far off balance and have no actual difference between each other in important points.

Article 26 of the Civil Execution Act (Compulsory Execution by Foreign Trial)

(1) Compulsory execution based upon the final and conclusive judgment of a foreign court or a trial the effect of which is recognized as the same therewith (hereinafter referred to as "final and conclusive judgment, etc.") may be conducted only if a court of the Republic of Korea has permitted such compulsory execution by means of a judgment of execution. *<Amended by Act No. 12588, May 20, 2014>*

Article 27 of the Civil Execution Act (Judgment of Execution)

(2) A lawsuit seeking a judgment of execution shall be dismissed without prejudice if it falls under any of the following: *<Amended by Act No. 12588, May 20, 2014>*

1. When it has not been proved that the final and conclusive judgment, etc. of a foreign court has become final and conclusive;
2. When the final and conclusive judgment, etc. of a foreign court fails to fulfill the conditions under Article 217 of the Civil Procedure Act.

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

(1) A contract shall be governed by the law which the parties choose explicitly or implicitly: Provided, That the implicit choice shall be limited to the case which the implicit choice can be reasonably recognized by the content of the contract and all other circumstances.

【Reference Cases】 [1] Supreme Court Decision 2002Da74213 decided October 28, 2004 (Gong2004Ha, 1937); Supreme Court Decision 2015Da207747 decided January 28, 2016 (Gong2016Sang, 348) / [2] Supreme Court Decision 2009Da68910 decided April 29, 2010 (Gong2010Sang, 980)

【Plaintiff-Appellant】 Ringfree USA Corp. and one other

(Attorney Shin Tae-gil, Counsel for the plaintiff-appellant)

【Defendant-Appellee】 Ringfree Co., Ltd. and one other (Lim, Chung & Suh (LCS), Attorneys Lim Dong-chin et al., Counsel for the defendant-appellee)

【Judgment of the lower court】 Seoul High Court Decision 2011Na27280 decided January 27, 2012

【Disposition】 Of the lower judgment, the part on attorneys' fees and costs is reversed, and that part of the case is remanded to the Seoul High Court. The remainder of the appeal is dismissed.

【Reasoning】

The grounds of appeal are examined (to the extent of supplement in the event any statements in the supplemental brief are not timely filed).

1. Developments leading up to the establishment of the foreign judgment

Review of the reasoning of the first instance judgment as accepted in part by the lower court and the record reveals the following facts.

A. Defendant Ringfree Co., Ltd. (hereinafter "Defendant Company") holds a patent in connection with the method and equipment generating ringback tones in voice, text, and image during the call waiting time on telephony or cell phone services. On December 7, 2002, Defendant Company entered into an exclusive license agreement with Plaintiff Ringfree USA Corp. (hereinafter "Plaintiff Ringfree USA"), under which Plaintiff Ringfree USA would be granted the exclusive and transferrable right to exploit, lease, and sublease Defendant Company's patent in the United States of America and Canada (hereinafter the "instant Exclusive License Agreement").

B. On December 9, 2002, Defendant Company, Defendant Company's Managing Director Defendant 2, Plaintiff Ringfree USA, and Plaintiff Ringfree USA's Managing Director Nonparty 1 executed the instant Memorandum of Agreement. Under the said Memorandum: (a) the counterparties would establish Plaintiff Ringfree International Corporation (hereinafter "Plaintiff Ringfree International"), as a joint venture, 44.5% equity in which would be held by Defendant Company, 40% by Plaintiff Ringfree USA, 11% by Nonparty 2, and 4.5% by Nonparty 1; (b) Defendant Company would transfer, assign, and deliver to Plaintiff Ringfree International all domestic and foreign patent application and patent rights that it owns or controls in connection with the method and equipment to generate ringfree tones in voice, text, and image during call waiting, including (i) patent rights or applications

related to said method or equipment, (ii) divisional or continuing patent applications (in whole or in part) related to said method or equipment, (iii) patent rights issued to such applications and extension of term thereof, reissue, reexamination or extension of term thereof, (iv) patent rights and applications in the U.S. and Canada, and patent applications and registrations in the Republic of Korea; and (c) the prevailing party in a lawsuit to enforce the instant agreement is entitled to recover reasonable costs and expenses including attorneys' fees and costs.

C. However, when Defendant Company failed to perform according to its agreement with Plaintiff Ringfree International, but instead notified the Plaintiffs, etc. to the effect that the instant Memorandum of Agreement and the Exclusive License Agreement were null and void, the Plaintiffs brought a lawsuit against the Defendants before the United States District Court for the Central District of California Western Division (hereinafter the "instant U.S. court") on the ground that the Defendants defaulted on their obligations under the instant Memorandum of Agreement and the Exclusive License Agreement and sought both specific performance and payment of attorneys' fees and costs.

D. The instant U.S. court held a jury trial from August 19 to 22, 2008, and from August 26 to 28, 2008. On August 28, 2008, the jury returned a verdict finding that the Defendants breached their obligation under the instant Memorandum of Agreement and the Exclusive License Agreement, thereby incurring loss to the Plaintiffs.

E. The instant U.S. court granted the Plaintiffs' motion to enter a decree of specific performance on October 21, 2008 and granted the Plaintiffs' motion for attorneys' fees and costs on January 12, 2009.

F. On January 15, 2009, the instant U.S. court rendered a judgment holding that the Plaintiffs were entitled to a decree of specific performance of the parties' Memorandum of Agreement and the Exclusive License Agreement against defendants Ringfree Company, Limited, and Defendant 2, and ordered the Defendants to jointly and severally pay to the Plaintiffs USD 940,378.32 in attorneys' fees and costs (hereinafter the "instant judgment"), which became final and conclusive as is.

2. As to the ground of appeal on the requirements for recognition of a foreign judgment

A. For a final and conclusive judgment of a foreign court to be recognized, Article 217(1)4 of the Civil Procedure Act requires that

"mutual guarantee exists or the respective requirements for recognition of final judgment, etc. in the Republic of Korea and the foreign country to which the foreign court belongs are not disproportionately off balance and are not substantially different in important points." Accordingly, the requirements for mutual guarantee of the recognition of judgments under Article 217(1)4 of the Civil Procedure Act shall be deemed fulfilled inasmuch as the respective requirements for recognition of like judgments in Korea and the other country are not disproportionately off balance, the foreign requirements are not unduly more burdensome overall than those in Korea, and the two sets of requirements are not substantially different in important points. It is sufficient to find mutual guarantee by comparing the requirements for recognition based on the relevant foreign laws and regulations, case law, and customs and practices. A treaty with the other country is not necessarily required. Even in the absence of a specific precedent, it is sufficient insofar as the foreign court is expected to in fact recognize a similar judgment rendered by a Korean court (*see*, *e.g.*, Supreme Court Decisions 2002Da74213, Oct. 28, 2004; 2015Da207747, Jan. 28, 2016).

B. The lower court determined as follows: (a) the Uniform Foreign-Country Money Judgments Recognition Act, as codified at Part 3, Sections 1713 through 1724 of the California Code of Civil Procedure (hereinafter the "Uniform Recognition Act"), is not applicable to the specific performance decree regarding the Memorandum of Agreement and the Exclusive License Agreement of the instant judgment (hereinafter the "instant specific performance decree") as they do not constitute a judgment decreeing or dismissing the payment of a specific pecuniary amount; (b) the Uniform Recognition Act provides that it does not prevent recognition under principles of comity or otherwise of a non-pecuniary foreign-country judgment not within its scope to the extent the said judgment is a judgment on family affairs such as divorce and support, which the instant judgment does not constitute either; and (c) therefore, there cannot be deemed to exist a mutual guarantee of recognition between Korea and the state of California on the instant specific performance decree.

However, while the scope of application of the Uniform Recognition Act is a foreign-country judgment ordering or dismissing a certain pecuniary payment, Section 1723 (Saving Clause) provides, "This chapter does not prevent the recognition under principles of comity or otherwise of a foreign-country judgment not within the scope of this

chapter." As such, under the general principles of comity based on common law, the United States District Court for the District of California allows for the recognition and enforcement of a non-pecuniary judgment by a foreign court when the following conditions are met: (a) the foreign court has personal and subject matter jurisdiction over the given case; (b) the defendant had the opportunity to be heard by an impartial tribunal with an appropriate service of process and under procedures compatible with the requirements of due process of law in the given foreign court; (c) the judgment was not unduly obtained by fraud; and (d) the judgment of the cause of action or claim for relief on which the judgment is based is not repugnant to the public policy of the state of California or of the United States. Such requirements for recognizing foreign judgments as set forth by California courts is not manifestly off balance overall compared to those under the Korean Civil Procedure Act and shows little if any actual difference in important points. Thus, it is reasonable to view that the U.S. District Court for the District of California can be expected to recognize like judgments by Korean courts.

Nevertheless, for the reasons as stated in its holding, the lower court determined that it cannot be deemed there was a mutual guarantee of recognition of the instant decree of specific performance. In so doing, it erred by misapprehending the legal doctrine on the requirements for mutual guarantee in the context of the requirements for recognition of a foreign judgment.

3. As to the ground of appeal on whether there is authority to enforce the decree of specific performance

A. Article 26(1) of the Civil Execution Act provides, "Compulsory execution based on a final and conclusive judgment of a foreign court or an adjudication recognized to have the same effect (hereinafter "final and conclusive judgment, etc.") may only be conducted if a court of the Republic of Korea approves of the compulsory execution by a judgment of execution." The purport of the system of judgment of execution as stipulated in this provision is as follows: (a) in cases of compelling enforcement in Korea of the rights of the parties concerned as ascertained in a judgment rendered in a competent foreign court; (b) enforcement may be grounded in the foreign judgment without having to compel redundant proceedings in Korea, such as by bringing a new action; (c) rather the parties shall obtain a judgment of execution in Korea based on the deliberation and approval of whether compulsory enforcement of the

judgment shall be granted; ultimately (d) leading to a result that reconciles the parties' demand for facilitation of enforcement of their rights with the state's exercise of its exclusive prerogatives over coercive enforcement and thereby striking an appropriate balance. From this perspective, a "final and conclusive judgment of a foreign court, etc." under the foregoing provision means a final judgment on a juristic relationship rendered by a competent judicial organ of a foreign country based on its authority under an adversarial system, the content of which is appropriate for compulsory enforcement, such as specific performance of an obligation (*see* Supreme Court Decision 2009Da68910, Apr. 29, 2010).

Meanwhile, at equity, courts of the United States may, at its discretion, enter a decree of specific performance ordering the performance of the terms of the contract, in cases where damages cannot appropriately provide remedy to the obligee. To enforce a specific performance decree, the terms of an agreement, as the object of specific performance, must be sufficiently certain to make the precise act which is to be done clearly ascertainable (California Civil Code Section 3390 subdivision (e)). In view of the legal nature of a specific performance decree, combined with the legislative purport of the provisions on the recognition and enforcement of foreign judgments under the Korean Civil Procedure Act and the Civil Execution Act, as a matter of principle, a court of Korea, as the country where the judgment is to be enforced, shall offer a legal remedy under the Civil Execution Act which is the same as or similar to enforcement under the final and conclusive judgment of a foreign court, etc., even when the form and mode in which the specific performance decree is stated in a final and conclusive judgment of a foreign court or adjudication recognized to have the same effect (hereinafter the "final and conclusive judgment, etc.") are different from the form of disposition or mode of statement in Korean judgments.

However, a Korean court must not grant compulsory execution in cases where the terms of an agreement, as the object of a specific performance decree, are not sufficiently certain to make the precise act which is to be executed clearly ascertainable, so that their enforcement is difficult to be immediately compelled even in the United States of America, the country where the judgment in the instant case was rendered.

B. In view of the foregoing facts, the instant decree of specific performance only states, "the Plaintiffs are entitled to a decree of specific

performance of the parties' Memorandum of Agreement and Exclusive License Agreement against the defendants." However, what the parties agreed to transfer and assign between themselves in the above Memorandum of Agreement was very comprehensive and broad, encompassing "all domestic and foreign patent application and patent rights, etc." Inasmuch as the object of a specific performance is neither sufficiently specific nor clear, a coercive enforcement of the instant specific performance decree is unlikely to be immediately feasible even in the U.S., the country where the judgment was rendered. Therefore, its compulsory execution cannot be granted by a Korean court either.

C. Although it was inappropriate for the lower court to determine that the instant specific performance decree is not qualified for enforcement authority on the ground that it does not directly and specifically state the type, content, or scope of performance to be enforced by compulsory execution under the Korean Civil Execution Act, the lower court was ultimately justified in its conclusion to reject this part of the Plaintiffs' claim. Therefore, this part of the lower court's determination was not erroneous, and thus, did not adversely affect the conclusion of the judgment.

4. As to the ground of appeal on the attorneys' fees and costs

A. In cases where a foreign court entered a decree of payment of reasonable attorneys' fees and legal costs of the suit, in addition to a decree of specific performance of obligation, determination whether to grant a judgment of execution on a decree of payment of reasonable attorneys' fees and costs shall be made separately and apart from the decree of specific performance and based on an examination of whether that part, by itself, meets the requirements under Article 27(2) of the Civil Execution Act..

Section 1717(a) of California Civil Code provides, "In any action on a contract, where the contract specifically provides that attorney's fees and costs which are incurred to enforce that contract shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract . . . shall be entitled to reasonable attorney's fees in addition to other costs." Section 1021 of the California Code of Civil Procedure provides, "Except as attorney's fees are specifically provided for by statute, the measure and mode of compensation of attorneys and counselors at law are left to the agreement, express or implied, of the parties."

B. Examining the foregoing facts in light of the above legal doctrine

and the provisions of the California Civil Code and Code of Civil Procedure, the part of the instant judgment on attorneys' fees and costs is a separate subject matter of litigation apart from the part seeking specific performance and cannot be deemed subordinate to the judgment on the specific performance decree. Therefore, whether enforcement judgment may be granted on said part shall be determined separately from the part on the specific performance decree, by examining whether the requirements under Article 27(2) of the Civil Execution Act are met.

C. Nevertheless, the lower court held otherwise by deeming the judgment on litigation costs to be subordinate to the merits of the case and denying enforcement judgment on attorneys' fees and costs on the ground that it is impermissible to compel the enforcement in Korea of only the payment of the costs incurred for the purpose of obtaining a foreign judgment, if it is impermissible to compel the enforcement in Korea of the liability to pay as ascertained under that foreign judgment. In so doing, the lower court erred by misapprehending the legal doctrine on the subject matter of a lawsuit and the enforcement of a foreign judgment, thereby failing to exhaust all necessary deliberations, which adversely affected the conclusion of the judgment. The ground of appeal assigning this error is with merit.

5. Conclusion

Therefore, of the lower judgment, we reverse the part regarding attorneys' fees and costs, and remand the case to the lower court for further proceedings consistent with this Opinion. We dismiss the remainder of the appeal. It is so decided as per Disposition by the assent of all participating Justices on the bench.

Justices Kim Jae-hyung (Presiding Justice)
Park Byoung-dae
Park Poe-young (Justice in charge)
Kwon Soon-il

Supreme Court Decision 2016Da216199 Decided June 29, 2017
【Lawsuit Claiming for the Transfer of Domain Registration】

【Main Issues and Holdings】

[1] Meaning of "possess" and "use" under the provisions of Article 12 of the Internet Address Resources Act

Whether one may claim for the cancelation or transfer of registration based on the said Act when there were unlawful purposes in possessing and using a domain name, albeit not in registering the same (affirmative), and the base time for determining whether there were unlawful purposes in "possessing and using" a domain name

[2] Scope of an act for unlawful purposes as provided under the Internet Address Resources Act and the method of determining whether unlawful purposes are present

Whether unlawful purposes are negated for the sole reason that the purpose of "possessing and using" a domain name was not to gain economic profit by the sale and lease of the domain name (negative)

【Summary of Decision】

[1] Article 12 of the Internet Address Resources Act (hereinafter the "Internet Address Act") prohibits any person from obstructing the registration of any domain name of a legitimate holder of a title to the same and from registering, possessing, or using a domain name for unlawful purposes, such as unjust enrichment of that person at the expense of the legitimate holder of the title (paragraph 1). The said Article authorizes the legitimate holder of a title to file with the court to claim for the cancelation or transfer of the domain name whenever another party registers, possesses, or uses the domain name in violation of the preceding paragraph (paragraph 2).

Here, "possess" means to hold a registered domain name, and "use" means to actually utilize a domain name upon its registration and possession by, for instance, opening an Internet website under the registered domain name and using it as an identifying mark on the party's own information systems including computer. As such, the Internet Address Act specifies "possessing and using" a domain name as a prohibited act separate and apart from "registering" the same. It is construed that one may claim for the cancelation or transfer of

registration under Article 12 of the Internet Address Act inasmuch as there were unlawful purposes in "possessing or using" the domain name, albeit not in registering the same. It is reasonable to determine whether there were unlawful purposes in "possessing and using" a domain name as of the point of such act.

[2] An act for unlawful purposes under the provisions of the Internet Address Resources Act encompasses not only unjust enrichment of the unlawful party at the expense of a legitimate holder of the title, but also acts in a manner not directly relevant to unjust enrichment, such as obstructing the registration of a domain name. Whether there are such unlawful purposes shall be determined by taking full account of such factors as: the degree of recognition or creativity of the name, business name, trademark, service mark, and other marks of the legitimate holder of a title (hereinafter the "subject mark"); the degree of identity and/or similarity between the domain name and the subject mark; whether the person who registered, possessed, or used the domain name knew of the subject mark; whether the person had a track record of attempting to gain economic profit by the sale and lease of a domain name; whether a website was opened and actually operated under the domain name; whether there is identity/similarity or economic interconnection between the goods and services, etc. on the website and those to which the subject mark is applied; whether Internet users are induced to the website due to the confidence and consumer attraction embodied in the subject mark; and any other circumstances surrounding the registration, possession, or use of the domain name. Unlawful purposes cannot be conclusively negated for the sole reason that the purpose of "possessing and using" the domain name was not to gain economic profit by the sale and lease of the domain name.

【Reference Provisions】 [1] Article 12 of the Internet Address Resources Act / [2] Article 12 of the Internet Address Resources Act

Article 12 of the Internet Address Resources Act (Prohibiting Registration, etc. of Domain Names for Unlawful Purposes)

(1) No one shall obstruct the registration of any domain name, etc. of persons who have a legitimate source of authority, or register, possess or use domain name for unlawful purposes, such as reaping illegal profits from persons who have a legitimate source of authority.

(2) When anyone registers, possesses or uses a domain name, etc., in violation of paragraph (1), persons who have a legitimate source of authority may request the cancellation of such domain name or transfer

of registration of such domain name, etc. to a court.

【Reference Case】 [2] Supreme Court Decision 2011Da64836 decided April 26, 2013 (Gong2013Sang, 937)

【Plaintiff-Appellee】 Electrolube Limited (Attorneys Hwang Sei-dong et al., Counsel for the plaintiff-appellee)

【Defendant-Appellant】 ZUNGCHEM Ltd. (Samik Law Firm, Attorneys Kim Hong-chul et al., Counsel for the defendant-appellant)

【Judgment of the court below】 Seoul High Court Decision 2015Na2051850 decided February 25, 2016

【Disposition】 The final appeal is dismissed. The costs of the appeal are to be borne by the Defendant.

【Reasoning】

The grounds of appeal are examined.

1. Article 12 of the Internet Address Resources Act (hereinafter the "Internet Address Act") prohibits any person from obstructing the registration of any domain name of a legitimate holder of a title to the same and from registering, possessing, or using a domain name for unlawful purposes, such as unjust enrichment of that person at the expense of the legitimate holder of the title (paragraph 1). The said Article authorizes the legitimate holder of a title to file with the court to claim for the cancelation or transfer of the domain name whenever another party registers, possesses, or uses the domain name in violation of the preceding paragraph (paragraph 2).

Here, "possess" means to hold a registered domain name, and "use" means to actually utilize a domain name upon its registration and possession by, for instance, opening an Internet website under the registered domain name and using it as an identifying mark on the party's own information systems including computer. As such, the Internet Address Act specifies "possessing and using" a domain name as a prohibited act separate and apart from "registering" the same. It is construed that one may claim for the cancelation or transfer of registration under Article 12 of the Internet Address Act inasmuch as there were unlawful purposes in "possessing or using" the domain name, albeit not in registering the same. It is reasonable to determine whether there were unlawful purposes in "possessing and using" a domain name as of the point of such act.

In addition, an act for unlawful purposes under the provisions of the Internet Address Act encompasses not only unjust enrichment of the

unlawful party at the expense of a legitimate holder of the title, but also acts in a manner not directly relevant to unjust enrichment, such as obstructing the registration of a domain name. Whether there are such unlawful purposes shall be determined by taking full account of such factors as: the degree of recognition or creativity of the name, business name, trademark, service mark, and other marks of the legitimate holder of a title (hereinafter the "subject mark"); the degree of identity and/or similarity between the domain name and the subject mark; whether the person who registered, possessed, or used the domain name knew of the subject mark; whether the person had a track record of attempting to gain economic profit by the sale and lease of a domain name; whether a website was opened and actually operated under the domain name; whether there is identity/similarity or economic interconnection between the goods and services, etc. on the website and those to which the subject mark is applied; whether Internet users are induced to the website due to the confidence and consumer attraction embodied in the subject mark; and any other circumstances surrounding the registration, possession, or use of the domain name (*see*, *e.g.*, Supreme Court Decision 2011Da 64836, Apr. 26, 2013). Unlawful purposes cannot be conclusively negated for the sole reason that the purpose of "possessing and using" the domain name was not to gain economic profit by the sale and lease of the domain name.

2. For reasons stated in its holding, which accepted the reasoning of the first instance judgment, the lower court determined to the effect that the Defendant can be found to have had "unlawful purposes" under Article 12 of the Internet Address Act regarding the possession and use of the instant domain name, and that the same shall be deemed to hold true even had the Defendant never sought to gain economic profit by the sale and lease of the instant domain name, taking full account of the following: (1) the Plaintiff is held to have legitimate title to the instant domain name, as it is closely connected with, and directly relevant to, the instant domain name as stated in the lower judgment (hereinafter the "instant domain name"), which accordingly deserves protection; and (2) given the stated facts, including the similarity between the instant domain name and the subject mark, developments leading up to the registration of the instant domain name, and the relationship between the Plaintiff and the Defendant, the following facts can be found: (a) once it became the Plaintiff's local agent, the Defendant registered and used the instant domain name in order to introduce the Plaintiff's products; (b)

thereafter, however, termination of the agency agreement rendered the parties rival companies; (c) nevertheless, the Defendant continued to use the instant domain name as its website address and refer to the Plaintiff as its overseas customer; (d) this misled Internet users into believing that the Defendant was still the Plaintiff's local agency, thereby causing confusion; and (e) this in turn had an adverse effect on the Plaintiff's agency management and sales performance.

3. Examining the reasoning of the lower judgment in light of the duly admitted evidence, the lower court's foregoing determination is based on the legal doctrine seen *supra*. In so determining, the lower court did not err either by misapprehending the legal doctrine as to the point for determining unlawful purposes and the standard of its determination as provided under Article 12 of the Internet Address Act, or by failing to exhaust all necessary deliberations and thereby exceeding the bounds of the principle of free evaluation of the evidence, and therefore did not adversely affect the conclusion of the judgment, contrary to what is alleged in the grounds of appeal.

4. Therefore, we dismiss the final appeal and assess the costs of the appeal to the losing party. It is so decided as per Disposition by the assent of all participating Justice on the bench.

Justices Kim So-young (Presiding Justice)
Kim Yong-deok (Justice in charge)
Kim Shin
Lee Ki-taik