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THE ASIAN BUSINESS LAWYER

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

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

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ARTICLES

Law Reform on the Extinctive Prescription and Time Extension Agreement for Maritime Claims (Recent Development in Japanese Maritime Law) *

Yohei Ito **

ABSTRACT

This article provides overview of the recent Law Reform on the Commercial Code and the Civil Code of Japan, specifically on the revision of extinctive prescription for collision claims and validity of the Time Extension Agreement for various maritime claims.

KEYWORDS: extinctive prescription for collision claims; starting point of prescription; validity of Time Extension Agreement; extension of accomplishment of prescription; Time Extension Agreement for cargo claims.

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* This article is prepared for the presentation in the 12th East Asia Maritime Law Forum at Korea University on November 2, 2019.

** Attorney-at-law, Toda & Co (2006 - present). LLB (Sophia University) in 2000, LLM in Maritime Law (Waseda University) in 2017.
URL: http://www.todalaw.co.jp E-mail: yohei.ito@todalaw.co.jp.

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I. Introduction

Compared to general land law, maritime law has distinct features in many aspects. One of these features is that, in general, a short time-bar period is prescribed for various maritime claims. For instance, claims for loss of or damage to the cargo (cargo claims) are subject to a one-year time bar under the Hague-Visby Rules. In respect of ship's collision claims, the Brussels Collision Convention 1910 provides a two-year time-bar, and under the pre-revised Commercial Code of Japan, the time bar period for collision claims was only one year. As consequence of these very short time-bar period, Time Extension Agreements are exchanged on a daily basis in maritime law practice world-wide.

Japan has recently reformed the Civil Code and the Commercial Code. In this article, I would like to present a summary of the law reform of the Civil Code and the Commercial Code and its influence upon the time-bar period for maritime claims and Time Extension Agreements in maritime practice.

II. Reform of Civil Code (Law of Obligation) and Commercial Code (Maritime Law)

The pre-revised Civil Code of Japan was enacted in 1898. Although family law and law of succession was partly revised after the World War II, the law of obligation had been left unchanged for more than a hundred years since its enactment. In 2009, the study of Civil Code reform was started at the Legislative Council, and in 2017, the legislative bill to revise the law of

obligation in Civil Code was passed by the Diet.

Similarly, maritime law embodied in the Commercial Code has been unchanged for a long time. The pre-revised Commercial Code was enacted in 1899, one year after the enactment of the Civil Code, but thereafter, Japan ratified a number of international conventions such as the Brussels Collision Convention 1910, the Hague-Visby Rules, the Convention on Limitation of Liability for Maritime Claims 1976 with 1996 Protocol, etc. During these hundred years, a number of inconsistencies arose between domestic law and international conventions, and also between the maritime law in the Commercial Code and the maritime practice. To fill these gaps, the Commercial Code was revised in 2018[1].

The revised Commercial Code has been in force since April 1, 2019 and the revised Civil Code has been in force from April 1, 2020.

III. New Extinctive Prescription for Collision Claims

A. Inconsistency between the Commercial Code and Collision Convention

Article 798 of the pre-revised Commercial Code[2] provided that the claims arising from collision are subject to a one-year extinctive prescription. After the enactment in 1899, however, Japan ratified the Brussels Collision Convention 1910 which provides "actions for the recovery of damages are barred after an interval of two years from the date of the casualty."[3] Therefore, there was an inconsistency in the length of the limitation period between our domestic law and the international convention ratified by the government. There have been persistent opinions that the Commercial Code should be amended to rectify the inconsistency with the Collision Convention, but it has been left unchanged for about a century.

There was also another inconsistency between the Commercial Code and

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[1] For revision of the Commercial Code generally, *See* Tomotaka Fujita, *MARITIME LAW REFORM IN JAPAN*, CMI Yearbook 2014, at413-419

[2] Article 798 of pre-revised Commercial Code

(1) A claim arising in general average or from the collision of Ships is extinguished by prescription once one year has passed.

(2) In the case of general average, the period set forth in the preceding paragraph is counted from the time of the completed settlement of the account.

[3] Article 7 of Brussels Collision Convention 1910

Actions for the recovery of damages are barred after an interval of two years from the date of the casualty.

the Collision Convention. Article 798 of the pre-revised Commercial Code provides that "a claim arising … from the collision shall be extinguished by prescription once one year has passed.", but does not specify when the prescription should start[4]. On the other hand, the Collision Convention makes it clear in Article 7 that the two-year time bar shall be counted from the date of the casualty. It was submitted that the drafter of the Commercial Code probably intended that a one-year extinctive prescription shall be commenced from the date of the collision. However, the Supreme Court took another view and sought the answer in the Civil Code.

B. Supreme Court Judgment

In June 1999, a collision between a fishing vessel and a cargo vessel took place on the high seas in a restricted visibility and as a result the fishing vessel sustained damage to her hull. As the fishing vessel was drifting without any crewmembers on the bridge at the time of collision, and due to the limited visibility, the fishing vessel could not identify the colliding vessel. In the course of criminal investigation by the Japan Coast Guard and an administrative investigation by the Maritime Accident Inquiry Agency following the collision, the cargo vessel was reasonably identified as the colliding vessel around October of 2000, about 1 year and 4 months after the collision. In the legal action brought by the owner of the fishing vessel against the owner of the cargo vessel, the starting point of prescription for collision claims was the question at issue.

The Article 724 of the pre-revised (current) Civil Code provides that "The claim for damages in tort shall be extinguished by prescription if it is not exercised by the victim or his/her legal representative within three years from the time when he/she comes to know of the damages and the identity of the offender...." The Supreme Court judgment on November 21, 2005[5] ruled that the Article 798 of the Commercial Code is the special provision to the Article 724 of the Civil Code (extinctive prescription for tort claims) and supersedes it in respect of the length of prescription period, but in respect of the starting point of prescription, the Civil Code should still be applied to collision claims. Therefore, under the pre-revised Commercial Code, it was established by the Supreme Court that the extinctive prescription for collision claims was one year from the time when the victim (owner of the damaged ship) comes to know of the damages and identity of the offender.

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[4] Contrary to the extinctive prescription for GA claims which specified to be commenced from the time of the completed settlement of the account.

[5] Decision of Supreme Court of Japan, Vol.59 No.11 at 2558 (Nov. 21, 2005)

C. Revision of the Commercial Code

By the Commercial Code revision, both length and starting point of prescription was adapted to the Collision Convention: 2 years from the date of collision[6]. In respect for human life, however, death or personal injury claims were excluded from the two-year extinctive prescription, contrary to the Collision Convention. In summary, under the new Commercial Code, claims for loss of or damage to the property on board the vessel arising from collision shall be subject to the extinctive prescription of 2 years from the date of collision.

IV. TEA under the Revised Civil Code

A. Maritime Practice under the Pre-revised Civil Code

As mentioned earlier in this article, one of the significant features of maritime law and/or maritime practice is that Time Extension Agreements are exchanged very frequently. As a practicing lawyer, I indeed execute Time Extension Agreements often, especially in collision cases and cargo damage claims.

It may be surprising, however, that the pre-revised Civil Code had no particular provision regarding an extension of the extinctive prescription by agreement of the parties. On the contrary, Article 146 of the pre-revised Civil Code provided that "the benefits of the prescription may not be waived in advance." This Article was widely interpreted to the effect that any agreement to hinder completion of prescription is also prohibited by the said Article. There have been no reported court cases on the validity of Time Extension Agreements, but it is possible that Time Extension Agreements will be found invalid because they are, technically, against Article 146 of the Civil Code.

In reality, however, Time Extension Agreements have been frequently exchanged because of practical demands for time extensions. Practitioners and scholars justified this practice by the theory that this is not "waiver of the benefits of the prescription"[7], which is prohibited by Article 146, but "waiver of the benefits of period already elapsed."[8] In my personal view, however, this

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[6] See Article 789 of the revised Commercial Code
Claims for damages (limited to damage to properties) arising from ship's collision shall be extinguished by prescription if it is not exercised within two years from the time of tort.

[7] Yasuhiro Sato, *Assessment Practice of Marine Hull Insurance*, at 204-205(1994).

[8] Typical wording for Time Extension Agreement is such as "It is hereby agreed that each party hereto shall waive the benefit of prescription to the extent of the time elapsed since the date of collision up to the date of this Agreement in respect of the other party's claim for damage, loss and expenses arising out of the aforementioned collision so that the one year prescription

justification was not free from doubt under Article 146 of the pre-revised Civil Code. Anyway, the validity of Time Extension Agreements under the pre-revised Civil Code has not been necessarily clear.

B. Revision of the Civil Code: Extension of Accomplishment by Written Agreement to Have Negotiation

The revised Civil Code dealt with this question. Article 151 of the revised Civil Code[9] provides that "in case that an agreement to have negotiation on the claim was made in writing, the extinctive prescription shall not be accomplished" until a certain point in time. This provision is based on the idea that if the parties hope to settle a dispute by negotiation, it is unsuitable to force them to take a legal action against their will.[10]

The summary of this provision is as follows: First, the extinctive prescription is barred from completion as an effect of the agreement to have negotiation. If the parties simply agree to a "time-extension," it is uncertain whether such agreement has a legal effect to suspend completion of prescription. It may be argued that the parties' intention to have negotiation is reasonably implied in an agreement of "time extension," but the validity of such agreement would be still arguable.

Second, it is undesirable to allow the parties to repeatedly extend accomplishment of extinctive prescription for a long time, so the Civil Code set a definite limit for extension of extinctive prescription. Article 151.2 of the new Civil Code provides that "extension of accomplishment of extinctive prescription shall not exceed 5 years from the time when the original extinctive prescription should have been accomplished if the extinctive prescription had not been extended."

Finally, extension of accomplishment of extinctive prescription is voidable by unilateral notice to the counter party. Article 151.1 provides, "in case that an

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period for such claim will commence from …"

[9] See Article 151 of the revised Civil Code

In case that an agreement to have negotiation on the claim was made in writing, the extinctive prescriptions shall not be accomplished until the following point in time, whichever is earlier.

(1) the time when one year has passed since the agreement was made

(2) where the parties set the period of negotiation (not longer than one year) in the agreement, the time when that period expires

(3) where one party makes a notice in writing to the opposing party to the effect that it refuses to continue negotiation, the time when 6 months have passed since that notice.

2 The repeated agreement which is made during the period when the accomplishment of extinctive prescription is extended, shall have the effect to extend the accomplishment of extinctive prescription by the same sub-section, provided that, extension of accomplishment of extinctive prescription shall not exceed 5 years from the time when the original extinctive prescription should have been accomplished if the extinctive prescription had not been extended.

[10] Civil Code (Law of Obligation) Study Group Report 69A, at 21.

agreement to have negotiation on the claim was made in writing, the extinctive prescription shall not be accomplished until the following point in time, whichever is earlier." and sub-paragraph (3) provides, "where one party makes a notice in writing to the counter party to the effect that it refuses to continue negotiation, the time when 6 months have passed since that notice." This means that a party can terminate the agreement to have negotiation by 6-month prior notice in writing, without the counter party's consent.

As mentioned above, the revised Civil Code is still silent on the validity of Time Extension Agreements. But when considering an extension of accomplishment of the extinctive prescription introduced by Article 151, and the fact that the revised Civil Code maintains the Article 146 regarding prohibition to waive the benefits of prescription in advance, it is highly likely that the Time Extension Agreement which fails to meet the requirement of Article 151 will be found invalid under the revised Civil Code. Article 151.1 regarding the extension of accomplishment of the extinctive prescription applies when the agreement to have negotiation in writing is made after the effective date (April 1, 2020). As 2 year extinctive prescription of the revised Commercial Code shall be applied to the collision which took place after the effective date (April 1, 2019), it will take some time before legal issues regarding Article 151.1 of the revised Civil Code actually arise. This may begin to happen around April 2021. However, we will have to pay keen attention to the wording of Time Extension Agreements subject to Japanese law in the near future.

V. Effect of Law Reform on Cargo Claims

Finally, I would like to consider the effect of the new Civil Code on the Time Extension Agreements for cargo claims. Japan has ratified Hague-Visby Rules and these Rules have been implemented in domestic law. Article 585.1 of the revised Commercial Code provides that the carrier's liability for loss, damage of delay of the goods shall be distinguished unless a legal action is brought within one year from the date of delivery of the goods (or in the case of the total loss of the good, the date when the good should have been delivered). And Article 585.2 provides that "the one-year period in the preceding paragraph may be extended by the parties' mutual agreement only after the damage of the goods arose."

This one-year time-bar shall be applied to any claims for loss, damage or delay of the goods against the carrier whether it is based in tort or on a breach of the contract of carriage. The misdelivery of the goods without production of the original B/Ls is considered to be "loss of the goods" for the purpose of this Article and therefore subject to one-year time-bar. As extension of the one-year period by agreement is allowed only after the damage arose, there is a

controversy whether the agreement made before the damage arose (for example, by general terms and conditions printed in the backside of B/Ls) is valid[11]. However, it can be hardly imagined that a carrier voluntarily sets a longer time-bar period than one year of the Commercial Code (or the Hague-Visby Rules) and such argument would be of little practical use.

The legal nature of this one-year period is generally considered to be "period of exclusion" ("除斥期間" in Japanese) which is different from "extinctive prescription" ("消滅時効" in Japanese). The "period of exclusion" is a fixed period which cannot be suspended nor extended. Nevertheless, the law (Article 585.2 of the new Commercial Code) specifically admits extension of the one-year time limit by agreement based on the Hague-Visby Rules, so it is submitted that extension of the one-year time-bar of Article 585 is valid regardless of the validity of Time Extension Agreements under the Civil Code. In view of the above, it is fair to say that Article 151 of the revised Civil Code is not applicable to the one-year time limit in cargo claims and therefore the practice in cargo claim handling will not be affected by the law reform of the Civil Code.

In respect of the one-year time-bar for cargo claims, an agreement to have negotiation will not be construed as an implied agreement of the time extension. The Tokyo District Court judgment on May 24, 1994[12] found that the fact that negotiation between the carrier and the cargo interests had been ongoing before and after the one-year period had passed cannot be construed as an implied agreement for the time extension. It follows that an agreement to have negotiation which shall have a legal effect to extend the accomplishment of the extinctive prescription under the revised Civil Code, will not be sufficient to extend the one-year time-bar in case of cargo claims.

VI. Conclusion

The main points I would like to express in this article are summarized as follows: First, the extinctive prescription for collision claims in respect of damage to the property on board a vessel is 2 years from the date of collision under the revised Commercial Code. Second, caution must be paid to the wording of Time Extension Agreements under the revised Civil Code which has been in force from April 2020. Finally, this law reform regarding Time Extension Agreements does not affect the one-year time limit for cargo claims under the revised Commercial Code.

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[11] Shuzo Toda and Masumi Nakamura, *Commentaries on the Carriage of Goods by Sea Act*, at310-311 (1997).

[12] Decision of Tokyo District Court, No.1400 at 104 (May 24, 1994)

I hope this article will be of the readers' academic interests, or of help in daily practice when dealing with maritime disputes subject to Japanese law.

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Insolvency of Shipping Business and BBCHP *

Byung-Suk Chung **

ABSTRACT

The writer has been dealing with the insolvency of shipping business (in particular, shipping and shipbuilding companies) for last decades or so and can spot the issues in which shipping law and the insolvency law meet. The writer hopes that these issues can be further studied and improvements on these issues will be made in terms of way of practice and legislation.

The insolvency of shipping business inevitably has the nature of international insolvency or cross border insolvency. International Insolvency Law deals with the overall legal issues involving insolvency which has foreign elements. Private International Law of Insolvency will deal with the private international law of the choice of law issues in respect of procedure and substance of the issues related to insolvency. The basic principle of the International Law of Insolvency is *lex concursus*. *Forum regit processum* shall be correct in case of the Private International Law of Insolvency. Substantive matters of the insolvency shall also be governed by *lex fori concursus*. However, it does not mean that all substantive matters which shall be governed by *lex fori concursus*. Substantive matter which shall be governed by *lex fori concursus* shall be restricted to the ones which can be considered "typical insolvency matters."

The writer examines the basic concepts of insolvency law in respect of the shipping business and considers the legal and practical issues involving BBCHP which arise in connection with the insolvency of shipping business.

KEYWORDS: shipping business, international insolvency, international law of insolvency, recognition of Korean insolvency proceedings, executory contract, BBCHP

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* This article is based on the writer's presentation at 12th East Asia Maritime forum held on 2 November 2019 at Korea University, Seoul Korea and is based on the writer's article on "Legal Matters related to the Insolvency of Shipping Business," *SNU Law Review*, at 115-158 (2019).

** Head of the Maritime Practice Group, Kim & Chang, Adjunct Professor, Korea University School of Law and Seoul National University School of Law

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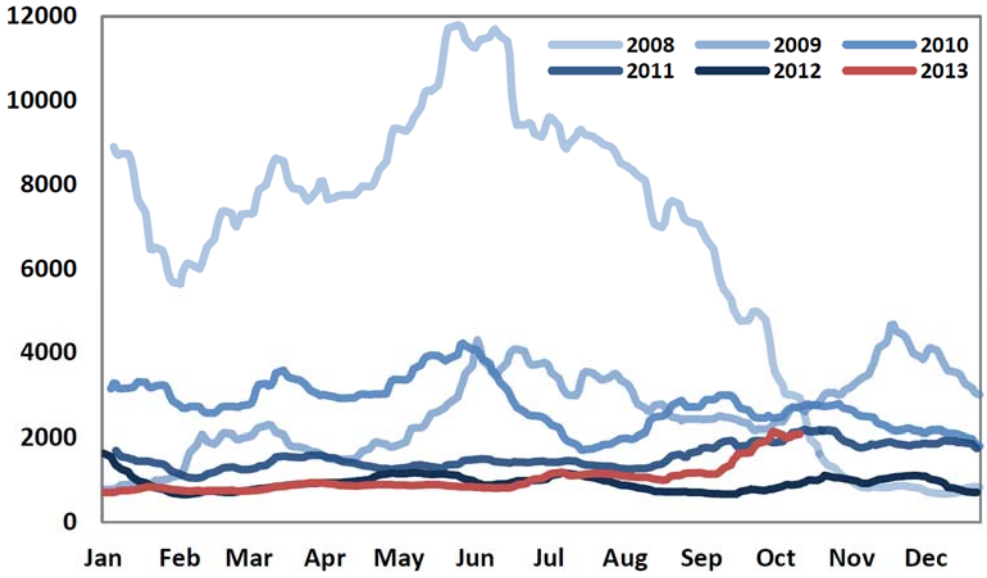
Ⅰ. Introduction

1. Economic Crisis and Shipping Business

Korea's shipping business has enjoyed high time during early 2000's and as seen at <Fig 1> below BDI (Baltic Dry Index) hit 12,000 in May 2008.

<Fig 1> BDI Index (2008-2013)



Source: Cass Maritime Ltd., "Weekly Market Report", 2013. 10. 08.

At this time, Korea's shipping business ranked No. 5 in terms of the tonnage of the vessels and Korea's shipbuilding business ranked No. 1. However, due to the economic crisis in 2008 caused by sub-prime mortgage which led to the collapse of world economy, the BDI Index had been down as low as 560 and shipping and shipbuilding industries had been badly affected with the result that many of the shipping or shipbuilding business went insolvent. The shipping and shipbuilding industries are still suffering financial difficulties and have not yet recovered.

2. Universality of Korean Insolvency Law

Korea has reformed an insolvency law in 2006 and consolidated 3 individual insolvency related laws, namely Reorganization Act, Bankruptcy Act and Composition Act, into one, and adopted UNCITRAL (The United Nations Commission on International Trade Law) 'Model Law on Cross Border Insolvency ('Model Law') which is called Debtor Rehabilitation and Bankruptcy Act ("DRBA") or Uniform Insolvency Law.[1]

In this uniform law, Korea discarded the Principle of Territoriality and instead has adopted Principle of Modified Universality. Majority of Korea's trading partners have adopted Model Law[2] and thus the insolvency proceedings initiated in Korea may protect the debtor's assets abroad. However, we note that PRC or Panama have not adopted the Model Law nor recognized the insolvency proceeding initiated in Korea.

When Korea has adopted the principle of Modified Universality, Korea has consulted Model Law and the Japanese legislation (Law related to the Recognition and Assistance of Foreign Insolvency Procedures) which has also adopted Model Law. Chapter 5 of DBRA provides for the jurisdiction of cross border insolvency, status of foreigner in the insolvency proceedings, legal effect of foreign insolvency proceedings (recognition and assistance procedures, application and participation of a receiver in the foreign insolvency proceedings), legal effect of Korean insolvency proceedings abroad (scope of bankruptcy estate, authority of Korean insolvency receiver/trustee), parallel insolvency proceedings.

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[1] In Hyeon Kim, "Legal Implication of Hanjin Shipping's Rehabilitation Proceeding," *HongKong Law Journal*, at 926 (2017)

[2] As of 22 January 2019, 46 countries have by and large adopted Model Law. Please refer to UNCITRAL website (https://uncitral.un.org) for the countries who have adopted Model Law.

Ⅱ. Special Characteristics of Insolvency of the Shipping Business: Cross Border Insolvency

1. Special Characteristics

Shipping or shipbuilding businesses are the ones doing business using ships. Since ships are very valuable assets, ships can be owned (based on loan arrangements) or, in many cases, chartered by shipping businesses. In case of the former, it is not unusual for the owners to take out financial arrangements with financing institutions.

Further, since a vessel is moving around, there will be more than one jurisdiction to make the claim against the owners.

Disputes by and among multiple parties in multiple jurisdictions are not an exception. Thus, the insolvency of shipping industries may be inevitably involved in "international or cross border insolvency".

2. Private International Law for Cross Border Insolvency

The international insolvency law refers to the whole rules and regulations which regulate the legal issues involving insolvency cases which have foreign elements.While the private international law for cross borer insolvency regulates the selection of the governing law as to the procedure and substance arising from the cross-border insolvency[3].

(1) **Principle of Private International Law for Cross Border Insolvency**: *lex fori concursus*

Neither Korean Private International Law nor DRBA provides for the provisions related to private international law for cross border insolvency. Model Law does not provide for the provisions of private international law for cross border insolvency either, except the "title to sue in case of avoidance" (Article 23). Thus, these issues may be examined by reference to the legislation of EU (European Union)[4] or Germany[5] which have the provisions related to *lex fori concursus*[6].

Lex fori conccurcus can be summarized as follows:

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[3] Suk, Kwahg-Hyun, *Private International Law and International Litigation*, at 594 (2012)

[4] "EU Council Regulation (EC) No.1346/2000 on Insolvency Proceedings" and "Regulation (E U) 2015/848 of the European Parliament and of the Council of 20 May 2015 on Insolvency Proceedings (recast)"

[5] "Gesetz zur Neulegulung des Internationlen Insolvenzrecht"

[6] Suk, Kwnag-Hyun, *Interpretation on Private International Law*, at 117-120 (2013)

1) Procedural Matters

It is true in the cross-border insolvency that the procedures shall be governed by *lex fori* (or *forum regit processum*.) Procedural matters in the cross border insolvency include jurisdiction of cross border insolvency, application and decision for the commencement of insolvency proceedings, appointment and authority of the trustee, filing·determination ·examination and distribution of the insolvency claims, procedures for determining the claims objected, suspension of pending legal proceedings, priority of the insolvency claims, assets consisting of the insolvency estate and recognition of foreign insolvency proceedings[7].

2) Substantive Matters – scope of application of *lex fori concursus*

Lex fori concursus shall be the governing law for the substantive matters of the cross border insolvency. However, there is a limitation of this principle, namely, *lex fori concursus* shall be applicable to the legal matters specific to the insolvency[8]. Thus, the question arises what constitutes legal matters specific to the insolvency matters. We may consider this issue in consultation with the regulations of EU or German law.

(2) Insolvency of Shipping Companies and Private International Law for Cross Border Insolvency

It is not necessarily clear as to which matters pertain to the legal matters specific to insolvency.

For example, the Korean Supreme Court[9], in cases where an executory contract was an issue, ruled: "when rehabilitation proceedings commenced against a company which entered into contract involving foreign element, the legal issues of whether such a contract is considered an executory contract with the result that the receiver of the insolvent company has the right to terminate or affirm the contract and/or whether the claims arising from the termination of such contract shall be considered rehabilitation claims shall be determined by *lex fori concursus.* On the other hand, the scope of damages as a result of the termination of contract by the receiver shall be the legal effect involving the contract itself and it shall be determined by the governing law to be determined by Private International Law, since the scope of compensation would not be considered the matters specific to insolvency." In other words, even if the scope of damage shall be considered "substantive matter", the principle of *lex*

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[7] Rim, Chiyong "Legal Issues involving the Commencement of Rehabilitation Proceedings for a Shipping Company in respect of Private International Law," *Private International Law Journal*, at 488 (2016).

[8] Park June and Han Min, Financial Transaction and Lawm at 847 (2018)

[9] Korean Supreme Court Judgment of 28 May 2015 in re 2012Da104526, 104533 Cases

fori concursus shall not be applicable since the scope of damage is not specific to insolvency.

In sum, the test for applying the principle of *lex fori concursus* would be whether it is appropriate to apply the principle of insolvency procedures which are collective proceedings and whose objective is equal treatment of creditors.

More specifically, termination of executory contracts (DRBA Article 119, Article 121), avoidance (DRBA Articles 100 through 113-2), restriction on set-off (DRBA Articles 144 and 145) can be considered the matters specific to insolvency and thus if the insolvency proceedings commenced in Korea, then Korean law, as *lex fori concursus,* shall be applicable,

Ⅲ. Basic Concepts in the Insolvency

1. Rehabilitation Claims

Rehabilitation claims refers to the claims which arose based on the causes existing prior to the commencement of rehabilitation proceedings (DRBA Article 118, Item 1) and the claims which arose after the commencement of rehabilitation proceedings but are provided as such in the individual provisions (DRBA Articles 108, 118, 121, 124, 125). Rehabilitation claims in principle can only be repaid according to the rehabilitation proceedings (DRBA 131 Main Text).

2. Secured Rehabilitation Claims

Secured rehabilitation claims refers to the claims which would otherwise be rehabilitation claims but secured at the time of commencement of the rehabilitation proceedings by possessory lien, pledge, mortgage, maritime lien, etc. (DRBA Article 141, Para. 1). Security rights shall exist on the assets owned by the debtor at the time of the commencement of the rehabilitation. Thus, if the security rights extinguished thereafter (e.g. by the loss of the object of security) or the property which is the object of security will be transferred thereafter, that would not affect the secured rehabilitation status[10].

Secured rehabilitation claims status can only be recognized to the extent of the value of the security. If the value of the security is less than the claim, then the claim can be considered secured rehabilitation claims to the extent of the value of the security and any claim which is not covered by the value of the security can be considered ordinary rehabilitation claims. (DRBA Article 141, Para. 4).

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[10] Korean Supreme Court Judgment of 24 December 2014 in re 2012Da94186 Case

In case of the insolvency of shipping companies, issues arose whether the claims under the ship lease, BBCHP, or lien on sub-hire/sub-freight shall be considered the secured rehabilitation claims. Legal issues involving BBCHP will be discussed below.

3. Common Benefit Claims

Common benefit claims refer to the claims as provided for in Article 179 of DRBA or other individual provisions as common benefit claims. Majority of the common benefit claims arose after the commencement of the rehabilitation proceedings.

Article 179 of DRBA provides, *inter alia,* the following claims as common benefit claims:

Item 2: Expenses incurred after the commencement related to the management and disposal of business and assets

Item 6: management of business without legal obligation and/or unjust enrichment after the commencement

Item 7: Claims by the other party in case of affirmation of executory contract

Items 8-2: Claims for the supply of provisions made 20 days prior to the application of rehabilitation.

While the rehabilitation claims shall be paid in accordance with the rehabilitation plan, the rehabilitation plan usually provides for payment by (i) combination of cash and shares of the debtor company and (ii) the cash portion shall usually be repaid over 10 years. On the other hand, the common benefit claims can be paid from time to time according to the original contract or due dates.

4. Executory Contract

(1) Meaning of Executory Contract

DRBA provides that contract where the obligations of both parties have yet to be performed is considered executory contract and gives the rights of whether to affirm/terminate such executory contract to the receiver of the debtor company (DRBA Article 119, Para.1 Main Text). If the receiver elected to affirm the contract, the claims of the other party can be considered common benefit claims (DRBA 179, Item 7). On the other hand, if the receiver elected to terminate the contract, then the claims of the other party arising from the termination of the contract shall be rehabilitation claims (DRBA Article 121, Para. 1). In the latter case, the scope of damages as a result of the termination

shall be determined by the terms of the contract under the governing law of such contract.

If the rehabilitation proceedings commenced, the receiver shall determine which contracts he would like to terminate and which contracts he would like to affirm, in terms of whether such contract would be helpful for the rehabilitation of the company.

If the receiver elected to terminate the charterparty ① unpaid hire incurred up to the commencement of rehabilitation proceedings shall be considered rehabilitation claims, ② hire from the commencement of the rehabilitation proceedings to the termination of the charterparty shall be considered common benefit claims, and ③ damages due to termination of the charterparty shall be considered rehabilitation claims. On the other hand, if the receiver elected to affirm the contract ① unpaid hire incurred up to the rehabilitation proceedings shall be considered rehabilitation claims[11] (we note that there are different opinions as to the nature of this claim[12] i.e., the position that these claims shall be considered common benefit claim), but ② the hire thereafter shall be considered common benefit claims.

Ⅳ. BBCHP and Insolvency

1. Meaning of BBCHP

There are many ways for the shipping company to procure the ships which are the bases of shipping business: straight purchase, BBCHP (bareboat charter with hire purchase option), simple BBC or time charter. By BBCHP, we refer to the bareboat charter where the charterer paid the hire in full and at the end of the charter period the charterer can acquire a title to the vessel in consideration of a nominal sum.[13] The Korean Supreme Court[14] ruled that "BBCHP takes the form of charter of a vessel but is in reality a special type of purchase/sales of a vessel in that the sales price will be paid in installments for a period of time but that the purchaser can use the vessel during the installment payment period."

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[11] Kim, Chang-Jun "Insolvency Law Issues of Hanjin Shipping Bankruptcy," *Korea Maritime Law Association Journal*, at 43 (2017)

[12] See *supra* note 7 478; Woo, Se-Na "Treatment of BBCHP under DRBA," *Study on Law and Policy*, at 167 (2010). Book 10, Vol. 1

[13] See supra note 1 928.

[14] Decision of Korean Supreme Court Judgment in re 82Nu 328 Case (October 1983)

2. BBCHP in the Insolvency Proceedings

There are many discussions on how to treat the BBCHP in the context of the rehabilitation proceedings.

One theory is that the vessel under the BBCHP shall be considered the assets of the debtor and thus the claimants under the BBCHP (i.e., seller or owner of the vessel under the BBCHP) shall be considered to have the secured rehabilitation claim[15].

On the other hand, BBCHP is considered an executory contract[16]. It has been the established practice of the Korean rehabilitation court that the BBCHP is considered an executory contract. In this respect, it is noteworthy that the Korean rehabilitation court has considered a ship under the financing lease (in contrast to BBCHP) shall be considered the assets of the debtor when the lessee (debtor) became insolvent and thus the lessor's claims against the lessee (debtor) under the financing lease shall be considered the secured rehabilitation claims.

3. Discussion

Korea has a long history of discussions on how to treat BBCHP in the context of rehabilitation proceedings since the rehabilitation proceedings against Samsun Logix in 2009. However, in the past, the BBCHP issues were discussed on how to treat the owner of the vessels under the BBCHP on the premise that the BBCHP would be maintained since the vessels under the BBCHP could be valuable assets for the rehabilitation of the debtor companies. Against this background, the rehabilitation court has taken the position that BBCHP is considered an executory contract and thus the owner of the vessel under BBCHP (financers) could enjoy the status of the common benefit claims since the charterer (debtor) of the vessel under the BBCHP without exception elected to affirm the BBCHP.

This issue has been revisited when one of the vessel ("Hanjin Xiamen") operated by Hanjin under the BBCHP was arrested by a bunker supplier in Korea based on the alleged maritime lien for the bunker claims under Panamanian law[17]. The bunker supplier alleged that Hanjin Xiamon was not the property of Hanjin Shipping (since she was owned in the name of the SPC who was the owner in the BBCHP) while the receiver of Hanjin Shipping alleged that the said vessel was the property of Hanjin Shipping since she was

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[15] Kim, Chang-June, *supra* (foot note 10) PP. 70-71

[16] Rim, *supra* (foot note 6) P. 481; Jeong, Suk-Jong "Treatment of Ship Financing in the Rehabilitation Proceedings- focusing on BBCHP",Study on Insolvency Law, at 34 (2011)

[17] Changwon District Court decision of 17 October 2016 in re 2016 TaKi 227; Changwon District Court decision (appellate division) of 23 February 2017 in re 2016Ra308; In Hyeon, Kim, op. cit, p. 927.

effectively owned by Hanjin Shipping, charterer under the BBCHP and Hanjin Shipping was considered for all purposes as the owner of the said vessel).

As noted above, in the past insolvency proceedings involving shipping companies (tramper, not liner business like Hanjin Shipping), most shipping companies elected to affirm the BBCHP's and thus there were no attempt to arrest the vessels under the BBCHP since the debtor shipping company needed the vessel under the BBCHP in order to perform the COA's (with a large customers such as POSCO or KEPCO) and had somehow repaid the debts. On the other hand, in case of Hanjin Shipping, the vessels under BBCHP were for liner services and the receiver of Hanjin Shipping elected to terminate even the BBCHP with the result that the creditors of Hanjin Shipping (in particular, the bunker suppliers) had attempted to arrest these vessels based on alleged maritime lien.

Regardless of whether the vessel under the BBCHP is considered the assets of the debtor, I wonder if it is reasonable to allow the receiver of the debtor (or any other creditor) to argue that the BBCHP is not an executory contract even if the receiver elected to terminate the BBCHP on the premise that BBCHP is an executory contract.

I am of the view that the BBCHP shall be considered an executory contract and thus the vessel under the BBCHP shall not be considered the part of the debtor's assets.

4. Individual Issues involving the BBCHP

(1) Termination of the BBCHP

As noted above, depending on which theory you will take, the receiver of the debtor company may or may not elect to terminate the BBCHP.

(2) Arrest of the Vessel under BBCHP

If the vessel under BBCHP is considered the assets of the debtor, creditors of the BBCHP charterer may not be allowed to arrest the vessel under Korean law since the vessel under BBCHP is the assets of the debtor.

However, as noted above, the Korean court has taken the view that the vessel under the BBCHP is not a part of the debtor company but that BBCHP shall be considered an executory contract. In such a case, the creditors may arrest the vessel under the BBCHP assuming there is a basis to arrest the vessel, which belongs to an owner other than the debtor (BBCHP charterer.)

(3) Stay Order

Notwithstanding the foregoing, I wonder if a foreign court could recognize the Korean insolvency proceedings in a manner wider than those available under Korean law.

As noted above, under Korean law and practice, the vessel under BBCHP (to the debtor) is owned by an SPC (which could be a subsidiary of the debtor), not by the debtor, and thus could be arrested based on the claim against the debtor if the claim gives rise to a maritime lien.

Stay orders issued in the US and Singapore covered the vessel not only owned by Hanjin Shipping but chartered by Hanjin Shipping[18].

The US court issued an order, *inter alia*, to the effect that ".....all entities .....hereby are enjoined from : c) taking or continuing any act to create , perfect, or enforce a lien or other security interests, set-off, or other in personam, in rem or quasi in rem claim against the Foreign Representative , Hanjin, any of the Hanjin Assets, or any asset or property chartered, leased, managed or operated, but not owned, by Hanjin that is located in the territorial jurisdiction of the United States.".[19]

In response to the above ruling, the bunker suppliers argued that the arrest based on maritime lien against the vessels owned by Hanjin Shipping and/or against the vessels under BBCHP shall be allowed in order to provide an adequate protection to the creditors as is available under US law. However, these arguments of the bunker suppliers have not been accepted by the US Court[20].

(4) Commencement of Separate Insolvency Proceedings against the Registered Owner (SPC) of the vessel under the BBCHP Charter

Since the Korean rehabilitation court has considered the BBCHP as executory contract and thus the owner of the vessel under BBCHP could terminate the BBCHP if there is a breach (such as failure to pay hire punctually) after the commencement of the rehabilitation proceedings. Also, the creditor may arrest the vessel chartered by the debtor under the BBCHP since the vessel is not considered the property of the debtor. In order to protect the vessel from arrest, the debtor may attempt to apply for the separate rehabilitation

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[18] Kim, In-Hyeon, "Scope of Stay Orders in the Hanjin Shipping Insolvency Proceedings," Study of Judgments on Commercial Matters at 136-137, (2017);Lee, Jung-Hyun "Rehabilitation Proceedings of Hanjin Shipping and International Insolvency,"Study on Insolvency Law,90-92 (2017)

[19] Please refer to the stay orders issued by various countries involved in Hanjin Shipping case in 2016. In Hyeon, Kim, op. cit., p. 928.

[20] Lee, Jung-Hyun, *supra* (foot note 16) P. 97 and P. 92

proceedings against the SPC in whose name the vessel under BBCHP is registered.

The Korean rehabilitation court[21] has accepted the jurisdiction against the SPC (which is registered in the Marshal Islands) for the following reasons:

A. The directors of the SPC are all Korean residents;

B. The place where the loan were drawn down and where the loan is to be repaid is in Korea;

C. The governing law of the relevant contracts is Korean law; and

D. Therefore, Korea has substantial connection to this case (Article 2 of Private International Law)

However, the court considered the merits of the case and did not grant the application for the rehabilitation proceedings for reason that this separate application is not in line with the common interests of the creditors.

Ⅴ. Conclusion

I have reviewed some of the issues involving the insolvency proceedings of shipping companies and found that we could see vivid issues involving international cross border insolvency proceedings. However, it is regrettable that the laws are not well established to deal with these issues. Thus, it is desirable to improve and amend the insolvency laws so that these rules could help effective and successful rehabilitation of the insolvent companies.

[21] Korean Rehabilitation Court decision of 22 May 2019 in re 2019Hoehap 100084 Case

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Recent Development and Discussion Related to Individual and Cross-border Bankruptcy Issues in China *

Zhiyong Zhang **

ABSTRACT

The current Enterprise Bankruptcy Law of China, which came into effect in 2006, regulates bankruptcy of enterprises only. In situations where individual debtors could not pay off debts with their whole assets, there is no corresponding legal mechanism to fit. Disputes can only be resolved within the legal framework of civil litigation procedures, instead of bankruptcy procedures. As there is no property available for execution, courts' execution efficiency had been adversely affected. To cope with these problems, research and discussions have been made by Chinese legislators and legal practitioners in recent years. In this article, the first part introduces PRC legislative backgrounds and process on bankruptcy. The second part enumerates a case on individual debt restructuring to show judicial attempts and explorations on individual bankruptcy. Meanwhile, with the process of economic globalization, the number of foreign-related corporations in China has increased significantly. In this context, cross-border bankruptcy becomes an inevitable topic, under which Chinese courts' jurisdiction is an issue worth exploring. In the third part, the writer discusses on PRC practices on the principle of reciprocity, Chinese courts' jurisdiction over cross-border bankruptcy cases and the application of the Centre of Main Interests rule.

Keywords: individual bankruptcy, cross-border bankruptcy, parallel proceeding, legislation, jurisdiction

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** Attorney at Law, Partner of Deheng Law Offices
e-mail : zhangzy@dehenglaw.com, telephone : +86 21 5598 9830, address : Floor 23, Sinar Mas Plaza, No.501 East Da Ming Road, Shanghai 200080, P. R. China

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I. Background

The Supreme People's Court of China ("SPC") has put a lot of efforts, in recent years, on organizing lower courts' human resources and funding in overcoming difficulties in the judicial enforcement of effective judgments around the People's Republic of China ("PRC" or "China"), as stated in the Opinions on Advancing the Trial Efficiency of Bankruptcy Cases issued by the SPC on 15 April 2020[1]. It should not be denied that some good results had been achieved up to this date. However, it also appears that Chinese courts still have a long way to march before this headache issue could be mostly relieved even finally eliminated. During this process, courts have kept on encouraging the transfer of judicial enforcement procedures to bankruptcy procedures. And for such purpose, the SPC also issued some corresponding directives for facilitating the formalities.

According to the SPC's report to the National People's Congress[2] in year 2018, about 630,000 cases were transferred from judicial enforcements to bankruptcy procedures. In addition, as indicated by publicly disclosed data, from year 2016 to 2018, around 20.42 million enforcement cases were entertained by courts and the average number of judicial enforcement cases was about 6.8 million each year. It is obvious that no more than 10% of these enforcement cases could be transferred to bankruptcy cases. Among all these enforcement cases, around 40% to 50% could not be enforced due to no assets available for execution. About 70% involve individual defendants. Furthermore,

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[1] The Opinions were made to fully exercise positive effects of bankruptcy trails on the rescuing and exiting mechanism of market entities, as expressly stated in the Opinions.

[2] Report of the Supreme People's Court about Deliberation Opinions on Studying and Handling Enforcement Difficulties, the Website of China Courts, Apr 24 2019, at https://www.chinacourt.org/article/detail/2019/04/id/3850699.shtml, Accessed on 25 November 2020.

it is estimated that about 30% to 35% of individual-related cases could not be executed.

Despite of the fact that it is still difficult to push forward such a transfer, top-tier decision makers have showed their determinations to strengthen bankruptcy procedures' important functions on resolving the headache of judicial enforcements, establishing a market-oriented and legalized bankruptcy trial mechanism, participating in building up international bankruptcy rules and enhancing international influence[3].

Although there was no mention on legislation of individual bankruptcy in the National People's Congress latest legislation plan, it shall be admitted that Chinese legislative and judicial practices were making progresses on the legal system of bankruptcy. In 2018, the importance of making deep research on reviewing and amending the 2006 Enterprise Bankruptcy Law ("EBL") was emphasized by the National People's Congress. In January 2019, the SPC successively approved the establishment of bankruptcy courts in Shenzhen, Beijing, Shanghai, Tianjin, Guangzhou, Wenzhou and Hangzhou. These shall be regarded as great movements in PRC bankruptcy field. Up to September 2020, there are 12 bankruptcy courts in China[4]. Their jurisdictions are not the same but subject to local practices and their higher courts' approval. For example, bankruptcy courts of Shanghai and Shenzhen are at intermediate level. They have centralized jurisdiction over bankruptcy cases within the whole city, no matter the cases are at the basic or intermediate or high level. However, the bankruptcy court of Beijing, at intermediate level as well, only in charge of bankruptcy cases at intermediate level.

On 27 February, 2019, the SPC issued *The Fifth Five-year Reform Program of the People's Court (2019-2023)*[5], which clearly put forward the opinion of *enhancing research on promoting individual bankruptcy system*[6].

On 22 June, 2019, jointly in names of the SPC, Department of Justice and other 11 departments or institutions subsidiary to the State Council, including the People's Bank of China, the Department of Treasure, etc., the National Development and Reform Commission ("NDRC") promulgated the

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[3] Please refer to the speech made by the senior judge Mr. LIU Guixiang with the SPC in the opening ceremony of Shenzhen Bankruptcy Court.

[4] The 12th bankruptcy court was established at the Intermediated People's Court in Xia'men, Fu Jian on 18th August 2020. For further information, please see at http://fjfy.chinacourt.gov.cn/article/detail/2020/08/id/5414481.shtml, latest accessed on 1st December, 2020.

[5] Supreme People's Court, Opinions on Deepening the Comprehensive Supporting Reforms of the Judicial System of the People's Courts, the Fifth Five Year Reform Program of the People's Court (2019-2023), Fa Fa [2019] No. 8, at https://www.chinacourt.org/law/detail/2019/02/id/149860.shtml, latest accessed on 24 November 2020.

[6] Supreme People's Court, Fifth Five Year Reform Program of the People's Court (2019-2023), Article 46.

Reformation Program of Advancing the Withdrawal System of Market Entities[7] , in which it was advocated that research on pre-reorganization system, out-of-court restructuring system and individual bankruptcy legislation shall be promoted[8]. This Reformation Program is only an outline while details of each part will be further studied by different State Council departments and institutions. We believe that in near future, concrete measures would be published.

Ⅱ. Chinese Individual Insolvency Rules in Bud

1. Legislative Progress on Individual Insolvency in Shenzhen

As one of the most important issues relating to revising the EBL 2006, district legislatures and judicial authorities had made some explorations on individual bankruptcy attempts under prevailing bankruptcy regime. *The Legislative Proposal to Take the Lead in Implementing the Individual Insolvency System in Shenzhen Special Economic Zone* ("SZSEZ") was presented to the local Standing Committee of the National People's Congress by Shenzhen Lawyers Association in September 2014. In April 2020, the Committee held a forum to discuss individual insolvency legislations in SZSEZ[9]. On 26 August 2020, *Regulations on Individual Bankruptcy of SZSEZ* were passed. It will come into effect on 1 March 2021.

It was expected that Shenzhen, as a special economic administration zone, might make some breakthroughs in this frontier issue by virtue of the favorable *Early and Pilot Implementation* policy. As we know, Shenzhen has already taken the lead in many areas such as advanced social security mechanism, higher-level minimum wage standard and financial subsidy standard as well as comprehensive individual registration system. More importantly, Shenzhen was one of pioneer cities establishing individual credit system. In 2014, its system had been integrated with the national credit information system, which made searches on information of individual properties more accurate and

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[7] Fa Gai Cai Jin [2019] No. 1104, at https://www.ndrc.gov.cn/xxgk/zcfb/tz/201907/t20190716_962483.html, latest accessed on 24 November 2020.

[8] Article 4, section 1, page 5 to 6, at: http://www.gov.cn/xinwen/2019-07/16/5410058/files/bbaef6612fed4832b70a122b39f1d5bd.pdf, latest accessed on 23 November 2020.

[9] Improve the Market Exit Mechanism to Stimulate Entrepreneurial Vitality, Shenzhen Special Economic Zone News, 11 April 2020, A02, at http://sztqb.sznews.com/PC/layout/202004/11/node_A02.html#content_844096, latest accessed on 25 November 2020.

efficient. However, this bill of individual bankruptcy was much doubted by traditional or obsolete ideology. There are concerns on possible negative effects such as intentional immigration to Shenzhen for dodging creditors. The answer would be given after the implementation of the *Regulations on Individual Bankruptcy of SZSEZ.*

2. Judicial Attempt on Individual Debt Restructuring in Wenzhou

Ping Yang County Court, Wenzhou, Zhejiang Province has become the forerunner by creating a new debt restructuring method[10]. This attempt has drawn much attention to the public and some media[11] even wrongfully praised it as an establishment of individual bankruptcy system.

In Ping Yang case, the debtor Mr. Cai was a shareholder of an insolvent company and it was adjudicated that he should be jointly liable with the insolvent company for the debt of about USD300,000 (i.e. CNY2.14 million). Mr. Cai and his wife's income was about USD1,150 (i.e. CNY8,000) per month, with which they had to support their daughter's college tuition and daily expenses. What is worse, Mr. Cai had to spend much money on curing his serious disease every year. The court concluded that even though Mr. Cai was proved as an honest man with good record of personal credit, he did have no capability to pay off the debt.

Upon Mr. Cai's application, Ping Yang court initiated the special procedure of Individual Debt Restructuring on 12 August 2019, with the designation of an administrator and the publication of a Notice for Registering Credits. On 24 September 2019, the first creditor s' meeting was held. During the meeting, Mr. Cai declared a Commitment of No Dishonest Conduct, promising that: i) there is no other property except those the manager had ascertained; ii) he shall bear all legal consequences and liabilities resulting from his dishonest conducts (if any); and iii) he shall take all compensation responsibilities for any losses of creditors due to his dishonest conducts (if any). And then Mr. Cai put up with his draft restructuring plan:

1) The liquidation rate for all debts was fixed at 1.5%, i.e. about USD4,500 (i.e. CNY32,000) in total as the settlement fund, which would be paid within 18 months from the date that the restructuring plan was agreed;
2) When 18 months' implementation period expires, during a period of

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[10] Behaviors Restriction Order issued by the Basic People's Court of Ping Yang, Zhejiang, (2019) Zhe 0326 Zhi Qing No.3.

[11] The National First Case of Centralized Liquidation of Individual Debts with Substantial Function of Individual Insolvency and Equivalent Procedures was Successfully Concluded, the Website of Zhejiang Courts, at http://www.zjsfgkw.cn/art/2019/10/9/art_353_18532.html, latest accessed on 25 November 2020.

6 years from the expiring date, if Mr. Cai's family income exceeded USD7,143 (i.e. CNY120,000), he should make further payments to creditors by using 50% of the amount in excess of USD17,143.

Four creditors attended the meeting and reached an agreement on Mr. Cai's draft restructuring plan. All creditors also agreed to forfeit their claims for outstanding payments against Mr. Cai under the precondition that the plan would be strictly carried out and there was no undisclosed property or any deliberate act for maliciously evading debts. After the implementation of the debt restructuring plan, on 27 September 2019, the court terminated all judicial enforcement proceedings and issued a Restriction Order, under which Mr. Cai was refrained from any luxury expenditures or being appointed as legal representative or director of any companies, etc.[12]. Key points of the final version of the debt restructuring plan included the following:

1) **Free Property.** Mr. Cai could keep part of his income for supporting his family's basic expenditures on daily life and health care.
2) **Forgiveness of Debt.** Upon the signing of this plan, all creditors exonerated Mr. Cai from outstanding debts.
3) **Forfeiture of Rights.** Mr. Cai would be bound by the court's Restriction Order under which Mr. Cai would continue being listed as a dishonest debtor and be refrained from any luxury expenditures.
4) **Restoration of Rights.** If Mr. Cai strictly implemented the plan, after three years from the date that the plan was completed, Mr. Cai would be deleted from the dishonesty debtor list and his personal credit would be restored.

With regard to the Commitment of No Dishonest Conduct, it was also agreed that when 18 months' implementation period expires, during a period of 6 years, creditors are entitled to request that their credits shall be repaid in the original full amount, if: i) any significant assets were found undeclared; or ii) there is any fraud, malicious reduction of debtor's properties or other debt evasion.

3. Breakthroughs and Ambiguous Issues in Ping Yang Case

Although it is a small case, there are some highlights which could be considered as breakthroughs or milestones for individual bankruptcy system.

Firstly, without any doubt, this procedure is a successful combination of bankruptcy system and judicial enforcement proceeding with much respect to creditors' willingness and voluntary participation. The debt restructuring plan

[12] Behaviors Restriction Order issued by the Basic People's Court of Ping Yang, Zhejiang, (2019) Zhe 0326 Zhi Qing No.3.

was thoroughly discussed and unanimously agreed by creditors.

Secondly, some special conceptions and methods such as free property, debt forgiveness, forfeiture and restoration of rights under typical individual bankruptcy system, had been referenced for the first time.

Thirdly, drafting of the out-of-court debt restructuring plan was endorsed by the court's intervention with quasi-enforceability.

It seems that the case was closed with a satisfactory end. However, there are still some ambiguous matters relating to this debt cleaning-up method.

1) What if creditors could not unanimously reach an agreement on the restructuring plan? Does a restructuring plan agreed by majority of creditors bind upon those minorities?
2) Could the court rule that the restructuring plan should be enforced even if creditors could not reach an unanimously agreement or a majority opinion?
3) Could the restructuring plan bind upon those creditors who never register their credits with any courts or registered with another court other than the restructuring court?
4) What is the reasonable valid period for a Restriction Order and when the debtor's rights shall be restored? Would the debt amount and its liquidation rate be crucial factors to consider before deciding the duration of such periods?
5) Could a creditor apply for a restructuring plan in the case where the debtor refused to do so?
6) Which party shall bear procedure costs incurred by appointing an administrator and drafting a restructuring plan?

On 13 August 2019, Wenzhou Intermediate People's Court, which is the higher court of Ping Yang Court, published the *Opinions on Implementation of the Centralized Liquidation of Individual Debts (for Trial Implementation)*[13], which we understand should be tailor-made opinions for hearing the above Ping Yang case. In this directive opinion, there are detailed provisions on entertainment and hearing of such centralized liquidation cases of individual debts. To some extent, the aforesaid Opinions could respond to some of the above queries but not all. The writer is in the view that, even with positive effects on rescuing those honest debtors, the Opinions could only be applied to rather limited cases due to the following reasons.

1) Any debt restructuring plan could only be a reconciliation between creditors and the debtor under judicial enforcement procedures rather

[13] Opinions on Implementation of the Centralized Liquidation of Individual Debts, Wen Zhong Fa (2019) No.45, at http://www.zhdongqi.com/newsinfo/2031441.html, latest accessed on 1 December 2020.

than bankruptcy procedures in nature.

2) It shall be applied only when all pending judicial enforcement proceedings against the debtor have been entertained by courts within Wenzhou city and there is no other pending proceeding against the debtor in any courts outside the jurisdiction of Wenzhou courts.
3) It shall be applied only to cases relating to financial disputes.

To establish Chinese own legal system for individual bankruptcy, legislation experience from other countries, especially those of civil law countries, shall be further studied. Meanwhile, the realistic Chinese social situation shall always be the principal factor to consider. There are also requirements of updates and improvements of corresponding supporting systems including relevant laws and regulations, tax regime, business administration system and credit restoration rules.

Ⅲ. Latest Discussions on Cross-border Bankruptcy

1. New Interpretation and Application of the Principle of Reciprocity

The recognition of foreign bankruptcy judgments or orders is the critical issue when handling cross-border bankruptcy cases. Unfortunately, under the current legislation system, only a few foreign country's judgments or orders could be recognized and enforced in China[14]. Chinese courts tend to take rather conservative attitudes towards applications of the principle of reciprocity, requiring the corresponding foreign courts have already acknowledged the effect of Chinese courts' judgments. Under such a "Principle of Reciprocity Based on Facts", it would become a deadlock if no country would like to take the first step.

Things are changing in recent years. In July 2015, by publishing *Several Opinions on the People's Court Providing Judicial Service and Guarantee for the Construction of 'One Belt One Road'*[15], the SPC pointed out that *in case some countries along the line have not yet concluded judicial assistance*

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[14] Article 282 of the PRC Civil Procedure Law, "for a judgment or ruling made by a foreign court which has come into legal effect for which ratification and enforcement is applied or requested, where a People's Court concludes, upon examination pursuant to the international treaty concluded or participated by the People's Republic of China or in accordance with the principle of reciprocity, that the basic principle of the laws of the People's Republic of China or the sovereignty, security or public interest of the State is not violated, the People's Court shall rule on ratification of the validity."

[15] The Supreme People's Court, Several Opinions on the People's Court Providing Judicial Service and Guarantee for the Construction of 'One Belt One Road', Fa Fa (2015) No.9, at http://www.court.gov.cn/zixun-xiangqing-14900.html, Accessed on 1 December 2020.

agreements with China, ***according to the intention of judicial cooperation and exchange of countries and the commitment of the other country to give judicial reciprocity to China***[16]***,*** *we could consider that the courts of our country should give judicial assistance to the parties of the other country* ***in advance****, actively promoting the formation of reciprocal relations, actively advocating and gradually expanding the scope of international judicial assistance.* By this opinion, the SPC was encouraging Chinese courts to apply the principle of reciprocity by interpreting it as a "Principle of Reciprocity Based on Law".

On 8 June, 2017, the second *China ASEAN*[17] *Forum of Justices* was held in Nanning, Guangxi Zhuang Autonomous Region of China and passed the Nanning Statement[18]. In its paragraph 7, the Statement declares that *to the extent permitted by domestic law, the courts of participating countries will interpret domestic law in good faith, reducing unnecessary parallel litigation, and consider appropriate promotion of mutual recognition and enforcement of civil and commercial judgments. In judicial procedures of recognizing and enforcing civil and commercial judgments of other countries,* ***if the courts of a country did not refuse to recognize and enforce civil and commercial judgments of another country on the basis of reciprocity****, within the scope permitted by the domestic law of the country, it can be presumed that there is a reciprocity relationship with that country*.

The Nanning Statement adopts a more open and inclusive "Principle of Reciprocity Based on Presumption," that is, as long as there is no precedent for a country refusing to recognize or enforce Chinese civil and commercial judgments, it can be presumed that there is a reciprocity relationship with the country, regardless of whether there is any provision in its domestic law. However, if the country takes an over conservative attitude towards the principle of reciprocity, such as the absolute principle of territoriality, then the "Principle of Reciprocity Based on Presumption" may not apply.

2. Application of the Principle of Reciprocity Based on Presumption

The open and inclusive attitude has received positive responses from an Israel court. On 15 August, 2017, after more than one year's trial, the Israeli High Court made a final judgment, finding that there is a reciprocal relationship between China and Israel in judicial assistance and maintaining the original judgment delivered by The Tel Aviv court in the first instance [19].

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[16] Article 2, section 6 of Several Opinions on the People's Court Providing Judicial Service and Guarantee for the Construction of 'One Belt One Road'.

[17] China-ASEAN, China and the Association of Southeast Asian Nations.

[18] China-ASEAN Forum of Justices, Nanning Statement, at http://www.court.gov.cn/zixun-xiangqing-47372.html, latest accessed on 1 December 2020.

[19] The original judgement held that the judgement numbered（2009）Tong Zhong Min San Chu

The Tel Aviv Court elaborated its specific reasons for recognition and enforcement of the judgment of Nantong Intermediate People's Court of China as follows.

Firstly, according to the decision of the Supreme Court of Israel on the principle of reciprocity, the application conditions to the principle of reciprocity under the Israeli law are relatively loose. As long as there is a reasonable potential possibility for the implementation of the decision made by the Israeli court in other countries, the judicial assistance between two countries can be applicable. Moreover, the principle aims to promote cooperation between Israel and other countries' judicial systems.

Secondly, mutual legal assistance between China and Israel is a never reclaimed land. There is no precedent for any country to implement or refuse to implement a judgment of another country where the two countries have not signed any agreement on recognition and enforcement of judgments made by the other country.

Thirdly, Chinese law experts and witnesses of both the plaintiff and the defendant agreed that the Chinese law recognizes the principle of reciprocity in mutual legal assistance and explicitly stipulates conditions for recognition and enforcement of foreign judgments. The principle of reciprocity loses its practical significance if all countries only enforce judgments of other countries that have actually recognized the judgments of their own courts.

Fourthly, mutual assistance relationship between China and Israel in business and other fields is developing day by day. From the perspective of public interests, mutual judicial assistance between China and Israel can promote the certainty of economic cooperation between the two countries, so we should encourage the development of mutual judicial assistance relationship.

At present, although there is no direct case supporting the "Principle of Reciprocity Based on Presumption" in the field of bankruptcy law, based on the above interactive and cooperative environment, in addition to the political requirements of supply-side reform in 2015, we believe that applying the "Principle of Reciprocity Based on Presumption" in cross-border bankruptcy cases conforms to current domestic and international environments and developments.

3. Expansion or Clarification of Chinese Courts' Jurisdiction over Cross-border Bankruptcy Cases

With the process of economic globalization, the number of foreign-related corporations has increased significantly in recent years. According to the statistics in the Reports on Foreign Investments (2019) issued by the Ministry

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Zi No. 0010 made by Nantong Intermediate People's Court could be executed in Israel.

of Commerce ("MOFCOM"),[20] from January to December in 2018, 60,533 new foreign-invested enterprises were established in China, with a year-on-year growth of 69.8%[21]. And according to the data published on the website of MOFCOM, the total amount of foreign investment actually from top ten countries and regions amounted to USD128.46 billion, accounting for 95.2% of the total amount of the foreign investment actually used in China[22]. Moreover, as statistics published by MOFCOM and the Safe Administration of Foreign Exchange ("SAFE"), Chinese domestic investors made non-financial direct investment in 5,735 foreign enterprises in 161 countries and regions. The total investment amount was CNY797.4 billion (i.e. USD120.5 billion)[23]. In the context of such active inbound and outbound two-way direct investment, Chinese courts' jurisdiction over potential cross-border bankruptcy cases cannot be ignored.

Article 3 of Chinese EBL provides the jurisdiction rule of bankruptcy cases, i.e. all bankruptcy cases shall be governed by the People's Court with jurisdiction where the debtor is domiciled. This rule does not make clear stipulations on jurisdiction over foreign enterprises (no matter whether these foreign corporations are actually Special Purpose Vehicles ("SPVs") or branches or entities actually controlled by Chinese individuals or enterprises). It does not consider the situation where a court has close connection or material interests with a certain case, either. If this rule applies in cross-border bankruptcy cases where the debtor does not domicile within China, the effect would be that Chinese courts made an automatic waiver of their jurisdiction, even if the debtor's main business were established in our country.

This lack of legislation on courts' jurisdiction over cross-border bankruptcy cases possibly prevents Chinese courts from lawfully exercising their jurisdiction over enterprises registered overseas, but whose main assets, managements, businesses and creditors are located in China, such as Tencent, Alibaba, JD, Baidu, Sohu, and NetEase listed in US or HK via VIE structures. This puts Chinese courts are in a very disadvantageous position in the competition for international bankruptcy jurisdiction[24]. In a more generalized

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[20] MOFCOM, Reports on Foreign Investments (2019), at http://images.mofcom.gov.cn/wzs/202008/20200819101923422.pdf, latest accessed on 1 December 2020.

[21] MOFCOM, Reports on Foreign Investments (2019), page 1.

[22] Department of Foreign Investment, MOFCOM, Newsletter of National Absorption of Foreign Direct Investment, January to December in 2018, at http://www.mofcom.gov.cn/article/tongjiziliao/v/201901/20190102832209.shtml, latest accessed on 1 December 2020.

[23] MOFCOM, Concise Statistics of PRC Foreign Direct Investment in All Industries in 2018, at http://fec.mofcom.gov.cn/article/tjsj/ydjm/jwtz/201901/20190102829090.shtml, latest accessed on 1 December 2020.

[24] Some scholars argue that "bankruptcy cases shall be under the jurisdiction of the people's court in the place where the debtor is domiciled" as stipulated in Article 3 of the Enterprise

perspective, it fails to protect PRC creditors' interests and even the national interests.

Therefore, some scholars suggested that the Standing Committee of National People's Congress or SPC should clearly illustrate that under Article 3 of EBL, Chinese courts shall have jurisdiction over foreign enterprises. For a foreign enterprise with properties, branches or regular offices for business operation in China, the court in the place where the branch or regular office is located has the authority to accept the enterprise's application for bankruptcy.

4. Application of the "Centre of Main Interests" Rule in Parallel Bankruptcy Procedures

The conception of Centre of Main Interests ("COMI") has been discussed for establishing the "master-slave" (or parallel or "main/non-main") procedure in cross-border bankruptcy cases. Chinese courts have clearly realized that initiating another parallel procedure in China might be the only practical method to protect both Chinese creditors' rights and foreign debtors' properties in cross-border bankruptcy cases. In the Hanjin Shipping Bankruptcy case, it was reported that Hanjin Shipping had applied to Shanghai Pudong District Court to initiate another independent bankruptcy reorganization application on 9 October 2016 for protecting Hanjin China's property around China. However, due to unknown reasons, the application was withdrawn during the court's pre-trial process on 9 November 2016.[25]

Regarding the identification of COMI, there are also many complicated issues such as:

1) Whether the listing of or an issuance of bonds by a Chinese enterprise overseas change the enterprise's main interests centre?
2) For those enterprises registered in China but controlled by oversea SPVs or shareholders or corporate groups, whether the COMI should be divided into two parts, domestic COMI and oversea COMI?
3) Where the oversea SPV itself is only a shell company and its actual management and main assets are in China, whether the SPV could apply to a Chinese court for bankruptcy as the main procedure and request judicial assistance from foreign courts, or start another parallel bankruptcy proceeding?

Bankruptcy Law, which has already provided the Chinese courts' jurisdiction over the bankruptcy of foreign enterprises in essence. However, from the perspective of the original intention of legislation, we opine that Article 3 addresses the territorial jurisdiction of domestic bankruptcy, which is obviously too far-fetched.

[25] Civil Amibitration on the Application of Hanjin Shipping (China) Co., Ltd on Bankruptcy Reorganization and Compulsory Liquidation, (2016) Hu 0115 Po Shen No.6.

No cases regarding Chinese courts' entertaining bankruptcy application of foreign companies had ever been reported but we estimate in the near future such applications by foreign companies would be filed with Chinese courts.

5. Main and Non-main Proceedings in Bankruptcy Cases

In parallel bankruptcy procedures, the rule of Centre of Main Interests is applied to distinguish main and non-main procedures, as mentioned above. This rule was adopted by the EU Insolvency Regulation (EC) No. 1346/2000, which is binding among Member States of European Union. In addition, the UNCITRAL Model Law on Cross-border Insolvency (1997) (the "Model Law") was designed to assist States to equip their insolvency laws with a modern legal framework to a more effectively address cross-border insolvency proceedings concerning debtors experiencing severe financial distress or insolvency[26]. However, it shall be noted that the Model Law is not a convention. It only provides a legislation reference without binding force. It could not be applied directly. Therefore, it remains blank in China that whether some measures and systems generally and internationally accepted in the field of cross-border bankruptcy, such as limited universalism, the "master-slave procedures" and cross-border bankruptcy judicial cooperation established on this basis could be adopted in judicial practice, since no test cases have emerged.

By applying the COMI Rule, foreign main proceeding and non-main proceeding can be distinguished. The "foreign main proceeding" means a foreign proceeding taking place in the State where the debtor has the centre of its main interests, while the "foreign non-main proceeding" means a foreign proceeding, other than a foreign main proceeding, taking place in a State where the debtor has an establishment, i.e. any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services.[27] The main insolvency proceeding has universal scope. They aim at encompassing all the debtor's assets on a world-wide basis and at affecting all creditors, where located.[28] In contrast, non-main insolvency proceedings have territorial effectiveness and extremely limited extraterritorial effectiveness. It

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[26] The UNCITRAL Model Law on Cross-border Insolvency (1997), Purpose, at https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency, latest accessed on 8 December 2020.

[27] Article 2 of the UNCITRAL Model Law on Cross-border Insolvency (1997), at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/1997-model-law-insol-2013-guide-enactment-e.pdf, latest accessed on 8 December 2020.

[28] Part 2 Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-border Insolvency (1997), section 83 and 84, at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/1997-model-law-insol-2013-guide-enactment-e.pdf, latest accessed on 8 December 2020.

should be noted, however, that the effects of an insolvency proceeding commenced based on only the basis of the presence of assets are normally restricted to the assets located in that State.[29]

The Model Law also emphasizes the coordination and cooperation of main and non-main proceedings, aiming to minimize conflicts and to strike a balance between protecting national interests and facilitating international cooperation.

By referring to the Model Law, in addition to recognizing and enforcing foreign bankruptcy judgments, many scholars view that the more practical method would be that foreign bankruptcy administrators or domestic creditors shall file an application for initiating a parallel bankruptcy proceeding in China, instead of recognition and enforcing the foreign bankruptcy judgment. In such an event, a domestic bankruptcy administrator shall be appointed to dispose and distribute the debtor's properties in China in accordance with Chinese EBL. The administrator of overseas bankruptcy proceeding shall be provided with full cooperation and assistance.

Of course, to balance interests between Chinese creditors and foreign creditors, it is also suggested that the Principle of Proportionality should be referenced and clearly defined. If this principle is applied, the basic rule would be that, once a certain creditor gets a certain proportion of payment in a foreign bankruptcy procedure, he could get additional payments from Chinese bankruptcy proceeds only after all the same ranking creditors in Chinese bankruptcy proceeding get the same proportion of payments.

IV. Conclusion

Top-tier scholars, judges and legislators have realized the importance and necessity of referencing new regime but no official plan for amendments to EBL has been put on the agenda. It remains ambiguous when there would be any genuine breakthrough in the field of both individual and cross-border bankruptcy with adoption of many new conceptions, principles and systems in line with foreign bankruptcy laws or the United Nations Model Law on Bankruptcy.

By virtue of this simple essay, the writer hopes to shed some light for our friends in Japan and South Korea on a brief summary of the latest research on recent development on judicial practice and theoretical discussions on individual and cross-border bankruptcy issues. As advocated by some scholars, the legislations and amendments to Chinese EBL need contributions of wisdom by scholars in developed countries. Should there be any comment or queries, please feel free to contact the writer.

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[29] Same as the above.

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Maritime Insolvency Laws in Japan *

*Teruyuki Sago***

ABSTRACT

This article provides general information of the Japanese insolvency laws, i.e. Bankruptcy Act, Civil Rehabilitation Act and Corporate Rehabilitation Act, and overviews of international aspect of those laws and Japanese legal systems relating to cross-border insolvency. Based on there overviews, this article also introduces some speculations about a few issues in Maritime insolvency.

KEYWORDS: Bankrupt; Civil Rehabilitation; Corporate Rehabilitation; Recognition of and Assistance for Foreign Insolvency Proceedings; execution of maritime lien against insolvent estate; requirements for withdrawal of ship, voyage abandonment, cancelation of shipbuilding

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** Attorney at law, Okabe & Yamaguchi (2003-present), LLB (Sophia University) in 1994

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Introduction

In 2016, Hanjin shipping filed for insolvency and the Seoul Central District Court ordered the commencement of a rehabilitation. With some bumps and detours, in 2017, the Seoul Central District Court gave up the rehabilitation and declared the bankruptcy of the company. The Hanjin's insolvency threw the world marine shipping business into confusion in which many Japanese shipping and logistics companies were heavily involved. This case is an actual example of how insolvency of an international shipping company would give a huge impact on the maritime shipping industry in the world and reminds us of importance of a mutual understanding of legal frameworks of maritime insolvency laws between the relevant counties.

In order to contribute to such mutual understanding, an overview of the legal frameworks of maritime insolvency laws in Japan is herein provided.

Ⅰ. Insolvency laws in Japan

1. Overview

Japanese insolvency laws are divided into two main categories according to a purpose or principal of the proceedings. Providing that a debtor is "company", one category is a liquidation in which the company's existing property is converted and contributed to creditors, resulting in a liquidation of the company. Another category is a rehabilitation or reorganization in which the company's business is tired to be rebuilt and a part of its revenues or profits from the business is contributed to its creditors.

From a procedural point of view, the insolvency laws are classified into two types of proceedings, one of which is, as one might say, the trustee-controlling proceeding in which corporate managers of the company are

required to drop or waive their rights to manage the company that is instead managed and controlled by a trustee or an administrator who is appointed by the court, and another of which is a Debtor in Possession (DIP) proceeding in which the company in DIP basically continues its business using its property in the best interests of creditors, situationally seeking court approvals for any actions that fall outside of the scope of regular business activities.

In Japan, we have three main insolvency laws, i.e., Bankruptcy Act (Act No.75 of 2004), Civil Rehabilitation Act (Act No.225 of 1999) and Corporate Rehabilitation Act (Act No.154 of 2002). As per the following table, the Bankruptcy Act is adapting a modal structure of liquidation and trustee-controlling proceeding. The Civil Rehabilitation Act has a legal system in rehabilitation and DIP proceeding. And the Cooperate Rehabilitation Act is categorized in rehabilitation and trustee-controlling proceeding.

	Rehabilitation laws	Liquidation law
Trustee-controlling proceeding	Cooperate Rehabilitation Act	Bankruptcy Act
DIP proceeding	Civil Rehabilitation Act	

In addition to the above-mentioned three laws, we have Special Liquidation proceeding in a sub-part of the Companies Act (Act No.86 of 2005). This proceeding provides for a simplified liquidation procedure for stock companies normally in consensual situations of their stake holders. Most often, this proceeding is employed by parent companies to wind up its subsidiaries. This Special law is applied in so limited occasion that supplementary remarks and explanations are here added only about three main laws from the following sections.

2. Liquidation law (the Bankruptcy Act)

The current Bankruptcy Act was enacted in 2004 and went into effect on 1st January 2005.

The bankruptcy proceeding is basically supposed to be taken in order to contribute property of the distressed debtor to its creditors through appointment or disposition of the property by bankruptcy trustee(s) appointed by the court, restricting creditors' o execution of their claims out of the proceeding. The following procedural flow is normally expected; a petition for commencement of bankruptcy proceeding, a decision of the bankruptcy court to commence bankruptcy proceeding, an appointment of the bankruptcy trustee(s) by the court, a public notice to knowable creditors, submission of bankruptcy claims by creditors, investigation on those claims, investigation on property belonging to the bankrupt estate, conversion of the property, dividend distribution to

creditors.

When a debtor is unable to pay its debts, or in the case of company, when the company is unable to pay its debts in full with its assets, the court, upon petition, shall commence bankruptcy proceeding by issuing an Order of Commencement of Bankruptcy Proceedings (Article 15, 30 of the Bankruptcy Act). In the proceeding, the court appoints bankruptcy trustee(s) (Article 74(1) of the Bankruptcy Act) who play a central and core role in the proceeding. The court is a party being responsible for management of the procedure. However, the bankruptcy trustee may normally take the lead in the actual procedure.

Creditors are principally prohibited from individual execution of their rights (compulsory execution, etc.) on the debtor's property and cannot be reimbursed or paid outside the framework of the procedure. When bankruptcy proceeding is commenced, the management and disposal rights of bankrupt estate are transferred to the bankruptcy trustee who shall commence the administration of such property immediately after the appointment (Article79 of the Bankruptcy Act).

The Bankruptcy Act provides that all property that the bankrupt holds at the time of commencement of bankruptcy proceeding (irrespective of whether it exists in Japan) shall constitute the bankruptcy estate (Article 34 (1) of the Bankruptcy Act). The debtor's property which constitutes the bankruptcy estate is established and fixed at the time of the Order of Commencement of Bankruptcy Proceedings. Any property acquired by the debtor after the commencement of proceeding cannot be built into the bankruptcy estate.

Bankruptcy claim is principally limited to the claims, causes of which have existed or occurred on or before the Order of Commencement of Bankruptcy Proceedings. The execution of any general statutory lien or any other general priority exists over property that belongs to the bankruptcy estate is prohibited to be done outside the framework of the procedure. But, unlike normal bankruptcy claims, any bankruptcy claim with the general statutory lien or any other general priority shall take preference over other normal bankruptcy claims in terms of the dividend (Article 98(1) of the Bankruptcy Act). On the other hand, a creditor who have a "right of separate satisfaction" (a right that a person who holds a *special statutory lien*, pledge or mortgage against property that belongs to the bankruptcy estate may exercise against the property that is the subject matter of these rights) is able to exercise the right against the subject property without process of bankruptcy proceeding (Article 65 of the Bankruptcy Act). Maritime lien is categorized in the above-mentioned "special statutory lien". Technically, it can be said that a creditor who have a maritime lien can exercise the lien over the subject ship even when her owner files for bankruptcy. However, in return, a holder of a claim secured by maritime lien is basically able to exercise it right as a bankruptcy creditor only up to the amount of the claim for which payment cannot be received by exercising the lien (Article 108 (1) of the Bankruptcy Act).

Apart from the above bankruptcy claims, the Bankruptcy Act establishes a category called “claim on the estate" which can be paid from the bankruptcy estate at any time without process of bankruptcy proceeding. Expenses to be paid in order to carry forward the proceeding and claims causes of which are generated by any of the trustee’s activities for the bankruptcy estate after the commencement of proceeding are required to be immediately paid in order to smoothly facilitate the procedure. Those costs and claims are basically categorized in claim on the estate. For example, a claim for expenses incurred related to management of bankruptcy estate (Article 148 (1) 2 of the Bankruptcy Act), a claim arising from bankruptcy trustees' activities regarding to the bankruptcy estate (Article 148 (1) 4) and a claim held by the counter party of a bilateral contract with the debtor in which both parties’ obligations have not been performed, but the trustee have opted to perform the obligation of the debtor in the bilateral contract (Article 148(1) 7) are legally categorized in the claim on the estate and is paid at any time outside of the procedure.

Under the provisions and rules described above, the debtor's property is converted, the debtor's debt is fixed, and its property is contributed to creditors under the principal of equality of creditors.

3. **Rehabilitation** laws

A. Civil Rehabilitation Act

The Civil Rehabilitation Act was enacted in 1999 and went into effect on 1st April 2000.

The Civil Rehabilitation proceeding is the proceeding in which a debtor in financial difficulty drafts, proceeds with and implements its rehabilitation plan under the supervision of the court and with the consent of its creditors, with the aim of ensuring the rehabilitation of the business or economic life of the debtor. As mentioned above, under the law, the debtor’s rehabilitation is promoted in the DIP proceeding. The following procedural flow is normally expected to be taken; a petition for commencement of civil rehabilitation proceeding, a decision of the court to commence the proceeding, if necessary, an appointment of authority of rehabilitation proceeding such like a supervisor, submission of rehabilitation claims by creditors, investigation on claims, investigation on property of debtor, preparation and establishment of rehabilitation plan, implementation of the plan. The Civil Rehabilitation Act is basically designed to be applied to a small or medium-size companies. But the law can be technically applicable to widely big companies and individual debtors. This law is a general law for restructuring debtors in financial difficulty.

Rehabilitation claim is defined as a claim arising against a rehabilitation debtor from a cause that has occurred before the commencement of rehabilitation proceedings (excluding a common benefit claim or claim with general priority) (Article 84(1) of the Civil Rehabilitation Act). One of

differences between rehabilitation claim and bankruptcy claim is the handling or treatment of a claim with general priority, i.e., a claim for which a general statutory lien or any other general priority exists. As mentioned above, in the case of bankruptcy, any bankruptcy claim with the general priority cannot be paid without process of the Bankruptcy proceeding but shall take preference over other normal bankruptcy claims in terms of the dividend (Article 98(1) of the Bankruptcy Act). On the other hand, in the civil rehabilitation proceeding, a claim with general priority can be paid by the debtor at any time without going through rehabilitation proceeding (Article 122 (2) of the Civil Rehabilitation Act). As to a claim created for common benefit to all the rehabilitation creditors is classed as a common benefit claim which is also paid at any time without going through rehabilitation proceeding (Article 121 (1) of the Civil Rehabilitation Act). The followings are a part of the common benefit claims: a claim for expenses for court proceedings performed for the common interest of rehabilitation creditors (Article 119 (1) of the Civil Rehabilitation Act), a claim for expenses for the rehabilitation debtor's business, livelihood and the administration and disposal of assets after the commencement of rehabilitation proceeding (119(2)) and a claim held by the counter party of a bilateral contract with the debtor in which both parties' obligations have not been performed, but the trustee have opted to perform the obligation of the debtor in the bilateral contract (Article 49(4)). In the proceeding, a claim arising from a cause that has occurred after the commencement of rehabilitation proceedings (excluding one that is a common benefit claim, claim with general priority or rehabilitation claim) is classed as a post-commencement claim and is treated separately from the other type of claims (Article 123 of the Civil Rehabilitation Act).

A creditor who has a "right of separate satisfaction" (a right that a person who holds a special statutory lien, pledge or mortgage against property that belongs to the bankruptcy estate may exercise against the property that is the subject matter of these rights) is able to exercise the right against the subject property outside the proceeding (Article 53 of the Civil Rehabilitation Act). This is the same with bankruptcy. However, in the rehabilitation, it is required to protect essential property to continue the business, without that the rehabilitation of debtor's business cannot be achieved. Then in the rehabilitation proceeding, when the relevant property is indispensable for the continuation of the rehabilitation debtor's business, the court, upon petition, can issue a permission to extinguish the security right by paying the amount of money equivalent to the value of the property (Article 148 (1) of the Civil Rehabilitation Act).

B. Corporate rehabilitation law

The current Corporate Rehabilitation Act was enacted in 2002 and went into effect on 1st April 2003.

This procedure is designed to reconstruct or reorganize a stock

company in financial difficulty in accordance with reorganization plan principally drafted by trustee(s) appointed by the court and with the consent of creditors. The following procedural flow is normally expected to be followed; a petition for commencement of reorganization proceeding, a decision of the court to commence the proceeding, an appointment of trustee(s), submission of reorganization claims by creditors (including claims with security rights), investigation on claims, investigation on property of debtor, preparation and establishment of reorganization plan, implementation of rehabilitation plan.

The Corporate Rehabilitation Act is a special law of the Civil Rehabilitation Act. This procedure applies only to a stock company (Article 1 of the Corporate Rehabilitation Act) and is considered to be strict and powerful in various respects. One of the characteristics of the organization proceeding is that this is not a DIP procedure but, one might say, a trustee controlling procedure in which trustee(s) are always appointed by the court (Article 67 (1) of the Corporate Rehabilitation Act) and have broader powers or authority to manage and control the reorganization company (Article 72 of the Corporate Rehabilitation Act). Also, compared to the civil rehabilitation proceeding, a wider range of reorganization plans such as a corporate split-up, merger, stock exchange and stock transfer is allowable and can be applicable. The reorganization proceeding may be well equipped for reconstruction of the reorganization company, but may be relatively stringent and so cost/time-consuming. The proceeding is principally designed to be applied to a big stock company in financial difficulty.

A claim arising against the reorganization company from a cause that has occurred before the commencement of reorganization proceeding is categorized in organization claim (Article 2 (8) of the Corporate Rehabilitation Act). Among it, a reorganization claim with a general statutory lien or any other general priority exists shall especially take preference over other bankruptcy claims in the dividend in accordance with order of preference in the Act (168(2) of the Corporate Rehabilitation Act). As to a claim created for common benefit to the reorganization creditors is classed as a common benefit claim which is paid at any time without going through reorganization proceeding (Article 132 of the Corporate Rehabilitation Act). The followings are a part of the common benefit claims: A claim for expenses for court proceedings performed for the common interest of reorganization creditors, etc. and shareholders (Article 127 (1) of the Corporate Rehabilitation Act, a claim arising from the borrowing of funds or any other act conducted by a trustee or the reorganization company with respect to the reorganization company's business and property based on his/her or its authority (Article 127 (5)) and a claim held by the counter party of a bilateral contract with the debtor in which both parties' obligations have not been performed, but the trustee have opted to perform the obligation of the debtor in the bilateral contract (Article 61(4)). In the proceeding, a claim arising from a cause that has occurred after the commencement of reorganization

proceeding (excluding one that is a common benefit claim, claim with general priority or rehabilitation claim) is classed as a post-commencement claim and is treated separately from the other type of claims (Article 134 of the Corporate Rehabilitation Act).

One of differences of the reorganization proceeding compared to the other proceedings is a treatment or handing of a claim with security right (a special statutory lien, pledge or mortgage etc. against property of debtor). This claim is treated as a "secured reorganization claim" in the proceeding. Unlike the other proceedings, after the commencement of reorganization proceeding, the secured reorganization claim is not allowed to be paid unless it is paid in accordance with the reorganization plan (Article 47(1) of the Corporate Rehabilitation Act). A creditor with a secured reorganization claim is not allowed to enforce compulsory execution on any property of the reorganization company (Article 50(1) of the Corporate Rehabilitation Act) and is required to participate in reorganization proceedings in order to receive the benefit of the reorganization of the company (Article 135 (1) of the Corporate Rehabilitation Act). Any payment to secured reorganization claim basically needs to be going through the reorganization proceeding. On the other hand, when the property of the reorganization company is obviously unnecessary for the company's business, the court, upon petition, can make an order to cancel the prohibition of the exercise of the security right against such property (Article 50 (7) of the Corporate Rehabilitation Act).

Ⅱ. Cross-Border Insolvency in Japan

1. Overview

It is necessary for us to consider the international aspects of the insolvency laws in the case of insolvency of shipping companies, many of which operate their ships internationally.

Regarding international aspects, Japan used to adopt, so to speak, a doctrine of Territorialism or doctrine of unit in the insolvency laws. This doctrine means that the jurisdiction of the court where the insolvency proceeding is commenced covers only its national territory and any property of the insolvency company which is located abroad is not included in the proceeding, as it falls into the jurisdiction of another county where the property locates. However, this doctrine became obsolete in the age of globalization and in the circumstances that internationalization of business is commonplace and international companies commonly have any property and assets all over the world. In such circumstances, in 1997, UNCITRAL Model law on Cross-Border Insolvency was adopted in the United Nations Commission on International Trade law (UNCITRAL) in which, so to speak, a kind the doctrine

of Universalism or modified Universalism was adopted. The direct and pure opposite doctrine to Territorialism is Universalism in which it is said that a single law and a single jurisdiction would cover all property and assets of the insolvent debtor. In the model law, this strict doctrine was modified in order to adapt to the reality of world where legal systems are basically divided from country to country and so myriad business structures exist and also in order to achieve global collective processes with efficient levels of centralization of insolvency proceedings. Japan was one of the 36 States' members of UNCITRAL. The General Assembly of United Nations adopted Resolution in 1997 in which it recommended to member States to give a favorable consideration to the model law. Accordingly, Japan became one of the first countries to enact legislation enabling recognition of and provision of assistance in foreign insolvency proceedings pursuant to the model law. In Japan, in 2000, refereeing to the model law, the "Act on Recognition of and Assistance for Foreign Insolvency Proceedings" (Act No.129 of 2000) was enacted which enables the Tokyo District Court to recognize and provide for assistance in respect of foreign insolvency proceedings in Japan. In addition, Japan also reformed the existing domestic insolvency laws in order to adapt them to the new international standard embodied in the model law. In this process, the Civil Rehabilitation Act was enacted and became effective in April 2000. In the law, several provisions dealing with cross-border insolvency were included. The idea of cross-border insolvency was also adopted to the Bankruptcy Act and the Corporate Rehabilitation Act accordingly.

2. Act on Recognition of and Assistance for Foreign Insolvency Proceedings (the "Act")

(1) Basic Principle

The purpose of the Act is to "appropriately give effect to foreign insolvency proceedings in Japan by providing recognition and assistance proceedings in relation to such foreign insolvency proceedings commenced against debtors who engage in international economic activities, with the aim of ensuring liquidation of the assets or economic rehabilitation of such debtors in an internationally coordinated manner" (Article 1 of the Act).

In the Act, the domestic or inward effect of the foreign bankruptcy procedure may be recognized in Japan. Strict territorialism was completely abolished. On the other hand, automatic recognition scheme was not adopted. The Act adopted a scheme in which the court can recognize the foreign proceedings by its decision. The court 's decision of recognition itself does not mean the proceedings are automatically applied to Japan. The court is reserved to have a broad discretion to assist the proceedings in Japan even after the said decision. In the Act, any effect of the insolvency proceedings in the foreign jurisdiction is not directly admitted in Japan, but that is indirectly admitted in

Japan through the decision and orders of Japanese court who is expected to consider perspectives of Japanese domestic laws and Japanese public policy.

The Act is also designed to adjust the several and concurrent insolvency proceedings in the several jurisdictions. Under the strict doctrine of Universalism, only one insolvency proceeding in one jurisdiction is idealized. However, considering the differences of each country's insolvency laws, it is unrealistic to expect only one proceeding in one jurisdiction especially in the case that debtor's assets are in several countries. In light of such reality, the Act acknowledges a possibility of concurrent several proceedings and set forth some provisions to adjust such concurrent proceedings. However, unlike the Model law, Japan adopts a "principal of one proceeding operating for one debtor" where only one main or priority proceeding have priority and the other non-main or secondary proceedings are required to be stayed.

(2) Overview of the rules

Recognition and assistance cases shall be subject to the exclusive jurisdiction of the Tokyo District Court (Article 4 of the Act). The court shall issue an order of recognition of foreign insolvency proceedings if legal requirements are fulfilled (Article 17 of the Act) and if there is no statutory reason to be dismissed (Article 21 of the Act). In the following cases, a petition for recognition of foreign insolvency proceedings needs to be dismissed: where the expenses for recognition and assistance proceedings are not prepaid, where it is obvious that the effect of the foreign insolvency proceedings does not extend to the debtor's property in Japan, where it is contrary to public policy in Japan to render a disposition of assistance for the foreign insolvency proceedings etc. In addition, it is also necessary that a decision to commence the foreign proceedings has already made in the foreign jurisdiction. If not, the petition in Japan may be dismissed (Article 22 of the Act).

The foreign insolvency proceedings need to be equivalent to bankruptcy proceedings, rehabilitation proceedings, reorganization proceedings or special liquidation proceedings in Japan (Article 2 (1) of the Act). This equivalency is decided by the court, weighing various factors. In order to file a petition with the Japanese court for recognition of the foreign insolvency proceedings, any of a domicile, residence, business office or other office of the debtor needs to be in Japan (Article 17(1) of the Act).

One of important characteristics of the Act is that disposition of assistance for foreign proceeding is broadly left to the discretion of the Japanese court. The court may order the suspension of compulsory execution, provisional seizure, or provisional disposition procedures, etc. that have been made against the debtor's property (Article 25 of the Art). If it is necessary in order to achieve the purpose of the recognition and assistance proceeding, upon the petition of an interested person or by its own authority, the court may render a disposition to prohibit a disposition of property and/or any payment and any other

disposition regarding the debtor's business and property in Japan (Article 26(1) of the Act). In addition, if it is necessary, upon petition, the court may issue an order to prohibit all creditors from enforcing compulsory execution, etc. against the debtor's property (Article 28 (1) of the Act). The court has broader discretionary power for assistance for foreign proceedings.

As mentioned above, the Act acknowledges a possibility of concurrent several proceedings and adopts a "principal of one proceeding operating for one debtor" where only one main proceeding is taken priority. A criterion for judging which proceeding has main or priority is important to be considered. In this regard, if a domestic insolvency proceeding already exists for any debtor, such domestic proceeding is basically considered to have priority and the petitions for recognition of foreign insolvency proceedings are rejected (Article 57 (1) of the Act). However, if any of the foreign insolvency proceedings is a primary foreign proceeding and some conditions are met, such foreign proceeding have priority to the domestic proceeding (Article 57 and 59 (1) of the Act). If some foreign insolvency proceedings exist concurrently, petitions for the secondary proceedings are dismissed (Article 62 (1) of the Act) or stayed. The priority foreign proceeding get preference over the secondary proceedings.

3. Legal provisions of insolvency laws relating to International insolvency

(1) Status of foreign nationals

A foreign national or foreign juridical person shall have the same status as a Japanese national or Japanese juridical person, respectively in all proceedings (Article 3 of the Bankruptcy Act, Article 3 of the Civil Rehabilitation Act and Article 3 of the Corporate rehabilitation Act).

(2) Jurisdiction

In the bankruptcy proceeding and civil rehabilitation proceeding, if the debtor is an individual, he or she needs to have a business office, address, residence or property in Japan in order for them to file for the proceeding in Japan. If the debtor is a company, it needs to have a business office or other office or property in Japan in order to do so (Article 4 of the Bankruptcy Act Article 4 of the Civil Rehabilitation Act).

A reorganization case shall be subject to the jurisdiction of the district court that has jurisdiction over the location of a stock company's principal business office (if a stock company has a principal business office in a foreign state, the location of its Japanese principal business office) (Article 5 (1) of the Corporate rehabilitation Act).

(3) Effect to the foreign counties

(a) Effect to foreign property

With the Act, domestic or inward effect of foreign insolvency proceedings is recognized or admitted to some extent. Corresponding to this, international or outward effect of Japanese proceedings is set forth in the insolvency laws. In the Bankruptcy Act, it is stipulated that all property that the bankrupt holds at the time of commencement of bankruptcy proceedings (*irrespective of whether it exists in Japan*) shall constitute the bankruptcy estate (Article 34 of the Bankruptcy Act). In the Civil Rehabilitation proceeding and Corporate Reorganization proceeding, debtor's property (*irrespective of whether it exists in Japan*) shall fall within the purview of trustee or administrator (Article 38 (1) of the Civil Rehabilitation Act, 32 of the Corporate Rehabilitation Act). With the above provisions, it is defined that the Japanese proceedings are technically covering the property located in foreign countries.

(b) Hotchpot rule

If the international or outward effect is affirmed, it comes to be necessary to coordinate or adjust between amount of recovery from foreign property and amount of dividends/payments in domestic procedure. For this, in the Japanese insolvency laws, so to speak, a "hotchpot rule" is adopted. According to the rule, the creditor who has recovered any from foreign property of the debtor may not receive any payment through the Japanese proceeding until any other creditors receive payment up to the same level or at the same proportion as that creditor have received.

(4) Cooperation to foreign proceeding

Japanese insolvency laws have various statutory provisions to provide cooperation and information necessary for the proper implementation of foreign insolvency proceedings (Chapter 11 of the Bankruptcy Act, Chapter 11 of the Civil Rehabilitation Act, Chapter 10 of the Corporate Rehabilitation Act).

Ⅲ. Issues in Maritime Insolvency

Based on the above, some issues inherent to maritime insolvency are overviewed below:

1. Maritime Lien

If a shipping company is insolvent and the company has a certain ship as its property, the creditor may examine a possibility or a chance to exercise the maritime lien over the ship and arrest her in order to recover money on a

preferential basis. In Japan, under the Bankruptcy Act and the Civil Rehabilitation Act, a maritime lien is categorized in the "right of separate satisfaction" and technically can be executed against the ship outside the framework of the said proceedings.

However, in order to execute the maritime lien, the maritime lien needs to be created and be effective under its applicable or governing law. What kind of security right is categorized in the “right of separate satisfaction” is a matter of rules and regulations. Under the principle that the lex fori still govern such procedural issues, if the execution procedure of any right is held in Japan, Japanese law is applicable and whether the right is categorized in the “right of separate satisfaction” or not is decided in accordance with Japanese law. From a legal point of view in Japan, a maritime lien can be executable as the right of separate satisfaction. If the Maritime lien exists and any claimant file for its execution in Japan, the claimants is technically able to arrest the ship even if the shipowner is in the proceeding of bankruptcy or civil rehabilitation. However, on the premise of that, the maritime lien needs to exist and be effective under the applicable substantive law. The critical issue is which law is applicable to the maritime lien as the substantive law. In Japan, this issue is very much controversial. Various theories have been put forward such like; (a) flag state law, (b) law applicable to the secured claim (claim law), (3) Lex fori, (4) multiple application of flag state law and claim law and (5) multiple application of claim and lex fori. There are divisions of opinion even among the Japanese courts. Recently, (4) and (5) ideas become prevailing. However, we need to note that there is no authorized idea in Japan at this stage.

Assuming the Japanese law is applied as the substantive law relating to the maritime lien, the maritime lien against any ship can be created and effective just under Article 95 (1) [1]of Act on Limitation of Shipowner Liability, Article 842[2] of Commercial Code or Article 40 (1)[3] of Act on Liability for Oil Pollution Damage. Under Japanese law, a maritime lien is a type of statutory

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[1] Article 95 (1) of Act on Limitation of Shipowner Liability
“A person holding a claim subject to limitation (only loss or damage of property) holds a statutory lien over the Ship involved in the accident, its equipment, and freight charges yet to be received, as regards that claim.”

[2] Article 824 of Commercial Code (noted: abstract and free translation)
“A person holding the following claim holds a statutory lien over the ship, its equipment:
(1) claim based on damages resulting from a loss of life, personal injury, occurred in direct connection with the operation of a ship.
(2) claim for salvage, contribution of GA.
(3) claim for port and other due, pilotage, towage.
(4) a claim arising from the necessity of continuing a voyage.
(5) a claim held by the ship's captain or another mariner arising from an employment contract

[3] Article 40 (1) of Act on Liability for Oil Pollution Damage
The claimant of the limited claim pertaining to Tanker Oil Pollution Damage has maritime lien on the ship pertaining to the accident, its equipment and the freight that has not been received.

lien which can be created and effective only based on statutory provision(s). A creditor whose claim is categorized in any of the claims under the said laws can have a maritime lien against the ship and then the creditor can execute the right in Japan as the right of separate satisfaction even if the shipowners has filed for bankruptcy or civil Rehabilitation in Japan.

In the case that the shipowners has filed for the Cooperate Rehabilitation in Japan, after the commencement order of the proceeding is issued, the creditor is not allowed to execute its maritime lien over the subject ship owned by the distressed shipowners in Japan. As mentioned above, a claim with security right including maritime lien is treated as a "secured reorganization claim" in the corporate rehabilitation proceeding. Such claim is not basically allowed to be executed on any property of the reorganization company (Article 50(1) of the Corporate Rehabilitation Act). Even if the arrest is made against any ship owned by the distressed shipowners before the issuance of the commencement order of the proceeding, when a petition for reorganization proceedings is filed, the court, when it finds it necessary, upon the petition of an interested person or on its own discretion, can issue a stay order for the arrest procedure if its stay order is not likely to cause undue damage to the creditor (Article 24 (1) of the Corporate Rehabilitation Act). With the stay order, the arrest procedure is hung up until the commencement order is issued. if the commencement order is actually issued, the stayed arrest procedure is required to be halted (Article 50 (1) of the Corporate Rehabilitation Act) while the commencement order is failed to be issued, the arrest procedure goes off.

2. Withdrawal of a ship

When a charter party is concluded between the owners and the charterers and the charterers become insolvent, the owners may examine a possibility to withdraw their ship from the charter.

If the charterers have failed to make punctual payment of an installment of hire, the owners are entitled to withdraw the ship subject to the clause of the charter party[4]. On the premise that the contractual conditions are fulfilled, the owners can successfully exercise such right to withdraw the ship from the charter if the punctual payment was failed before commencement of the insolvent proceedings. The claim of unpaid hire is respectively treated as the bankruptcy claim, rehabilitation claim or reorganization claim in each proceeding.

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[4] NYPE93 line 145-148

"Failing the punctual and regular payment of the hire, or on any fundamental breach whatsoever of this Charter Party, the Owners shall be at liberty to withdraw the Vessel from the service of the Charterers without prejudice to any claims they (the Owners) may otherwise have on the Charterers."

On the other hand, in the case that hire has been paid punctually before the commencement of procedure and non-payment occurred after that, it is basically difficult for the owners to exercise the contractual right to withdraw the ship from the charter. Under the insolvency laws, the charter party is basically treated as a "bilateral contract in which both parties' obligations have not been completely performed" (Article 53 [5]of the Bankruptcy Act, Clause 49 of the Civil Rehabilitation Act, Clause 61 of the Corporate Rehabilitation Act) and under the laws the trustee or the debtor, depending on the type of proceedings, may decide on whether they may terminate the contract or perform its obligation in order to continue the contract. If the decision is not made on a timely basis, the courter party may set a reasonable deadline and require the trustee or the debtor to make the decision on or before the deadline. If they miss the deadline, it shall be deemed that the contract is terminated. In such case, through the deemed termination of the Charter Party, Owners can eventually withdraw the ship. Logically speaking, if the withdrawal clause is in the charter party, the Owners may be contractually and substantively entitled to withdraw the ship at any time when the hire is not punctually paid by the Charterers even after the commence of the procedures. However, in the insolvency proceedings, if we strictly stick to consequences led under the substantive law or contract relationship, legislative purposes of the insolvency laws cannot be well achieved. Therefore, in the insolvency legal systems, the normal substantive law is amended to some extent. In the case of a bilateral contract (including charter party) in which both parties' obligations have not been completely performed, as there are clear provisions in all insolvency laws (Article 53 [6]of

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[5] Article 53 of Bankruptcy Law

"(1) If both the bankrupt and his/her counter party under a bilateral contract have not yet completely performed their obligations by the time of commencement of bankruptcy proceedings, a bankruptcy trustee may cancel the contract or may perform the bankrupt's obligation and request the counter party to perform his/her obligation.

(2) In the case referred to in the preceding paragraph, the counter party may specify a reasonable period and make a demand on a bankruptcy trustee that he/she should give a definite answer within that period with regard to whether he/she will cancel the contract or request the performance of the obligation. In this case, if the bankruptcy trustee fails to give a definite answer within that period, it shall be deemed that he/she cancels the contract.

(3) The provision of the preceding paragraph shall apply mutatis mutandis where the counter party or a bankruptcy trustee may give a notice of termination pursuant to the provision of the first sentence of Article 631 of the Civil Code or cancel the contract pursuant to the first sentence of Article 642(1) of said Code."

[6] Article 53 of Bankruptcy Law

"(1) If both the bankrupt and his/her counter party under a bilateral contract have not yet completely performed their obligations by the time of commencement of bankruptcy proceedings, a bankruptcy trustee may cancel the contract or may perform the bankrupt's obligation and request the counter party to perform his/her obligation.

(2) In the case referred to in the preceding paragraph, the counter party may specify a reasonable period and make a demand on a bankruptcy trustee that he/she should give a definite

the Bankruptcy Act, Article 49 of the Civil Rehabilitation Act, Article 61 of the Corporate Rehabilitation, the contractual rule and substantive law is amended in accordance with those provisions and the shipowners' contractual right of ship withdrawal is restricted to that extent. In conclusion, when non-payment occurred after the commencement of insolvency proceedings, the charter party is simply treated as a "bilateral contract in which both parties' obligations have not been completely performed" where the trustee or the debtor can have an option on which the contract is terminated or performed.

In the above-mentioned case of the "bilateral contract in which both parties' obligations have not been completely performed", there is an argument on which law is applicable to the trustee or the debtor's decision of whether terminate or perform the contract. This issue is assumed to be prominent in the case that there are a several concurrent insolvency proceedings and the trustee or the debtor's decisions are different in some jurisdictions. In this regard, there is no precedent to judge the issue in Japan, but it is widely considered that the issue should be decided in accordance with laws in the jurisdiction of the priority proceeding. Based on this idea, if the priority proceeding is Japanese insolvency proceeding, the issue is decided in accordance with rules under the Japanese insolvency laws (Article 53 of the Bankruptcy Act, Clause 49 of the Civil Rehabilitation Act, Clause 61 of the Corporate Rehabilitation Act).

3. Voyage abandonment

When a shipowner go out of business, the shipowner may be unable to continue voyage with the ship and further voyage can be abandoned.

In many cases, some shipping or logistic companies are involved in a voyage as space charterers and/or logistic companies as NVOCC. They normally have contracts of carriage of good by sea with cargo interests and issue their own bills of lading to the cargo. When the voyage is abandoned by the shipowners, space charterers and logistic companies may examine a possibility of legal or contractual abandonment of further carriages without taking any responsibility. In this regard, the bill of lading normally has so-called a "abandonment clause" or similar clause [7], in which the carrier may be entitled

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answer within that period with regard to whether he/she will cancel the contract or request the performance of the obligation. In this case, if the bankruptcy trustee fails to give a definite answer within that period, it shall be deemed that he/she cancels the contract.

(3) The provision of the preceding paragraph shall apply mutatis mutandis where the counter party or a bankruptcy trustee may give a notice of termination pursuant to the provision of the first sentence of Article 631 of the Civil Code or cancel the contract pursuant to the first sentence of Article 642(1) of said Code."

[7] Clause 10 (1) of JIFFA (Japan International Freight Forwarders Association Inc.)

"If at any time the performance of the Carriage hereunder is or is likely to be affected by any hinderance, danger or disturbance of whatever kind which cannot be avoided by exercise of

to terminate the contract of carriage of goods by sea and/or abandon the voyage without taking any responsibility when the voyage or carriage is hindered by disturbance of whatever kind which cannot be avoided by exercise of reasonable endeavors by the carrier. The space charters or logistics companies may try to enjoy such clause, if any, in the bill of lading.

There is no precedent in Japan to clearly judge the effectiveness of such clause in the bill of lading. However, a doctrine of change of circumstances may be referable. This doctrine is a similar principal of doctrine of frustration in which contract may be discharged on the ground of frustration when something occurs after the formation of the contract which renders it physically or commercially impossible to fulfil the contract or transforms the obligation to perform into a radically different obligation from that undertaken at the time of the entry into the contract. It is not sure whether abandonment of a voyage due to the insolvency of the shipping company falls under the relevant doctrine. But this doctrine may be referable when the said issue is considered.

4. Cancelation of shipbuilding contract

In a shipbuilding contract, it is also worth considering whether the shipowner who has ordered the shipbuilding has the right to cancel or terminate the contract in the event that the shipyard goes insolvency. In this regard, a shipbuilding contract is treated as a bilateral contract in which both parties' obligations have not been completely performed and, like the charter party, the trustee or the debtor can have an option on which they terminate the contract or perform its contractual obligation to continue the contract.

In general, in the shipbuilding contract, there is a termination clause in which the other contracting party can cancel or terminate the shipbuilding contract if the shipyard has filed for commencement of any of insolvency proceedings. If this clause is valid and binding, the owners can terminate the contract without waiting for the decision of the trustee or the debtor relating to whether the contact is performed or terminated. It is however generally considered that effect of the clause is restricted or denied in the course of insolvency proceedings. In actual, there are precedents in Japan that denied the effect of the termination clause[89] in the case of the civil rehabilitation and corporate rehabilitation. If the shipowners wish to terminate the shipbuilding contract, the shipowners may be required to follow the legal manner set by laws

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reasonable endeavors, the Carrier may, whether or not the Carriage is commenced, without notifying the Merchant, treat the Carriage as terminated and discharge, land, store or take at the Merchant's disposal at any place or port which the Carrier may deem safe and convenient whereupon the responsibility of the Carrier in respect of such Goods hereunder, and the Carrier shall be discharged from any further responsibility of the Goods."

8 Supreme Court Decision on 30th March 1982 Minshu 36-3-483

9 Supreme Court Decision on 16th December 2008 Minshu 62-10-2561

and, in particular, to set a reasonable deadline and require the trustee or the debtor to make the decision on or before the deadline. If they missed the deadline, it shall be deemed that the shipbuilding contract is (Article 53 (2) of the Bankruptcy Act, Article 49 (2) of the Civil Rehabilitation Act and Article 61 (2) of the Corporate Rehabiiation Act).

IV. CONCLUSION

The issues relating to maritime insolvency are not limited to the above and various further issues may develop or present. Studies about maritime insolvency from academic points of view and from practical points of view has not made enough in Japan. we believe that further and deeper investigation and studies would be required.

On the other hand, as mentioned in the beginning of this article, it should be important for us to enhance the mutual understanding about legal frameworks of maritime insolvency laws between the relevant counties in the circumstances that international insolvency case can occur in the shipping industry.

This article is written to contribute such understanding by introducing the legal frameworks of Japanese insolvency laws and by examining some maritime insolvency issues.

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The Shipping Competition Practice in China: Policy, Regulation and Cases

Zhu-Zuoxian *

ABSTRACT

Despite the Chinese competition regulation extended to the shipping industy and uniform competition policy applied to the shipping industry with some exemption, it is believed the exemption will be narrower. So it is important for China to take a look at denouncing the *Liner Conference Convention*. Also, the economic analyses should be accompanied with the shipping competition development. Like maritime law, the shipping competition regulation should include broad competition between different authorities from different nations. Finally, the anti-monopoly measure need to be carefully managed, especially acknowledging the complexity of economic theory.

KEYWORDS: Chinese competition regulation, uniform competition policy, Liner Conference Convention.

* Professor, Dalian Maritime University Law School; Attorney and Counselor at Law

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I. Introduction: different competition policy for shipping?

Regarding the competition policy, there are different opinions about whether shipping industry should be treated differently. Naturally, in China the cargo owners strongly oppose the viewpoint of the shipping companies that the shipping industry should enjoy the exception to the general competition policy. According to the provisions of *Anti-Monopoly Law of PRC*, it seems that the shipping industry should be equally treated as others because there are only two exceptions to this law which are the conduct of business operators to exercise their intellectual property rights [1] and the ally or concerted actions of agricultural producers and rural economic organizations. [2] However, some people advocate that shipping industry be treated differently and their main reasons are as follows: (1)The outstanding feature of shipping is its international nature, and many maritime countries remain the traditional and special competition regime for international shipping, i.e. exception to the general competition policy; (2)Besides *Anti-Monopoly Law,* there have been some other important laws applicable to international shipping such as *Convention on a Code of Conduct for Liner Conferences 1974* and *Regulation on International Ocean Shipping of PRC* which could represent the exception to general competition policy.

II. The shipping competition regulation in China

2.1 The relevant legislation

According to the relevant provisions of *Anti-Monopoly Law of PRC* which

[1] See Article 55 of Anti-Monopoly Law.
[2] See Article 56 of Anti-Monopoly Law.

comes into effect as of August 1, 2008, only the conduct of business operators to exercise their intellectual property rights and the ally or concerted actions of agricultural producers and rural economic organizations are excluded from it coverage. Therefore, the most important legislation regulating the shipping competition is *Anti-Monopoly Law.* The other important laws with respect to the shipping competition are *Regulation on International Ocean Shipping of PRC* (hereinafter referred to as "RIOS") and its detailed rules for the implementation. Now two points should be stressed with respect to RIOS: (1) it came into effect as of January 1, 2002 when *Anti-Monopoly Law* didn't exist yet, therefore, the coordination of their provisions seems to be somewhat difficult; (2) it is actually the law of industrial management which covers not only competition issue but also many other issues of management such as market access. Anyway, the regulation on competition of international shipping is its core purpose which is expressly embodied in Article 1 of this law: "*This Regulation have been enacted in order to normalize the activities of international ocean shipping, to protect fair competition, to maintain the order of the international ocean shipping market and to guarantee the lawful rights and interests of the parties to international ocean shipping.*"

2.2 The relevant authorities

According to *Anti-Monopoly Law,* there exists Anti-monopoly Commission in State Council whose function is to organize, coordinate and guide the anti-monopoly work. It means Anti-monopoly Commission doesn't perform anti-monopoly regulation work itself. In March of 2018, according to institutional reform of the State Council, the anti-monopoly work uniformly belongs to State Administration for Market Regulation which establishes Anti-monopoly Bureau. Before that time, the anti-monopoly work has been performed for about ten years by three different institutions vividly described as "Three Carriages" which individually refers to National Development and Reform Commission, Ministry of Commerce and State Administration for Industry and Commerce. It is believed that the unified enforcement of anti-monopoly be a good thing which could avoid the unnecessary conflict.

According to RIOS, the department in charge of transportation under the State Council (i.e. Water Transport Bureau under Ministry of Transport) shall also have the jurisdiction of investigating and making the administrative penalty on the relevant activity which limits or distorts the competition in the international shipping market. However, it should be noted that such investigation on anti-competitive act shouldn't be carried out by Water Transport Bureau solely and Article 29 of RIOS expressly provides that "*The department in charge of transportation under the State Council shall conduct the investigations jointly with the market regulatory department of the State*

Council (hereinafter referred to as the investigation departments". Such provision means the power of regulating on shipping competition which is under the scope of RIOS[3] will be shared by both Water Transport Bureau and Anti-monopoly Bureau now. Moreover, Water Transport Bureau will have no power of regulating the relevant issues of shipping competition which are outside of the scope of RIOS, such as Undertakings Concentration, Anti-monopoly on port and so on.

III. The Relevant Cases

There have been some important reported cases regarding shipping competition which cover the monopoly agreement, abuse of dominant position and undertaking concentration from the year of 2002. Some of them are very famous or influential in China, even in the world such as *P3 alliance, refusal to transport goods by MAERSK LINE, THC dispute.* Apparently, these cases couldn't be discussed in detail in this paper, the focus will be only on some main issues and a very brief comments will be made.

3.1 The Monopoly Agreement

Case 1: THC Dispute

THC refers to terminal handling charges which is collected by the container carrier because the carrier has paid the relevant charges to the port operator. In December, 2001, almost at the same time, some famous shipping organizations including TSA, WTSA, IADA, FEFC declared that their members will collect THC from the cargo owner at Chinese ports on 15th January,2002 and the declared amount of THC is almost the same. *China Shipper's Association* claimed that the act of such shipping organizations and the relevant liner shipping companies violated *Convention on a Code of Conduct for Liner Conferences 1974* and *Regulation on International Ocean*

[3] The provisions of Article 28 reads as follows: *The department in charge of transportation under the State Council may, based on the request of the interested persons or its own decision, conduct investigations with respect to the following situations:(1) The liner conference agreement, operation agreement, or freight rate agreement, etc. signed between the international shipping operators engaged in international liner shipping may impair fair competition;(2) For various kinds of associations generated through the agreements signed by the international shipping operators engaged in international liner shipping, the shipping share of a sea route involving Chinese ports has continuously exceeded 30% of the shipping volume of that sea route for a year, and may impair fair competition;(3) Any action as prescribed in Article 21 of these Regulations;(4) Other actions that may impair fair competition on the international ocean shipping market.*

Shipping of PRC. After more than three years, the investigation organ delivered its conclusion, the two following points should be stressed:

(1) In light of *Liner Conference Convention* and RIOS, it is considered that the liner conference and the international liner shipping operator have the right of collectively concluding the price agreement subject to no prejudice to the fair competition and international shipping market order. Moreover, such agreement should be put on record to Ministry of Transport of PRC.

(2) By way of joint notification or announcement, the liner conference and freight rate agreement organization has declared that THC will be collected with the same standard at the same time in China according to collective agreement. Because these notifications or announcements don't declare the decision of collecting THC has no binding effect on the members(namely, the members should have the independent right), the objective outcome is that the freedom of electing the carrier by the shipper is limited. Therefore, the normal price competition between liner companies is prejudiced, to some extent also is the international shipping market order.

As we know, from the perspective of competition law, price-fixing agreement concluded between competitors belongs to hard core cartel which should be prohibited and severely punished. The THC dispute above mentioned is actually about the price-fixing agreement. However, due to the member to *Liner Conference Convention*, Chinese investigation organ had to recognize the legality of such activity whose purpose is to unify the THC rate by the relevant liner conferences. However, it is a legal paradox that such price-fixing agreement shouldn't prejudice the "fair competition" which is required by the conclusion of the investigation organ at the same time. Additionally, the requirement that the conference member should have the independent right isn't in accordance with *Liner Conference Convention* itself. As we know, such independent right is required by the US Shipping Act 1984 whose logic of regulating liner shipping market is totally different from that of the *Liner Conference Convention*.

In this case, it is noted that China Shipper's Association also asserted that activity of collecting THC constituted the abuse of the dominant position by the liner companies, for example, they stated that if the relevant consignor didn't agree to pay for THC, the liner carrier usually would decline to issue B/L after the cargo was loaded, or decline to release the relevant goods at the destination. Such argument wasn't accepted by the relevant investigation organ at this investigation. Actually, the controversies of THC never calm down in China even after above mentioned investigation. However, today the circumstances under which THC dispute arises is totally different now. In the case above mentioned, the essence of THC dispute is regarding whether the liner conference could unify the THC rate and which conditions should be satisfied when unifying the THC rate. Today, the liner conferences almost disappear in the shipping market which are replaced by shipping alliances while the latter

never do such thing as concluding price-fixing agreement. So, one theory against THC arises that is so-called *abuse of advantaged position by the liner carrier* who is considered to have advantaged position to force the consignor, shipper or consignee pay the THC even if no carriage contract existing between them (for example, the FOB seller) . It seems that some Chinese anti-monopoly authority tends to accept such theory. For example, in the year of 2017, there was another investigation on THC by National Development and Reform Commission which considered that THC collected by the relevant liner shipping companies at Chinese ports was usually too high compared with the real cost and then required the liner shipping companies operating in Chinese shipping market should reduce their THC rate. Such decision is based on the abuse of advantaged position rather than the abuse of dominant position.

Case 2: The Collusion between Ro-Ro Carriers[4]

There are eight shipping companies involved in this case which *Nippon Yusen Kabushiki Kaisha* (NKY), *Kawasaki Kisen Kaisha, Ltd., Mitsui O.S.K. Lines, Ltd., EUKOR Car Carriers Inc., Wallenius Wilhelmsen Logistics., COMPANIA SUD AMERICANA DE VAPORES S.A., Eastern Car Liner Ltd.* and *Chile Shipping Rolling Shipping Co., Ltd.* In fact, these companies has been imposed fines for their collusion with respect to biding price of transportation by several competition authorities from different countries. Therefore, the result of administrative penalty on these shipping companies decided by National Development and Reform Commission could be expected.

Case 3: Monopoly Agreement Concluded by Towing Companies at Shenzhen Port[5]

This case concerns four towing companies whose operations exist different harbor district at the area of Shenzhen port. The investigation carried out by the anti-monopoly authority has determined the fact as follows:

> "The parties who are the towing companies located at the area of Shenzhen Port began to have the meeting regularly or irregularly at least from the year of 2010. On the one hand, they communicated the general trend of towing charge in order to keep it basically same; on the other hand, they would communicate the issue of charging some particular shipping company in order to keep basically same negotiating tactic."

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[4] The Decision on Administrative Penalty [2015] NO.1-8 by National Development and Reform Commission.

[5] Guo Shi Jian Jia Jian Penalty[2018] No.1-4.

The core issue of this case is regarding whether there exists "competitive relationship" between the four companies because Article 13 of Anti-monopoly expressly requires that the monopoly agreement must be concluded between the operators who have competitive relationship. However, on the face of it, the operation district of each towing company permitted by the business license belong to different harbor district which doesn't coincide. The anti-monopoly authority still held that there existed the competitive relationship mainly due to the following reasons:

> "The each harbor district is so near that the relevant operators regarding harbor district face fierce market competition. Then such competition between harbor districts will pass to their affiliated towing companies."

In my viewpoint, there must exist the competitive relationship, or, there will be no reasonable explanation for the negotiation of towing fee between them. However, maybe the anti-monopoly authority need further explore whether the operators of the relevant harbor district were also involved in such activity because the relevant towing companies were only their affiliated enterprises.

Case 4: Monopoly Agreement of Price Concluded by Container Yards in Tianjin Port[6]

This case is decided by Tianjin City Development and Reform Commission on 16 November, 2018. It is found that there are 27 operators of container yard who concluded and implemented the price monopoly agreement since the year of 2010. The case is the best distinguished about different penalties against the different companies in one activity the amount of which is from 5%, 3%, 2.5% or 2% of whole sales in the previous year to the exemption from the punishment. The exemption is given to the company who has voluntarily confesses the information about the monopoly agreement and provides the important evidence.

3.2 The Abuse of Dominant Position

Case 5: Carriage Refusal by MAERSK Line [7]

The main controversy of this case is how to understand the relevant provisions of *The Contract Law of PRC., i.e.* Article 289 which provides: *A public carrier may not deny any normal and reasonable carriage requirement by a passenger or consignor.* This case has been tried by Xiamen Maritime Court, Fujian Province High People's Court and the Supreme People's Court in sequence. The important passage of the judgment delivered by the Supreme

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[6] Jin Fa Gai Jia Jian Chu Decision [2018] No. 69-85.

[7] The Judgment (2010) Min Ti Zi No. 213.

People's Court is as follows:

> "The public carriage means the transportation service for the society by one public utility which has the status of monopoly……The international liner shipping is the commercial operation serving the international trade which doesn't belong to public utility and doesn't have the feature of public interest. Currently, no matter in one district of the world or all over the world, there is fierce competition about the international liner shipping, and no monopoly exists."

This judgment delivered by the Supreme People's Court clarifies that the legislative original meaning of "public carrier" under The Contract Law is different from that of "common carrier" under Anglo-American Law. So, under Chinese law the liner shipping company doesn't have the mandatory obligation to accept the offer for shipping goods by the shipper. Conversely, it will have the right of deciding whom to contract with by the doctrine of freedom of contract. I agree with such conclusion. However, it seems somewhat arbitrary to decide that no monopoly exist under the liner shipping market without any further in-depth economic analysis.

Case 6: Anti-monopoly Investigation On Shanghai Port and Tianjin Port

National Development and Reform Commission made the anti-monopoly investigation on Shanghai Port and Tianjin Port in April of 2017 who required that all the 39 coastal ports should examine their activities themselves and rectify any anti-monopoly activities. This is the first time that the port operators were investigated by the anti-monopoly authority in China. Some people once thought the area of port operation should be determined as the exception to the general anti-monopoly law because of being natural monopoly. It is proved to be wrong in light of this investigation. According to the investigation, the port activities which seemed to be in breach of *Anti-monopoly Law* are as follows:

(1)Limitation on the election of some services, i.e. the shipping companies are required to use the services about tug, tallying, shipping agency and so on provided by its affiliated companies.

(2)Charging the local exporting container much more loading or discharging fee than the international transshipment container because there is no competition with respect to the former whereas there usually exists full competition regarding the latter.

(3)Existing some forced transaction conditions which are unreasonable such as unstuffing and tallying, no-compete clause, loyalty clause and so on.

3.3 Undertakings Concentration

Case 7: P3 Alliance[8]

P3 alliance case is very famous in the world which is decided by Anti-monopoly Bureau of Commerce Ministry in the year of 2014. As we know, P3 refers to three biggest container shipping liner companies at that time which are Maersk Line, Mediterranean Shipping Co., CMA CGM.

On 17th June, 2014, the Ministry of Commerce of PRC denied the plan of P3 alliance which was the first time to prohibit the concentration of business operators all of who were foreign companies by employing *The Anti-monopoly Law*. Especially, such decision was made under the circumstance that the relevant competition authorities of USA and EU had indicated that they wouldn't intend to stop P3 alliance plan. The reasons of Ministry of Commerce could be summarized as follows:

(1) Mainly due to the planned network center which will be established to serve P3 operation, the P3 alliance is regarded as close joint-operation which belongs to one type of undertakings concentration. Therefore, Ministry of Commerce has acquired the jurisdiction to examine it according to *The Anti-monopoly Law.*

(2)Their overall market share of these three companies amounts to 46.7 per cent of global capacity.

(3)Before the transaction of P3 alliance, The HHI is about 890 with respect to Asia-Europe trade; however, if the transaction of P3 alliance is finished, the HHI will be increased to about 2240. The variable of HHI is 1350, so, the market of Asia-Europe trade will become high concentrated.

(4)Additionally, the transaction may drive up the barriers to entry and it is difficult to generate new competitive force as the constraint. By integrating their navigation course and capacity resource, they will increase their control of market, then prejudice the interest of cargo owner and increase the ability of price negotiation with the port by way of such control.

In my viewpoint, the final decision of prohibiting the P3 alliance plan could be welcome. However, the relevant analysis in this decision needs some reflection. For example, should the P3 alliance agreement be examined by the rules with respect to "monopoly agreement" or "Undertakings Concentration"? According to Article 20 of *The Anti-monopoly Law,* The "concentration of business operators" refers to three following circumstances: (1)merger of business operator; (2)a business operator acquiring control over other business operators by acquiring their equities or assets ; (3)A business operator acquiring control over other business operators or is able to exert a decisive influence on other business operators by contract or any other means. Apparently, there is no

[8] The Notice No.46 of the year 2014 by Ministry of Commerce.

actual merger or consolidation about the intended P3 alliance and no equities or assets transferred from one company of P3 to others. And the network center of P3 alliance doesn't stands for one company could control over or exert the decisive influence on the others, either. Therefore, jurisdiction of Ministry of Commerce over this case could be questioned. Moreover, the economic analysis of this case seems somewhat weak. Especially, about calculating HHI assumed that P3 alliance would be formed, it is unreasonable that the P3 alliance is regarded as one entity because the three shipping companies are still independent entities even if they co-operate in the form of the shipping alliance.

Actually, during these years there have occurred many famous concentration cases in the shipping market in China. For example, China COSCO Shipping Corporation Limited is established in the year of 2016 as result of the merger of COSCO and China Shipping which are two biggest shipping companies in China at that time. Such merger passed the examination of Undertakings Concentration. And currently Chinese ports are undergoing the broad consolidation which surely needs the necessary examination by the anti-monopoly authority.

IV. Conclusion

From the above discussion of this paper, the following conclusion can be drawn:

1. It is evident that Chinese competition regulation has been broadly extended to the shipping industry now. And it seems that uniform competition policy has been applied to the shipping industry only with one exception that the international container liner shipping enjoying some exemption of monopoly agreement in China due to *Liner Conference Convention.* However, the scope, content or conditions of such exemption are not very clear, anyway, it is thought that such exemption will become narrower and narrower since liner conferences are almost passing away while the shipping alliances have become dominant in the container liner shipping market. In my personal viewpoint, China should seriously consider whether to denounce this Convention.

2. It should be proud that China has made great achievements with respect to shipping competition in short time. However, it is believed that China need more experience in this area, especially the economic analysis should be reinforced when dealing with the competition issues of international shipping market.

3. Just as maritime law, the shipping competition regulation also need broad cooperation between different authorities from different countries in the world because the uniform rules of shipping competition is very valuable to the operation of shipping companies which is often carried out beyond one national boundary. For example, international community may consider to draw up

Shipping Companies Merger Guideline or *The Guideline on Cooperative Operation by Shipping Companies*.

4. Last but not the least, as we all know the law of economic is also very complicated, therefore, the anti-monopoly measure should be carefully implemented in order to avoid negative consequence of a heavy government hand. Especially, the competition regulation shouldn't be based only on some economic theory which might be proved incorrect very soon. A Chinese saying should be remembered-*A good intention sometime make the matter worse*.

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CASES

Supreme Court Decision 2016Da33752 Decided June 13, 2019【Loan】

【Main Issues and Holdings】

[1] Meaning and standard of determining "substantive relations" in Article 2(1) of the Act on Private International Law

[2] Whether the jurisdictional provision in the Civil Procedure Act becomes the most important criteria for determining international jurisdiction (affirmative)

Whether the defendant's place of residence as the center of his/her interest lies becomes an important matter of consideration (affirmative)

[3] Reason for considering special jurisdiction in international jurisdiction, and, in a case where the defendant's assets are located within the Republic of Korea at the time of the Plaintiff's filing of lawsuit but without direct relevance to the Plaintiff's claim, method of determining international jurisdiction

[4] Standard of determining predictability in international jurisdiction, and in a case where the defendant has a foundation of livelihood or conducts economic activities by acquiring assets in the Republic of Korea, whether the predictability of a lawsuit against the defendant on his/her assets in the court of the Republic of Korea is recognized (affirmative)

[5] Whether international jurisdiction can concurrently exist (affirmative), and whether the Korean court's jurisdiction can readily be denied on the sole ground that the courts in other countries provide better convenience in terms of geography, language, and communications compared to the court in the Republic of Korea (negative)

[6] In a case where: (a) Party A, a Chinese national, who used to run a moneylending business, entered the Republic of Korea with a view to running a business of the same nature; (b) Party B, etc., a couple with Chinese nationality, who used to operate real estate development business in China, took up residence in the Republic of Korea; and (c) Party A brought a suit in the Republic of Korea court against Party B, etc. for the return of the loan it lent back in China, the case holding that the lower court was justifiable to have determined that, in light of the entirety of the circumstances, the foregoing suit is substantively related to the Republic of Korea, and thus, the Republic of Korea court has international jurisdiction

【Summary of Decision】

[1] Article 2(1) of the Act on Private International Law states that "In case a party or a case in dispute is substantively related to the Republic of Korea, a court shall have the international jurisdiction. In this case, the court shall obey

reasonable principles, compatible to the ideology of the allocation of international jurisdiction, in judging the existence of the substantive relations." Here, the term "substantive relations" refers to having relevance with the concerned parties or the disputed matter to the extent that justifies the Korean court's exercise of jurisdiction. Determination of "substantive relations" must be rooted upon reasonable principles compatible to the idea of the allocation of international jurisdiction, including impartiality among interested parties, reasonableness of a trial, and promptness and the judicial economy. More specifically, such determination ought to take account of not only personal interests such as equity among, as well as convenience and predictability of interested parties, but also the interests of the court and the state, including the reasonableness, promptness, efficiency of a trial, as well as the validity of a judgment. As such, there exist various interests of international jurisdiction. Determination on which interests deserve protection ought to be made on the basis of reasonable examination of the existence of "substantive relations" in individual cases.

[2] Article 2(2) of the Act on Private International Law states, "A court shall judge whether or not it has the international jurisdiction in the light of jurisdictional provisions of domestic laws and shall take a full consideration of the unique nature of international jurisdiction in the light of the purport of the provision of paragraph (1)," providing jurisdictional provisions of domestic laws as the specific criteria or method of determining "substantive relations" as prescribed in Parag. (1). As such, jurisdictional provisions in the Civil Procedure Act functions as the most important standard of determining international jurisdiction. However, considering that such jurisdictional provisions pertain to the provisions regarding venue on the domestic front, in some cases involving determination of international jurisdiction, these jurisdictional provisions must be modified and applied to the extent that they align with the idea of the allocation of international jurisdiction by considering the unique nature thereof.

The main text of Article 3 of the Civil Procedure Act stipulates, "General forum of a person shall be determined by his/her domicile," meaning that a place where an interested party keeps a living relation, i.e., the center on which that living relation is based, is the most general and universal source of land jurisdiction. Article 2 of the Civil Procedure Act states, "A lawsuit is subject to the jurisdiction of a court at the place where a defendant's general forum is located." This is because it is compatible to the impartiality of the interested parties in the allocation of jurisdiction to allow the plaintiff to bring a suit at the court within the jurisdiction where the defendant's domicile is located. A defendant's domicile is the center of living relation and is an important matter to be taken into consideration in the matter of international jurisdiction.

[3] Taking into account special jurisdiction in the matter of international jurisdiction is to recognize the jurisdiction of the state that has "substantive

relations" to the disputed issue. Article 11 of the Civil Procedure Act stipulates, "A lawsuit concerning a property right against a person who has no domicile in the Republic of Korea or against a person whose domicile is unknown, may be brought to the court located in the place of the objects of a claim or those of the security, or any seizable property of a defendant." If the defendant's assets remain in the Republic of Korea at the time of the plaintiff's filing of a lawsuit, the plaintiff may bring a suit against the defendant at the Korean court. Upon the ruling in favor of the plaintiff, the court may immediately enforce the judgment to bring the actual result of the trial. As above, if the defendant's assets lie in the Republic of Korea, the Korean court's international jurisdiction may be recognized so as to protect the rights of the interested parties or to ensure the enforceability of the judgment. Nevertheless, indiscriminately recognizing international jurisdiction even in a case where the defendant's assets are accidentally placed in the Republic of Korea may put the defendant at a considerable disadvantage. Therefore, where the plaintiff's claim has no direct relevance to the defendant's assets, the determination of international jurisdiction shall be made by considering the background leading up to the defendant's assets ending up in the Republic of Korea, the value of the pertinent assets, the need to protect the rights of the plaintiff, and the effectiveness of a judgment.

[4] Determination of predictability ought to be made on the basis of whether the defendant could have reasonably predicted the filing of a suit at the court in the relevant jurisdiction because of "substantive relations" between the defendant and the jurisdiction. A defendant, who has an established livelihood in the Republic of Korea or acquires assets and conducts economic activities, can easily foresee the filing of a suit against him/her relating to the assets at the Korean court.

[5] International jurisdiction is not exclusive jurisdiction, but it can exist concurrently with national jurisdiction. The jurisdiction of the Republic of Korea court shall not be readily denied on the sole basis of the fact that courts of other countries provide more convenience than the Republic of Korea court in terms of geography, language, and communications.

[6] In a case where: (a) Party A, a citizen of the People's Republic of China (hereinafter "China"), who used to run a moneylending business, entered the Republic of Korea with a view to running a business of the same nature; (b) Party B, etc., a couple with Chinese nationality, who used to operate real estate development business in China, took up residence in the Republic of Korea; and (c) Party A brought a suit in the Republic of Korea court against Party B, etc. for the return of the loan it lent back in China, the Court held as follows: (a) comprehensively considering the fact that (i) Party B, etc. purchased a real estate property and a car in the Republic of Korea, and possessed and used them; (ii) at the time of the instant lawsuit, Party B, etc. had an established livelihood in the Republic of Korea, raised children, and inhabited the acquired real estate

property; (iii) at the time of the filing of the instant lawsuit, Party A entered the Republic of Korea, had been residing in the Republic of Korea for a considerable period of time, and planned to carry out business activities in the Republic of Korea going forward, it can be considered that both Party A and Party B, etc. laid substantial groundwork for livelihood activities in the Republic of Korea at the time of the filing of the instant lawsuit; (b) after leaving China, Party B, etc. established livelihood in the Republic of Korea and acquired assets, making it difficult to assume that Party B, etc. did not possibly foresee the filing of the instant lawsuit against themselves at the Republic of Korea court; (c) since Party B, etc. possessed assets including real estate property and a car in the Republic of Korea, which Party A held under provisional seizure, Party A had a practical interest in filing a suit at the Republic of Korea court to seek valid enforcement of the claim; (d) considering the fact that (i) Party A, a Chinese national, sought a trial by showing an explicit intent to be tried at the Republic of Korea court against Party B, etc., who are also Chinese nationals; (ii) Party B, etc. filed a countersuit by appointing a legal representative in the Republic of Korea; (iii) practical proceedings and deliberation took place with regard to the merits of the case for a considerable period of time; (iv) the facts that require attestation in the instant case can be proven through the evidentiary document, such as a contract or the history of account transfer records, and do not necessarily require an investigation in China; (v) whereas pursuing a litigation in the Republic of Korea may not be deemed considerably disadvantageous to Party B, etc., denying international jurisdiction of the Republic of Korea court and bringing the case back to the Chinese court for deliberation would seriously undermine judicial economy; (e) the concepts of international jurisdiction and applicable law are governed by different ideologies, and thus, the substantive relations between the foregoing lawsuit and the Republic of Korea court may not be readily denied on the sole basis of the fact that the law applicable to the legal relation of the foregoing case is the Chinese law; (f) taking these matters into account, the lower court was justifiable to have determined that the foregoing lawsuit was substantively related to the Republic of Korea, and therefore, the Republic of Korea court had international jurisdiction.

【Reference Provisions】 [1] Article 2(1) of the Act on Private International Law / [2] Article 2 of the Act on Private International Law; Articles 2 and 3 of the Civil Procedure Act / [3] Article 2 of the Act on Private International Law; Article 11 of the Civil Procedure Act / [4] Article 2(1) of the Act on Private International Law / [5] Article 2(1) of the Act on Private International Law / [6] Article 2 of the Act on Private International Law

Article 2 of the Private International Law (International Jurisdiction)

(1) In case a party or a case in dispute is substantively related to the Republic of Korea, a court shall have the international jurisdiction. In this case, the court shall obey reasonable principles, compatible to the ideology of the allocation of international jurisdiction, in judging the existence of the substantive relations.

(2) A court shall judge whether or not it has the international jurisdiction in the light of jurisdictional provisions of domestic laws and shall take a full consideration of the unique nature of international jurisdiction in the light of the purport of the provision of paragraph (1).

Article 2 of the Civil Procedure Act (General Forum)

A lawsuit is subject to the jurisdiction of a court at the place where a defendant's general forum is located.

Article 3 of the Civil Procedure Act (General Forum of Person)

General forum of a person shall be determined by his/her domicile: *Provided*, That where the person has no domicile in the Republic of Korea or his/her domicile is unknown, it shall be determined pursuant to his/her residence, and if the residence is unfixed or unknown, it shall be determined pursuant to his/her last domicile.

Article 11 of the Civil Procedure Act (Special Forum of Location of Property)

A lawsuit concerning a property right against a person who has no domicile in the Republic of Korea or against a person whose domicile is unknown, may be brought to the court located in the place of the objects of a claim or those of the security, or any seizable property of a defendant.

【Reference Cases】 [1] Supreme Court Decision 2002Da59788 (Gong2005Sang, 294) decided Jan. 27, 2005; Supreme Court Decision 2006Da71908, 71915 decided May 29, 2008

【Plaintiff-Appellee】 Plaintiff (Chinese name omitted) (Kyungin-Law, Attorney Lee Deok-mo, Counsel for the plaintiff-appellee)

【Defendant-Appellant】 Defendant 1 (English name omitted) and one other (Attorney Ko Chang-hoo, Counsel for the defendant-appellant)

【Judgment of the court below】 Gwangju High Court Decision (Jeju) 2014Na1166 decided July 6, 2016

【Disposition】 All final appeals are dismissed. The costs of final appeal are assessed against the Defendants.

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

1. Regarding misapprehension of legal principle concerning

international jurisdiction

A. Standard of determining international jurisdiction

(1) Article 2(1) of the Act on Private International Law states that "In case a party or a case in dispute is substantively related to the Republic of Korea, a court shall have the international jurisdiction. In this case, the court shall obey reasonable principles, compatible to the ideology of the allocation of international jurisdiction, in judging the existence of the substantive relations." Here, the term "substantive relations" refers to having relevance with the concerned parties or the disputed matter to the extent that justifies the Korean court's exercise of jurisdiction. Determination of "substantive relations" must be rooted upon reasonable principles compatible to the idea of the allocation of international jurisdiction, including impartiality among interested parties, reasonableness of a trial, and promptness and the judicial economy. More specifically, such determination ought to take account of not only personal interests such as equity among, as well as convenience and predictability of interested parties, but also the interests of the court and the state, including the reasonableness, promptness, efficiency of a trial, as well as the validity of a judgment. As such, there exist various interests of international jurisdiction. Determination on which interests deserve protection ought to be made on the basis of reasonable examination of the existence of "substantive relations" in individual cases (*see, e.g.,* Supreme Court Decisions 2002Da59788, Jan. 27, 2005; 2006Da71908, May 29, 2008; 2006Da71908, 71915, May 29, 2008).

Article 2(2) of the Act on Private International Law states, "A court shall judge whether or not it has the international jurisdiction in the light of jurisdictional provisions of domestic laws and shall take a full consideration of the unique nature of international jurisdiction in the light of the purport of the provision of paragraph (1)," providing jurisdictional provisions of domestic laws as the specific criteria or method of determining "substantive relations" as prescribed in Parag. (1). As such, jurisdictional provisions in the Civil Procedure Act functions as the most important standard of determining international jurisdiction. However, considering that such jurisdictional provisions pertain to the provisions regarding venue on the domestic front, in some cases involving determination of international jurisdiction, these jurisdictional provisions must be modified and applied to the extent that they align with the idea of the allocation of international jurisdiction by considering the unique nature thereof.

(2) The main text of Article 3 of the Civil Procedure Act stipulates, "General forum of a person shall be determined by his/her domicile," meaning that a place where an interested party keeps a living relation, i.e., the center on which that living relation is based, is the most general and universal source of land jurisdiction. Article 2 of the Civil Procedure Act states, "A lawsuit is subject to the jurisdiction of a court at the place where a defendant's general forum is located." This is because it is compatible to the impartiality of the

interested parties in the allocation of jurisdiction to allow the plaintiff to bring a suit at the court within the jurisdiction where the defendant's domicile is located. A defendant's domicile is the center of living relation and is an important matter to be taken into consideration in the matter of international jurisdiction.

Taking into account special jurisdiction in the matter of international jurisdiction is to recognize the jurisdiction of the state that has "substantive relations" to the disputed issue. Article 11 of the Civil Procedure Act stipulates, "A lawsuit concerning a property right against a person who has no domicile in the Republic of Korea or against a person whose domicile is unknown, may be brought to the court located in the place of the objects of a claim or those of the security, or any seizable property of a defendant." If the defendant's assets remain in the Republic of Korea at the time of the plaintiff's filing of a lawsuit, the plaintiff may bring a suit against the defendant at the Korean court. Upon the ruling in favor of the plaintiff, the court may immediately enforce the judgment to bring the actual result of the trial. As above, if the defendant's assets lie in the Republic of Korea, the Korean court's international jurisdiction may be recognized so as to protect the rights of the interested parties or to ensure the enforceability of the judgment. Nevertheless, indiscriminately recognizing international jurisdiction even in a case where the defendant's assets are accidentally placed in the Republic of Korea may put the defendant at a considerable disadvantage. Therefore, where the plaintiff's claim has no direct relevance to the defendant's assets, the determination of international jurisdiction shall be made by considering the background leading up to the defendant's assets ending up in the Republic of Korea, the value of the pertinent assets, the need to protect the rights of the plaintiff, and the effectiveness of a judgment.

Furthermore, the determination of predictability ought to be made on the basis of whether the defendant could have reasonably predicted the filing of a suit at the court in the relevant jurisdiction because of "substantive relations" between the defendant and the jurisdiction. A defendant, who has an established livelihood in the Republic of Korea or acquires assets and conducts economic activities, can easily foresee the filing of a suit against him/her relating to the assets at the Korean court.

(3) International jurisdiction is not exclusive jurisdiction, but it can exist concurrently with national jurisdiction. The jurisdiction of the Republic of Korea court shall not be readily denied on the sole basis of the fact that courts of other countries provide more convenience than the Republic of Korea court in terms of geography, language, and communications.

B. Factual relations

The lower court found the following factual relations.

(1) The Plaintiff, a citizen of the People's Republic of China (hereinafter "China"), who resided in the Chinese city of OO and engaged in moneylending

business, entered the Republic of Korea in around 2014 for purposes of operating the said business. The Defendants, a couple of Chinese nationality, who resided in the city of △△ in the Shandong province and operated a real estate development business, frequently went back and forth between the Republic of Korea and China from March 2013 to June 2013, and around that time, claimed residence in Jeju Self-Governing Province (hereinafter "Jeju Island") in the Republic of Korea.

(2) Defendant 1: (a) purchased (Address 1 omitted) and four plots of land that have the address of □□□□□□ town, ▽▽▽-dong, ☆☆☆-ho (hereinafter "instant real estate") in Jeju Island on March 12, 2013, and registered the ownership transfer thereof on April 8, 2013; (b) registered the ownership transfer of a Discovery 4 3.0D car on May 21, 2013; (c) purchased (Address 2 omitted) a land lot of 1,584 square meters and a building thereon, and registered the ownership transfer thereof on May 28, 2013. Defendant 2 had savings deposit claims in KB Kookmin Bank Inc. and Shinhan Bank Co., Ltd.

(3) Defendant 1 continued to reside and lived in Jeju Island from June 12, 2013 to the time at which the instant lawsuit was filed, and had his child enter ▽▽ International School ◎◎ Campus and reared the child. Defendant 2 also resided in the Republic of Korea for a considerable period of time, coming and going between the Republic of Korea and China, while living with his family. Defendant 2 left for China on July 23, 2013 and was forbidden from leaving the country.

(4) The Defendants obtained the B-2 tourist visa with a validity period of one year on April 4, 2013, and then filed an application for the change of status of residence on April 15, 2013 on the grounds that they have acquired real estate property subject to investment following the real estate investment immigration scheme and acquired the F-2 long-term residency visa with a validity period of two years for themselves and their children. Unless special circumstances emerge, a validity period of the residency visa is extended by three years after the lapse of the initial validity period of two years. The visa holders, who maintain the qualification of investors by possessing the investment property by then, are eligible to acquire permanent residency on the fifth anniversary of the date of the issuance of the F-2 visa.

(5) Arguing that the Defendants borrowed CNY 5,000,000 in aggregate from May 24, 2009 to November 25, 2011 while running a business in China, the Plaintiff sought a decision of provisional seizure on the real estate property, vehicle, and claim as prescribed in the foregoing paragraph (2), and filed the instant lawsuit at the Jeju District Court in the Republic of Korea on January 18, 2014.

(6) Upon the court's decision of provisional seizure on Defendant 1's assets as above, the visa of the above Defendant was downgraded, and the

validity period of Defendant 2's visa was also curtailed. Defendant 1 left the Republic of Korea in February 2015 when Defendant 2 was forbidden from leaving China, and was investigated in China for the criminal case, and is currently out on bail. The Defendants are currently residing in China.

C. Reasonableness of the lower judgment

(1) The lower court recognized the Republic of Korea court's international jurisdiction on the instant case for the following reasons.

(A) The Defendants: (i) purchased, possessed, and used the real estate property and vehicle in the Republic of Korea; (ii) established a livelihood in the Republic of Korea, nurtured their children, and actually inhabited the acquired real property; (iii) had their children enter a school located in the Republic of Korea; and (iv) acquired a visa necessary for the acquisition of permanent residency in the Republic of Korea for themselves and their children. It appears that the Defendants left China and entered the Republic of Korea with a view to evading the civil and criminal case-related disputes they had been involved in, which made it hard for them to continue residing in China. The Defendants are currently residing in China because they had no choice but to go back to China because of the foregoing civil and criminal cases. The Plaintiff entered the Republic of Korea at the time of the filing of the instant lawsuit, and has been spending a considerable period of time in the Republic of Korea at the time of the pleading, with a plan to conduct business activities in the Republic of Korea going forward. Comprehensively taking account of these circumstances, it can be deemed that the Plaintiff and the Defendants established a substantial livelihood foundation in the Republic of Korea at the time of the filing of the instant lawsuit.

(B) The Defendants left China to evade disputes, established a livelihood foundation in the Republic of Korea, and acquired assets. Hence, it is difficult to consider that the Defendants could not anticipate the Plaintiff's filing of the instant lawsuit at the Republic of Korea court. Considering that the Defendants possess the real estate property and vehicle in the Republic of Korea, which have been held under provisional seizure upon the Plaintiff's request, the Plaintiff has a practical interest in bringing a suit at the Republic of Korea court to seek a valid enforcement of the instant claim.

(C) The Plaintiff, a Chinese national, has voluntarily stated an explicit intent of having his case against the Defendants, Chinese nationals, tried in the Republic of Korea court. The Defendants have also appointed legal representatives to answer the suit. The substantive pleading and deliberation on the merits of the instant lawsuit have been conducted in the Republic of Korea court. The facts requiring proof in the instant case can be mostly proved by the evidentiary document such as a contract or account transfer records, and it is difficult to see that a local investigation in China is necessary. Bringing a lawsuit in the Republic of Korea is not considered to be considerably disadvantageous to the Defendants. On the other hand, denying international

jurisdiction of the Republic of Korea court in the instant case, and bringing the case back to the Chinese court would seriously undermine judicial economy.

(D) Although the applicable law that governs the legal relation of the instant case is the Chinese law, international jurisdiction and applicable law are subject to different ideology, and thus, the substantive relations between the instant lawsuit and the Republic of Korea court may not be readily denied based on such circumstances.

(2) The lower judgment is justifiable in light of the legal principle examined in the foregoing paragraph (A). In determining so, the lower court did not err by misapprehending the legal principle concerning international jurisdiction, contrary to what is alleged in the grounds of appeal.

2. Regarding violation of the rules of evidence and misapprehension of the legal principle on satisfaction of claim

A. Lower judgment

(1) The legal relation of the instant case contains a foreign element; hence, its applicable law must be determined in accordance with the Act on Private International Law. At the time of the conclusion of the instant loan agreement, the Plaintiff's habitual residence and business office were located in China. Therefore, according to Article 26(2)2 of the Act on Private International Law, the Chinese law would be the governing law of the instant lawsuit.

(2) The Plaintiff, running the moneylending business in China, loaned CNY 5,000,000 in aggregate to the Defendants using not only his financial account but also those of his friends and relatives, with the period of payment stated as November 25, 2011 at a monthly interest of 2%. Unless special circumstances emerge, the Defendants shall be joint and severally liable for the payment of the foregoing loan amount and the agreed interest or damages for delay thereto pursuant to the relevant provision in the Chinese law.

(3) It is found that the Defendants paid CNY 14,509,120 in aggregate to the Plaintiff, but such payment appears to have been made in order to satisfy the loan obligation pursuant to a separate financial transaction. The evidence to prove that the Defendants made payment to the Plaintiff is insufficient. As such, the Defendants may not be deemed to have satisfied the foregoing loan obligation to the Plaintiff.

B. Reasonableness of the lower judgment

Examination of the reasoning of the lower judgment in light of the duly admitted evidence, the lower court did not err in its judgment by misapprehending the legal principles on determination of evidence or satisfaction of claim, or by exceeding the bounds of the principle of free evaluation of evidence inconsistent with the logical and empirical rule.

3. Conclusion

The Defendants' final appeals are meritless, and thus, are all dismissed. The costs of appeal are assessed against the losing party. It is decided as per Disposition by the assent of all participating Justices on the bench.

Justices Lee Dong-won (Presiding Justice)
Jo Hee-de
Kim Jae-hyung (Justice in charge)
Min You-sook

Supreme Court Decision 2017Da280951 Decided September 26, 2019【Damages (Automobile)】

【Main Issues and Holdings】

[1] Whether, in a case where a victim who died as a result of a tort had pursued a profession with a fixed term, lost income may be calculated on the basis of the findings upon investigation and review regarding the victim's occupation, which the victim may be deemed to have subsequently taken up, and the income derived therefrom after the expiration of the term (affirmative) and whether, in a case where a functional group containing the occupation, that the victim was engaged in, in accordance with statistical data on income classified by a functional group integrating several fields is composed of careers that are mutually dissimilar, the victim's expected income may be calculated on the basis of the statistical income of the functional group (negative)

[2] In a case where Party A's parents claimed damages against Party B and Insurance Company C, an insurer of the Party B's vehicle upon the death of Party A during treatment as a result of an automobile accident in which Party A's vehicle was impacted by the vehicle Party B was driving while Party A, who had served as an military surgeon after qualifying as an orthopedic specialist, was driving the affected vehicle, the case holding that the lower judgment estimating lost income after Party A would have been discharged from military service on the basis of the statistical income of the "profession related to health, social welfare and religion" contained within the Survey Report on Labor Conditions by Employment Type is untenable; and in so determining, the lower court erred by misapprehending the legal doctrine on the calculation of lost income

【Summary of Decision】

[1] Lost income of a victim, who died from a tortious act, shall be, in principle, estimated on the basis of the actual income of the victim at the time of death. However, in a case where the victim was engaged in an occupation with an appointed term, the occupation the victim may be deemed to be able to assume and the income that may drive from the said occupation after the termination of the victim's office shall be examined and reviewed in the light of comprehensive consideration of the age, educational background, profession, career, other social and economic conditions and empirical rule of the victim, which shall serve as the basis for calculation of lost income. Estimated income including statistical income may be the basis of the estimation of lost income insofar as impartiality and rationality are guaranteed. Calculating lost income completely and accurately may prove to be impossible as the estimated income

is a prediction of uncertain future facts; that said, efforts ought to be made to estimate an amount which is reasonable and probable as soon as possible by comprehensively taking into account all evidential data and making use of empirical rule. Therefore, in a case where, in the statistical data on income categorized by a functional group integrating several careers, the functional group including the occupation that the victim was engaged in consists of careers that are not mutually analogous, estimating the victim's expected income based on statistical income of the functional group lacks rationality and objectivity and thus is unacceptable.

[2] In a case where Party A's parents filed a claim for damages against Party B and Insurance Company C, an insurer of the Party B's vehicle, on the ground that Party A died under medical treatment soon after Party A's vehicle was hit by the vehicle driven by Party B while Party A, having acquired qualification as an orthopedic surgeon and then serving as a military surgeon, was driving the affected vehicle, the case holding that (a) the expected income, to be deemed reasonable and probable, shall be assessed on the basis of the income of a salaried orthopedic doctor with a medical license or a medical practitioner, in that the "profession related to health, social welfare and religion" of the Survey Report on Labor Conditions by Employment Type includes medical specialists such as doctors, oriental medical doctors, dentists, veterinarians, etc.; healthcare professionals such as pharmacists, herbalists, nurses, nutritionists, therapists, medical technicians, emergency medical technicians, hygienists, opticians, medical record administrators, nurses' aides, etc.; workers in health and social services such as social workers, nursing instructors, etc.; and religious workers such as priests, etc. and thus, Party A shall be deemed to have been able to either become a paid doctor working for a general hospital, etc., or establish and operate a hospital, as an orthopedic surgeon after the completion of Party A's military service; (b) but when following the occupational classification of the aforementioned survey report, an orthopedic surgeon included in medical specialists as an occupation with a high level of specialized expertise appears difficult to be considered as an occupation similar to those such as healthcare professionals, workers in health and social services, religious workers, etc.; and (c) although assessing Party A's expected income after the completion of his military service in light of the statistical income of the said occupational group simply due to the fact that an orthopedic surgeon belongs to the "profession relevant to health, social welfare and religion" of the survey report mentioned above hardly has rationality and probability, the lower judgment estimating lost income after Party A's discharge from the military on the basis of the statistical income of the "profession related to health, social welfare and religion" of the survey report mentioned above is untenable; and, in so determining, the lower court erred by misapprehending the legal doctrine on the calculation of lost income

【Reference Provisions】 [1] Article 393 and 763 of the Civil Act / [2]

Article 393 and 763 of the Civil Act

Article 393 of the Civil Act (Scope of Compensation for Damages)

(1) The compensation for damages arising from the non-performance of an obligation shall be limited to ordinary damages.

(2) The obligor is responsible for reparation for damages that have arisen through special circumstances, only if he had foreseen or could have foreseen such circumstances.

Article 763 of the Civil Act (Applicable Provisions to be Applied Mutatis Mutandis)

The provisions of Articles 393, 394, 396 and 399 shall apply mutatis mutandis to torts claims.

【Reference Cases】 Supreme Court Decision 87Daka1129 decided Apr. 12, 1988 (Gong1988, 831); 90Daka24502 decided Nov. 13, 1990 (Gong1991, 89); 92Da7269 decided Jul. 28, 1992 (Gong1992, 2556); 97Da58491 decided Apr. 24, 1998 (Gong1998Sang, 1465)

【Plaintiff-Appellant】 Plaintiff 1 et al. (Law Firm Haein, Attorneys Go Yeongtae et al., Counsel for the plaintiff-appellant)

【Defendant-Appellee】 Defendant 1 et al. (Law Firm Dongrae, Attorney Kim Chunghui, Counsel for the defendant-appellee)

【Judgment of the court below】 Busan District Court Decision 2017Na44138 decided Oct. 26, 2017

【Disposition】 The part of the lower judgment against the Defendant is reversed, and the case is remanded to the Busan District Court.

【Reasoning】 The grounds of appeal are examined.

1. Factual basis

The reasoning of the lower judgment reveals the following facts.

Defendant 1 drove along a road located in Yecheon-eup, Gyeongsangbuk-do on June 9, 2015 and hit a vehicle a non-party was driving. As a result, the non-party died under medical treatment on June 30, 2015. Plaintiffs are the parents of the non-party and Hyundai Marine & Fire Insurance Co., Ltd., one of the Defendants, is an insurer which concluded an automobile insurance contract regarding the vehicle driven by Defendant 1. The non-party obtained a medical doctor's license on February 25, 2009, acquired qualification as an orthopedic surgeon on March 3, 2014 and then joined the military as a surgeon on April 4, 2014. At the time of the accident, he was serving in the military as an air force captain and was expected to be discharged upon completing his military service on April 25, 2017.

2. Lower judgment

The lower court admitted the Defendants' liability for damages caused by the foregoing accident and determined the scope thereof. Furthermore, the lower court estimated the lost income that would have accrued after the non-

party's discharge from the military on the basis of the average monthly income of a male health care professional corresponding to the "profession relevant to health, social welfare and religion" of the 2015 Survey Report on Labor Conditions by Employment Type.

3. Judgment of the Supreme Court

A. Lost income of a victim, who died from a tortious act, shall be, in principle, estimated on the basis of the actual income of the victim at the time of death. However, in a case where the victim was engaged in an occupation with an appointed term, the occupation the victim may be deemed to be able to assume and the income that may derive from the said occupation after the termination of the victim's office shall be examined and reviewed in the light of the comprehensive consideration of the age, educational background, profession, career, other social and economic conditions and empirical rule of the victim and this shall serve as the basis for calculation of lost income. Estimated income including statistical income may be the basis of the estimation of lost income insofar as impartiality and rationality are ensured. Calculating lost income completely and accurately may prove to be impossible as the estimated income is a prediction of uncertain future fact but efforts ought to be made to estimate an amount that is reasonable and probable as soon as possible by comprehensively taking into account all evidential data and making use of empirical rule (*see e.g.*, Supreme Court Decision 87Daka1129 decided Apr. 12, 1988; 90Daka24502 decided Nov. 13, 1990; 92Da7269 decided Jul. 28, 1992). Therefore, in a case where, in the statistical data on income categorized by a functional group integrating several careers, the functional group including the occupation that the victim was engaged in consists of careers that are not mutually analogous, estimating the victim's expected income based on statistical income of the functional group lacks rationality and objectivity and thus is unacceptable (*see e.g.*, Supreme Court Decision 90Daka24502 mentioned above; 97Da58491 decided Apr. 24, 1998).

B. Factual basis stated above is examined in light of the foregoing legal principle.

The "profession related to health, social welfare and religion" of the 2015 Survey Report on Labor Conditions by Employment Type includes medical specialists such as doctors, oriental medical doctors, dentists, veterinarians, etc.; healthcare professionals such as pharmacists, herbalists, nurses, nutritionists, therapists, medical technicians, emergency medical technicians, hygienists, opticians, medical record administrators, nurses' aides, etc.; workers in health and social services such as social workers, child care teachers, etc.; and religious workers such as priests, etc. In that the non-party ought to be deemed to have been able to either become a paid doctor working for a general hospital, etc. or establish and operate a hospital, as an orthopedic surgeon after his discharge from the military, the expected income which is reasonable and probable ought to be assessed on the basis of the income of a salaried orthopedic

doctor with a medical license or a medical practitioner. Meanwhile, an orthopedic surgeon included in medical specialists when following the occupational classification of the aforementioned survey report is an occupation with a high level of specialized expertise and thus, it appears difficult to be considered as an occupation similar to those such as healthcare professionals, workers in health and social services, religious workers, etc. Assessing the non-party's expected income after the completion of his military service in light of the statistical income of the said occupational group simply due to the fact that an orthopedic surgeon belongs to the "profession relevant to health, social welfare and religion" of the survey report mentioned above lacks rationality and probability.

Accordingly, the lower judgment estimating lost income after the non-party's discharge from the military on the basis of statistical income of the "profession related to health, social welfare and religion" of the survey report mentioned above is untenable; and in so determining, the lower court erred and adversely affected the conclusion of the judgment by misapprehending the legal doctrine on the calculation of lost income.

4. Conclusion

The part of the lower judgment against the Plaintiffs is reversed as the Plaintiffs' final appeal is with merit, and the case is remanded to the lower court for further proceedings consistent with this Opinion. It is so decided as per Disposition by the assent of all participating Justices on the bench.

Justices Lee Dong-won (Presiding Justice)
Jo Hee-de
Kim Jae-hyung (Justice in charge)
Min You-sook

Supreme Court Decision 2019Da213009 Decided July 10, 2019【Damages (Etc.)】

【Main Issue and Holding】

[1] Meaning of a multimodal transport contract

In a case where a freight forwarder concludes a transport contract under his/her own name and performs carriage, whether the freight forwarder acquires the status of a multimodal transport operator and becomes a holder of rights and obligations pursuant to the given transport contract (affirmative), and in a case where the parties concerned conclude a contract regarding general freight operation, which includes the entirety of freight-related operation, such as unloading, loading, storing, and transferring cargo at the port, as well as utilization of logistics information, whether the most important element of the operation must be considered as multimodal transport (affirmative)

[2] In the event of loss or damage to the cargo in the process of multimodal transport, and where it remains unclear in which transport section the damage has occurred or the occurrence of the damage is not limited to any area in its nature, if the distance of transportation by sea is the longest, whether the liability of a multimodal transport operator for the said damage must be subject to the application of the provision concerning maritime transport (affirmative)

[3] Meaning of "the date when the carrier will deliver the cargo" under Article 814(1) of the Commercial Act, and in the event of lost cargo, the transport operator's refusal to deliver the cargo, or the suspended transportation for reasons attributable to the transport operator, determination of whether the period of filing a lawsuit as stipulated in the foregoing provision lapsed must be made on the basis of "the date when the carrier will deliver the cargo" (affirmative)

【Summary of Decision】

[1] A multimodal transport contract concerns the performance of freight transport involving at least two different modes of transport, among transportation by land, sea, and air. The former Freight Distribution Facilitation Act, which used to limit the scope of logistics to physical distribution previously centered on transport, storage, and loading and unloading of goods, was entirely amended into the Framework Act on Logistics Policies by Act No. 8617 on August 3, 2007, which extended the scope of logistics to encompass the entire process, from procurement, manufacturing, and consumption to retrieval and disposal of goods (Article 2(1)1 of the Act). The Framework Act on Logistics Policies stipulates that a multimodal freight forwarder under the former Freight Distribution Facilitation Act is deemed as an international

freight forwarder (Article 7 of the Addenda). In addition, as an international freight forwarder may issue under his/her name a bill of lading (B/L) and an air waybill (AWB) (*see* Article 5(2)2 of the Enforcement Rule of the Act), in a case where the international freight forwarder concludes a transport contract under his/her name and performs carriage, the said international freight forwarder acquires the status of a multimodal transport operator, and becomes a holder of rights and obligations pursuant to the said transport contract. Where the parties concerned conclude a contract regarding general logistics operation that concerns not only multimodal transport but also unloading, loading, storage and transfer of cargo at the port, as well as utilization of logistics information, multimodal transport shall be viewed as the most important element of the contract.

[2] In the event of loss or damage to cargo in the multimodal transportation process, choosing a law applicable to which means of transportation to hold a carrier accountable becomes a matter of concern. As for the liability of a multimodal transport operator, the Commercial Act stipulates that the multimodal transport operator takes responsibility in accordance with an Act applicable to the segment of transportation where the damage has occurred (Article 816(1)). Furthermore, it states, "in cases where it is unclear in which segment of transportation the damage has occurred or the occurrence of the damage is not limited to any particular area in its nature, a carrier shall take responsibility in accordance with an Act applicable to the segment of transportation, the distance of which is the longest; *Provided*, That when the distance is the same or it is impracticable to determine the longest segment of transportation, he/she shall take responsibility in accordance with an Act applicable to the section the freight of which is the highest" (Article 2). Therefore, in a case where the section of transportation from which damage has occurred is unclear or the occurrence of damage is not limited to any particular area in its nature, if the distance of transportation by sea is the longest, a provision concerning maritime transport shall be applied.

[3] The claims and obligations of a maritime carrier against a consignor or consignee shall be terminated, whatever the causes for the claims may be, where no judicial claim is made within one year after the date when the carrier has delivered or will deliver the cargo to the consignee (Article 814(1) of the Commercial Act). The term "the date on which the carrier will deliver the cargo to the consignee" generally refers to the date on which the delivery should have been performed had the transport contract been performed in conformity with the terms therein. Not only in a case where the cargo is lost, but also in a case where the delivery of cargo is not made either because of a carrier's refusal or for reasons attributable to a carrier, determination of whether the period of filing a lawsuit lapsed shall be made based on "the date on which the cargo will be delivered."

【Reference Provisions】 [1] Article 816 of the Commercial Act; Article 2(1)1 of the Framework Act on Logistics Policies; Article 7(1) of the Addenda (Aug. 3, 2007) of the Framework Act on Logistics Policies; Article 5(2)2 of the Enforcement Rule of the Framework Act on Logistics Policies / [2] Article 816 of the Commercial Act / [3] Article 814(1) of the Commercial Act

Article 814 of the Commercial Act (Termination of Claims and Obligations of Carriers)

(1) The claims and obligations of a carrier against a consignor or consignee shall be terminated, whatever the causes for the claims may be, where no judicial claim is made within one year after the date when the carrier has delivered or will deliver the cargo to the consignee: *Provided*, That this period may be extended by an agreement between the parties.

Article 816 of the Commercial Act (Responsibility of Consolidated Carriers)

(1) In cases where a segment of transportation, other than marine transportation, has been included in the transportation accepted by a carrier, he/she shall take responsibility in accordance with an Act applicable to the segment of transportation where the damage has occurred.

(2) In cases where it is unclear in which segment of transportation the damage has occurred or the occurrence of the damage is not limited to any particular area in its nature, a carrier shall take responsibility in accordance with an Act applicable to the segment of transportation, the distance of which is the longest: *Provided*, That when the distance is the same or it is impracticable to determine the longest segment of transportation, he/she shall take responsibility in accordance with an Act applicable to the section, the freight of which is the highest.

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

Article 2 of the Framework Act on Logistics Policies (Definitions)

(1) The definitions of terms used in this Act shall be as follows: *<Amended by Act No. 11473, Jun. 1, 2012; Act No. 13374, Jun. 22, 2015>*

1. The term "logistics" means transport, storage, loading and unloading, etc., carried out in the process of delivery of goods procured or manufactured, from suppliers to users or in the process of collection of goods from consumers until disused, and processing, fabrication, classification, repair, packing, labelling, sale, information and communications, etc. adding values thereto;

【Reference Cases】 [3] Supreme Court Decision 97Da28490 decided Nov. 28, 1997 (Gong1998Sang, 68); Supreme Court Decision 2005Da5058 decided Apr. 26, 2007 (Gong2007Sang, 754)

【Plaintiff-Appellant-Appellee】 Jeju Province Development Co. (Law

Firm Kun Yang, Attorney Choi Geon et al., Counsel for the plaintiff-appellant-appellee)

【Defendant-Appellee】 Dongbang Inc. and three others (Jipyung LLC, Attorney Kim Da-hee et al., Counsel for the defendant-appellee)

【Defendant-Appellant】 Samjin Shipping Inc. (Attorney Lee Hak-joon, Counsel for the defendant-appellant)

【Judgment of the court below】 Gwangju High Court (Jeju) Decision 2018Na10212 decided January 9, 2019

【Disposition】 All final appeals are dismissed. Of the costs of final appeal, the part between the Plaintiff and Defendant Dongbang Inc., Jeju Cold Storage Logicstics Inc., KD Total Distribution Ltd., and Youngjin Inc. is assessed against the Plaintiff. The part between the Plaintiff and Defendant Samjin Shipping Inc. is borne by Defendant Samjin Shipping Inc.

【Reasoning】 The grounds of final appeal are examined.

1. Determination on the Plaintiff's grounds of final appeal

A. (1) A multimodal transport contract concerns the performance of freight transport involving at least two different modes of transport, among transportation by land, sea, and air. The former Freight Distribution Facilitation Act, which used to limit the scope of logistics to physical distribution previously centered on transport, storage, and loading and unloading of goods, was entirely amended into the Framework Act on Logistics Policies by Act No. 8617 on August 3, 2007, which extended the scope of logistics to encompass the entire process, from procurement, manufacturing, and consumption to retrieval and disposal of goods (Article 2(1)1 of the Act). The Framework Act on Logistics Policies stipulates that a multimodal freight forwarder under the former Freight Distribution Facilitation Act is deemed as an international freight forwarder (Article 7 of the Addenda). In addition, as an international freight forwarder may issue under his/her name a bill of lading (B/L) and an air waybill (AWB) (*see* Article 5(2)2 of the Enforcement Rule of the Act), in a case where the international freight forwarder concludes a transport contract under his/her name and performs carriage, the said international freight forwarder acquires the status of a multimodal transport operator, and becomes a holder of rights and obligations pursuant to the said transport contract. Where the parties concerned conclude a contract regarding general logistics operation that concerns not only multimodal transport but also unloading, loading, storage and transfer of cargo at the port, as well as utilization of logistics information, multimodal transport shall be viewed as the most important element of the contract.

(2) In the event of loss or damage to cargo in the multimodal transportation process, choosing a law applicable to which means of transportation to hold a

carrier accountable becomes a matter of concern. As for the liability of a multimodal transport operator, the Commercial Act stipulates that the multimodal transport operator takes responsibility in accordance with an Act applicable to the segment of transportation where the damage has occurred (Article 816(1)). Furthermore, it states, "in cases where it is unclear in which segment of transportation the damage has occurred or the occurrence of the damage is not limited to any particular area in its nature, a carrier shall take responsibility in accordance with an Act applicable to the segment of transportation, the distance of which is the longest; *Provided*, That when the distance is the same or it is impracticable to determine the longest segment of transportation, he/she shall take responsibility in accordance with an Act applicable to the section the freight of which is the highest" (Article 2). Therefore, in a case where the section of transportation from which damage has occurred is unclear or the occurrence of damage is not limited to any particular area in its nature, if the distance of transportation by sea is the longest, a provision concerning maritime transport shall be applied.

(3) The claims and obligations of a maritime carrier against a consignor or consignee shall be terminated, whatever the causes for the claims may be, where no judicial claim is made within one year after the date when the carrier has delivered or will deliver the cargo to the consignee (Article 814(1) of the Commercial Act). The term "the date on which the carrier will deliver the cargo to the consignee" generally refers to the date on which the delivery should have been performed had the transport contract been performed in conformity with the terms therein (*see, e.g.*, Supreme Court Decisions 97Da28490, Nov. 28, 1997; 2005Da5058, Apr. 26, 2007). Not only in a case where the cargo is lost, but also in a case where the delivery of cargo is not made either because of a carrier's refusal or for reasons attributable to a carrier, determination of whether the period of filing a lawsuit lapsed shall be made based on "the date on which the cargo will be delivered."

B. The lower court determined as follows on the grounds stated in its reasoning.

(1) Each of the freight services agreement in the instant case (hereinafter "instant agreement") is concerned with the Defendant's obligation to receive products from the Plaintiff's plant and transport them to the Plaintiff's sales agency or the location designated by the Plaintiff. The freight-related tasks, including unloading, loading, storing, and transferring cargo at the port, are ancillary to transportation, and, thus, are difficult to be considered as the essential part of the agreement. It seems that the Plaintiff, from the time when it issued a public notice for selection of a service provider, solicited service providers, making it a condition that the appointed service provider of the pertinent project has to be able to provide regional transportation services, from the Plaintiff's plant in Jeju Island to the inland destinations. Comprehensively taking account of these circumstances, it is reasonable to deem the instant

agreement as a multimodal transport contract composed of transport by land and transport by sea.

(2) As for the liability of a multimodal transport provider, Article 816 of the Commercial Act applies; the damage the Plaintiff alleges to have incurred is an additional cost from the Defendants' failure to properly transport the volume ordered by the Plaintiff, which resulted the Plaintiff to request alternative transportation to Hanjin Inc., thereby constituting the "cases where it is unclear in which segment of transportation the damage has occurred or the occurrence of the damage is not limited to any particular area in its nature." As such, a carrier has to take responsibility in accordance with an Act applicable to the segment of transportation, the distance of which is the longest, under Article 816(2).

(3) Defendants Dongbang Inc., Jeju Cold Storage Logistics Inc., KD Total Distribution Ltd., and Youngjin Inc. (hereinafter jointly referred to as "Dongbang Consortium") transported the goods produced by the Plaintiff to Gangwon area and some regions in the metropolitan area, mainly through the Incheon Port or the Pyeongtaek Port. In this case, the distance of transportation by sea (from the Jeju Port to the port of destination) considerably exceeds the distance of transportation by road (from Plaintiff's production plant to the port in Jeju Island and the Incheon Port, or, from the Pyeongtaek Port to the logistics center); hence, as for Dongbang Consortium, the limitation period has to be determined pursuant to an Act applicable to the segment of sea transportation.

(4) According to Article 814(1) of the Commercial Act regarding short-term limitation period for sea transport operators, the Plaintiff had to claim damages in a trial within one year after the date when it could receive the delivery had Dongbang Consortium properly conducted transportation of logistics products. The transportation of the goods produced by the Plaintiff appears to have completed within one month at the latest from the time of shipment to the Plaintiff's distributor or the place of the Plaintiff's designation. The goods involved in the latest damage, which occurred at the end of June 2014, due to negligence in transportation on the part of Dongbang Consortium, could have been delivered to the Plaintiff by the end of July 2015. Nevertheless, the Plaintiff filed the instant lawsuit on December 12, 2016, one year after the lapse of the limitation period. Thus, the Plaintiff's lawsuit against Dongbang Consortium is unjustifiable on account of the lapse of the limitation period.

C. In light of the foregoing legal principle and the record, the lower court did not err in its judgment by misapprehending the legal principles regarding the legal nature of the instant agreement, applicability of Article 816 of the Commercial Act, cause of damages, the principle of a multimodal transport operator's liability in a case where the occurrence of the damage is not limited to any particular area, and the interpretation of Article 814(1) of the Commercial Act, or failing to exhaust all necessary deliberations, thereby exceeding the bounds of the principle of free evaluation of evidence against

logical and empirical rules.

2. Determination of the grounds of appeal alleged by Defendant Samjin Shipping Inc.

A. The lower court opined as follows on the grounds stated in its reasoning.

(1) The damage the Plaintiff alleges to have incurred is difficult to be concluded to have arisen in the process of sea transportation, as noted earlier, and constitutes the case where it is unclear in which segment of transportation the damage has occurred or the occurrence of the damage is not limited to any particular area in its nature.

(2) Hyundai Consortium, to which Defendant Samjin Shipping Inc. belongs, transported the shipments to the Honam area and some parts of the metropolitan area via Wando Port and Nokdong Port. As the distance of land transport surpasses the distance of sea transport (except for the closest distribution center to each port), the determination with regard to Hyundai Consortium has to be made pursuant to the law applicable for the segment of road transportation.

(3) A short-term limitation period under Article 814(1) of the Commercial Act does not apply to Defendant Samjin Shipping Inc., etc., which composes Hyundai Consortium. As such, Defendant Samjin Shipping Inc., etc. is obligated to pay the Plaintiff damages incurred from Hyundai Consortium's failure to properly transport the volume of shipments from January to June 2014. Furthermore, the scope of damages is the difference between the expense for transportation, which was supposed to be paid by the Plaintiff to Hyundai Consortium had Hyundai Consortium properly transported the shipment, and the expense for transportation incurred from the Plaintiff's use of alternative transportation via Hanjin Inc.

B. In light of the relevant legal principles and the record, the lower court did not err in its judgment by misapprehending the legal principle regarding the scope of the segment of transportation from which damages incurred and the scope of damages, or by leaving out a judgment that dismissed the part of the Plaintiff's claim for its illegality.

3. Conclusion

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

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

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