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THE ASIAN BUSINESS LAWYER

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K Line PTE Ltd v Priminds Shipping (HK) Co Ltd (The "Eternal Bliss") [2020] EWHC 2373 (Comm)

Sir Bernard Eder

Published on May 31, 2021

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

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ARTICLES

The Balance between Cooperation and Competition: How the Shipping Industry Responds to the Hong Kong Competition Ordinance*

Yvette Yu[**]
Kelly Kim[***]

ABSTRACT

The authors have been advising the shipping industry on legal and compliance matters, including issues arising from the relatively new competition/antitrust law under the Competition Ordinance in Hong Kong, which came into full force in December 2015. Compared to other developed economies, Hong Kong is a late adopter of competition law. Underscoring the extra-territorial reach of the Competition Ordinance, the authors examine new legal and practical challenges faced by the international shipping community, against the backdrop that Hong Kong is one of the world's busiest international container ports.

KEYWORDS: Competition, Antitrust, Shipping, Block Exemption, Vessel Sharing Agreement

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* This article is based on the writer's presentation at the 7th Asia Business Lawyer(ABL) Symposium held on February 24, 2021.

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I. Introduction

In a free market economy, businesses are expected to compete and attract customers by providing the best range of products and services at the best prices. The Competition also motivates businesses to improve the efficiency of their operations and innovate. Competition law aims to protect businesses and consumers from unfair pricing, lack of choices and economic inefficiency by prohibiting anti-competitive mergers and activities and restraining monopolistic behaviour.[1]

In Hong Kong, the Competition Ordinance (Cap 619, the "**Ordinance**") and its related subsidiary legislation are the primary sources of competition law.

This article will first provide readers with a brief introduction of the Ordinance and its enforcement mechanism, followed by a discussion about two instances in which the shipping industry sought clarification and permission from the competition regulator for their existing practices.

II. The Hong Kong Competition Ordinance

The Ordinance is the first cross-sector competition law in Hong Kong, which came into force on 14 December 2015. As the main competition legislation in Hong Kong, the Ordinance is enforced by the Competition Commission (the "**Commission**") and the Competition Tribunal (the "**Tribunal**"). The Ordinance adopts a judicial enforcement model to separate

[1] Competition Commission, 'Overview: Understanding the Competition Ordinance' (*Competition & Anti-Competitive Practices*) <https://www.compcomm.hk/en/practices/what_is_comp/overview.html> accessed 6 July 2021.

the powers of investigation, prosecution and adjudication.

The Commission is an independent statutory body established under the Ordinance, with the power to conduct investigations on suspected contravention of the Ordinance and issue a warning and infringement notices.[2] The Commission is the principal competition authority responsible for enforcing the Ordinance through enforcement proceedings before the Tribunal.[3] The functions of the Commission include providing guidelines on the interpretation of the competition rules, promoting and educating the public regarding the Ordinance and advising the government on competition-related matters.[4]

The Tribunal is a dedicated superior court that handles legal proceedings regarding competition matters. The jurisdiction of the Tribunal includes hearing and determining applications made by the Commission with regard to alleged contraventions of the competition rules, [5] private follow-on actions, applications for the disposal of property, granting of equitable and legal remedies, and cases concerning competition issues transferred from the High Court.[6]

The Ordinance applies generally across industries in Hong Kong and prohibits agreements that prevent, restrict or distort competition and the abuse of market power.[7] The Ordinance also includes provisions regarding the control of mergers, which, however, currently only apply to mergers involving carrier licence holders within the meaning of the Telecommunications Ordinance (Cap. 106).

The Ordinance prohibits three main areas of anti-competitive conduct under the First Conduct Rule, the Second Conduct Rule and the Merger Rule (collectively known as the competition rules).[8]

1. The First Conduct Rule

The First Conduct Rule prohibits anti-competitive agreements and arrangements between undertakings. An undertaking must not:

a. make or give effect to an agreement;

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[2] Felix Ng, et al, 'The Cartels and Leniency Review – Hong Kong Chapter' in John Buretta and John Terzaken (eds) *The Cartels and Leniency Review* (9th edn, LR 2021).

[3] Competition Commission, 'Overview' (*Legislation & Guidance*) <https://www.compcomm.hk/en/legislation_guidance/legislation/overview.html> accessed 6 July 2021.

[4] Competition Commission, 'Role & Functions: Our Functions' (*About the Commission*) <https://www.compcomm.hk/en/about/comm/role_functions.html> accessed 6 July 2021.

[5] Competition Tribunal, *Guide to Court Services* (Judiciary, 2015) 18.

[6] *Ibid* 19.

[7] Halsbury's Laws of Hong Kong, *Competition* [113.001].

[8] Nicola Hui and Winnie Chung, 'Hong Kong' in George Eddings and Andrew Chamberlain (eds), *The Shipping Law Review* (7th edn, LBR 2020) 297.

b. engage in a concerted practice; or

c. as a member of an association of undertakings, make or give effect to a decision of the association,

if the object or effect of the agreement, concerted practice or decision is to prevent, restrict or distort competition in Hong Kong.

The term 'agreement' is broadly defined in the Ordinance to include any agreement, arrangement, understanding or promise, whether in oral or written form, whether express or implied, and whether it was intended to be enforceable.[9] The agreement must or likely have an adverse impact on the parameters of competition in the market, such as price, output, product quality, product variety or innovation.[10]

The First Conduct Rule applies where the object or effect of an agreement is to harm competition in Hong Kong. The Commission considers certain types of agreement, by their very nature, to be so harmful to competition that there is no need to examine their effects. These agreements, including both horizontal agreements (between competitors) and vertical agreements (between different levels of the supply chain), are considered to have the object of harming competition.[11] Examples of such agreements include cartel, price fixing, market sharing, resale price maintenance, *etc*. If an agreement does not have an anti-competitive object, it may nevertheless contravene the First Conduct Rule if it has an anti-competitive effect. When assessing whether an agreement has an anti-competitive effect, the Commission may consider not only actual effects but also effects that are likely to flow from the agreement.[12] Anti-competitive effects may include reduction of output, product quality and variety or innovation.[13] For an agreement to have the effect of harming competition, the relevant effect must be more than minimal.

There are a few exceptions where the First Conduct Rule will not apply. The First Conduct Rule is not applicable to undertakings between two entities which are considered as a single economic unit. Accordingly, agreements between employees and the employing company within the framework of a single economic unit are outside the scope of the First Conduct Rule. The same applies to the situation where a trade union acts on behalf of its members in collective bargaining since the Commission believes that the trade union is not engaging in economic activity.

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[9] Competition Ordinance (Cap 619) s 2.

[10] Competition Commission, *Guideline: The First Conduct Rule* (Communications Authority, 2015) 17.

[11] *Ibid* 15.

[12] Competition Ordinance (Cap 619) s 7(2).

[13] Competition Commission (n 10) 18.

The Ordinance also provides for the economic efficiency exclusion, which will be discussed in further detail below.

2. The Second Conduct Rule

The Second Conduct Rule prohibits undertakings with a substantial degree of market power from abusing that power by engaging in conduct that has the object, effect or harming competition in Hong Kong.

Unlike the First Conduct Rule which requires agreement or concerted practices between two or more undertakings, the Second Conduct Rules is applicable to conduct of unilateral abuse by a single entity, provided that the undertaking has a substantial degree of market power.

The Ordinance sets out a few factors that the Commission may consider in determining whether an undertaking has a substantial degree of market power, including[14]:

a. the market share of the undertaking;
b. the undertaking's power to make pricing and other decisions;
c. any barriers to entry to competitors in the relevant market; and
d. any other matters considered relevant by the Commission.

An undertaking is regarded as having a substantial degree of market power if it has the ability to charge prices above competitive levels, to restrict output or quality below standards of other competitors for a sustained period of time (generally accepted as two years by the Commission).[15] In reality, only a small number of businesses are likely to be regarded as having substantial market power.[16]

Abusive conduct may result in higher prices, a restriction in output, a reduction in product quality or variety, and/or anti-competitive foreclosure. Anti-competitive foreclosure occurs when actual or potential competitors are denied access to buyers of their products or to suppliers as a result of the conduct of the undertaking with a substantial degree of market power.[17] Examples of conduct which may constitute abuse by an undertaking with a substantial degree of market power include[18]:

a. predatory pricing;
b. tying and bundling;
c. margin squeeze conduct;

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[14] Competition Ordinance (Cap 619) s 21(3).
[15] Competition Ordinance (Cap 619) s 21(1).
[16] Ng (n 2).
[17] Competition Commission, *Guideline: The Second Conduct Rule* (Communications Authority, 2015)
[18] *Ibid* 29.

d. refusals to deal; and
e. exclusive dealing.

While the Ordinance makes provision for a general exclusion from the application of the First Conduct Rule for agreements enhancing overall economic efficiency,[19] there is no comparable efficiency-based exclusion for conduct within the scope of the Second Conduct Rule.

3. The Merger Rule

The Merger Rule prohibits mergers between businesses which substantially lessen competition in Hong Kong. It currently only applies to mergers involving 'carrier license'[20] holders under the Telecommunications Ordinance.[21]

While the Commission is the principal authority enforcing the Ordinance, it shares concurrent jurisdiction with the Communications Authority in relation to the telecommunications and broadcasting sectors.[22]

4. Investigations, complaints and enforcement by the Commission

In terms of statistics, there were a total of 674 enforcement contacts received by the Commission between 1 April 2019 and 31 March 2020. Since the full commencement of the Ordinance in December 2015, the accumulated contacts up to March 2020 were 4,277.[23] These contacts mainly concern cartel conduct, resale price maintenance, and exchange of information in relation to the First Conduct Rule. For contacts with issues under the Second Conduct Rule, the majority were related to exclusive dealing, tying, and bundling.

The Commission and the Communications Authority have issued various Guidelines under the Ordinance to provide guidance on how the Commission intend to interpret and give effect to the provisions of the Ordinance. Pursuant to the Guideline on Complaints, Guideline on Investigations, and Enforcement Policy, the Commission will consider all complaints and queries it receives. It will then raise those matters for further assessment or investigation to the Initial Assessment phase and Investigation phase respectively. Between 1 April 2019 and 31 March 2020, the Commission escalated 18 cases to these two phases.[24]

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[19] Competition Ordinance (Cap 619) sch 1, s 1.
[20] Telecommunications Ordinance (Cap 106) s 2(1).
[21] Adelaide Luke, Mark Jephcott and Herbert Smith Freehills, 'Merger Control in Hong Kong: overview' [2021] PL 14.
[22] *Memorandum of Understanding between the Competition Commission and the Communications Authority*, 14 December 2015.
[23] Competition Commission, *Annual Report 2019/2020* (2020) 33.
[24] *Ibid*, at 33-34.

In accordance with its Enforcement Policy, the Commission accords priority to cases which involve one or more of the following types of conduct: cartels, other agreements contravening the First Conduct Rule causing significant harm to competition in Hong Kong, and abuses of substantial market power involving exclusionary behaviour by incumbents. It is the Commission's aim to focus on enforcement actions against contraventions causing significant harm to competition in Hong Kong.

The Commission will proceed to the Investigation Phase only where it has reasonable cause to suspect a contravention of a conduct rule. During the Investigation Phase, the Commission is vested with wider investigative powers.[25] It may require relevant parties under investigation to provide documents and information and/or to give evidence before the Commission.[26] The Commission is also empowered to obtain search warrants to enter and search specific premises.[27]

III. Block Exemption Order for the Liner Shipping Industry

As discussed above, there is a general exclusion of the First Conduct Rule for agreements that enhance overall economic efficiency.

The Commission may issue a block exemption order[28] in respect of a particular category of agreements if the Commission is satisfied that that category of agreement is qualified for the economic efficiency exemption.

On 8 August 2017, upon the application made by the Hong Kong Liner Shipping Association ("**HKLSA**"), the Commission issued a block exemption order under section 15 of the Ordinance for certain agreements between liner shipping companies (the "**Order**").[29] It remains the only block exemption order issued by the Commission to date.

The HKLSA originally applied for an exemption confirming that the Vessel Sharing Agreements ("**VSAs**") and Voluntary Discussion Agreement ("**VDAs**"), two main types of cooperation agreements commonly used among carriers, could rely on the economic efficiency exclusion. However, after a 19-month review process, the Commission only issued the block exemption order for VSAs but rejected the application in relation to VDAs.[30]

In order to issue a block exemption order, the Commission will assess and must be satisfied that the four cumulative criteria for the efficiency exclusion

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[25] Competition Ordinance (Cap 619), Part 3.
[26] *Ibid*, ss 41-42.
[27] *Ibid*, s 48.
[28] Hui (n 8).
[29] Competition Commission, *Competition (Block Exemption for Vessel Sharing Agreements) Order 2017* (8 Aug 2017).
[30] Hui (n 8).

to apply are met[31]:

(a) the agreement contributes to improving production or distribution, or promoting technical or economic progress;
(b) consumers receive a fair share of the resulting benefit;
(c) the agreement does not impose on the undertakings concerned restrictions that are not indispensable to the attainment of the objectives stated at point (a); and
(d) the agreement does not afford the undertakings concerned with the possibility of eliminating competition in respect of a substantial part of the goods or services in question.

1. Vessel Sharing Agreements

VSAs are agreements by which liners agree on operational arrangements including the coordination or joint operation of vessel services, and the exchange or charter of vessel space.[32] As VSAs involve agreements regarding the sharing and/or coordination of service and capacity between competing carriers, they may constitute anti-competition agreements caught by the First Conduct Rule.

Nevertheless, the Commission accepted that VSAs promote service coverage and frequency, and expand the carriers' range of services in the market. The Commission also accepted that the broader service coverage and higher frequencies could facilitate transhipment traffic and maintain Hong Kong's status as a transhipment hub.[33] The Commission's only concern was that with the help of VSAs, parties might have the ability to control capacity in the market by coordination of their services, in particular where the parties hold certain market shares. In order to strike a balance between the benefits and risks associated with VSAs, the exemption for VSAs was issued subject to three conditions[34]:

a. The parties to the VSA do not collectively exceed an aggregate market share of 40% (or 45% over two consecutive years). The market share is calculated by reference to the total volume of goods carried (or the total number of vessels operating) in the market in which the VSA is in place;
b. The VSA does not authorize or require carriers to engage in cartel conduct;

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[31] Competition Ordinance (Cap 619) sch 1, s 1.
[32] Competition Commission (n 29) para 5.
[33] Clara Ingen-Housz, 'Hong Kong Competition Commission Grants 5-year Block Exemption for Liner Shipping' Hong Kong (October 2017).
[34] Competition Commission (n 29) para 7.

c. Carriers must be free to withdraw from the VSA with reasonable notice without incurring any penalties.

2. Voluntary Discussion Agreements

VDAs are agreements by which liners discuss commercial issues and exchange competitively sensitive data including supply and demand information and pricing.[35]

The Commission rejected the application for an exemption order for VDAs on the ground that VDAs do not satisfy the criteria for the economic efficiency exclusion.[36] Also, the Commission considered that customers do not benefit from any of the claimed efficiencies arising from VDAs and these efficiencies may perhaps be achieved by alternative means which do not involve a restriction on competition.

3. The Commission's Economic Efficiency Analysis

The Commission's decision in granting the Order for VSAs but rejecting the application in relation to VDAs shed light on how the Commission interprets and applies the economic efficiency exclusion:

a. The Commission took into account both qualitative benefits (*e.g.* higher frequencies of services and a larger number of destinations offered *etc*.) and quantitative benefits (*e.g.* reduced operation costs) in assessing economic efficiency.

b. The Commission applies a proportionality test in reviewing the benefits claimed in the application. The greater the harm to competition, the more compelling the submitted evidence should be as to demonstrate the benefit arising out of the agreement.

c. After adducing sufficient evidence to prove that the agreement gives rise to economic efficiency, the applicant must demonstrate that customers also fairly benefit from it. As the Commission considers competition as an essential incentive for parties to lower their prices in favor of customers, applicants of an exemption order shall convince the Commission that the agreement could achieve the same result despite the limited competition.

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[35] Ingen-Housz (n 33).

[36] HKLSA, *Response to Hong Kong Competition Commission's Public Consultation under Section 16 of the Competition Ordinance* (2016) para 2.4.

4. Comparison with Other Jurisdictions

Many jurisdictions have exemptions for liner shipping agreements in their competition law. During the consultation process, submissions were made to call for the adoption of the foreign approach by the Commission.

United States

In the United States, exemptions from competition law are made by specific statutory provisions. Specifically, the United States permits both VSAs and VDAs by virtue of the Shipping Act of 1984 (as amended by the Ocean Shipping Reform Act of 1998). The Ocean Shipping Reform Act of 1998 made certain amendments to the system of exemption. For example, conference agreements will be permitted under statutory provisions, given that conference members are permitted to enter into confidential and individual service contracts with shippers. Since the exemptions are pursuant to relevant statutory provisions, they will not necessarily be issued merely when particular economic efficiency tests are met.

South Korea

Same as the US, South Korea provides exemptions from competition law under specific statutory provisions in their Maritime Transport Act. In general, such exemptions implicitly or explicitly cover conference or rate-fixing agreements between carriers on operational and commercial matters (*i.e*. the matters covered by VSAs and VDAs respectively).[37] Similar to the US, exemptions are not necessarily granted on the basis that specific economic efficiency tests are met.

European Union

On the other hand, the EU adopts a similar block exemption regime to that in Hong Kong. Under the EU regime, only 'consortia' agreements between carriers (equivalent to VSAs) benefit from the exemption from the EU competition rule ("**EU Consortia BER**"). Repeal of the block exemption was made in 2006,[38] after the EU launched a review of its previous block exemption for conference agreements ("**EU Conference BER**").

Recently the European Commission had extended the 'Consortia Block Exemption Regulation' to 25 April 2024, so that liner shipping consortia can provide joint services without infringing the EU prohibition of anticompetitive

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[37] Competition Commission, *Application for a Block Exemption Order under Section 15 of the Competition Ordinance in Respect of Certain Liner Shipping Agreements Decision to Issue a Block Exemption Order in Respect of Vessel Sharing Agreements: Statement of Reasons* (2017) para 3.6.

[38] Council Regulation (EC) No 1419/2006 repealing Council Regulation (EC) No 4056/86.

agreements. More specifically, liner shipping consortia are agreements between shipping companies to operate joint liner shipping services and engage in certain types of operational cooperation.

The relevant block exemptions will be issued when the agreements covered can satisfy a specific efficiency exemption, which is similar to the efficiency exclusion under the Hong Kong Competition Ordinance.

Singapore

In addition to South Korea, Singapore is another Asian country which recognises both VSAs and VDAs as exemptions from the prohibition against anti-competition agreements. The Competition (Block Exemption for Liner Shipping Agreements) Order was issued in 2006, followed by two amendment Orders in 2010 and 2015 respectively.

The Singapore Competition Act s.36 allows the Minister for Trade and Industry to make a block exemption order. To fall within the scope of the block exemption order, agreements may not require carriers to adhere to a particular tariff.[39] Even though in practice the issue of exemptions may take into account satisfaction of the economic efficiency tests, there is no express requirement that the tests must be passed.

Overview

Generally, activities carried out in VSAs would benefit from a block exemption from competition law in the above jurisdictions. With respect to VDAs, Hong Kong at present aligns with the EU approach for not permitting VDAs by exemption from the competition law.

However, in terms of the block exemption regime as a whole, the EU and Singapore approaches are more similar to that of Hong Kong. The relevant exemptions have been issued if the agreement can satisfy a specific efficiency exemption similar to that being excluded in the statutes. On the contrary, in jurisdictions like the US and South Korea, the exemptions are not necessarily granted when specific economic efficiency tests are met.

5. Impact on the Shipping Industry

The Commission's issuance of the Order in relation to the VSAs is consistent with the practice of most jurisdictions around the world. As for the Commission's position regarding the VDAs, while VDAs are exempted in jurisdictions such as Japan, Korea and Singapore, they ceased to benefit from a block exemption from the European Union competition rules in 2008.[40]

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[39] Competition Commission (n 37) para 3.9.

[40] Philippe Chappatte, et al, 'Hong Kong Competition Commission Issues Block Exemption Order for the Liner Shipping Industry' (2017) Lexology.

Therefore, Hong Kong is not alienated from international practice. Approaches taken by foreign competition authorities are also discussed in the Commission's Statement of Reasons for the Order, showing that while the Commission took an independent approach to reach its own conclusion under the Ordinance and the Commission's published guideline, it also recognized the value of reference of international practice.

As indicated in the Guideline[41] issued by the Commission on applications for exclusions and exemptions under the Ordinance, undertakings are not required to obtain a decision or block exemption order from the Commission before they may only rely on the economic efficiency exclusion. Undertakings and associations may self-assess the legality of their conduct having regard to the First Conduct Rule and the requirements of the exclusion and exemptions.[42] As such, theoretically, the liner shipping companies may benefit from the economic efficiency exclusion without applying to the Commission for a block exemption order.

However, as set out in the HKLSA representations to the Commission,[43] the self-assessment regime poses difficulties on the liner shipping companies as it undermines the legal uncertainty of the long-standing practices adopted by the industry. HKLSA is also concerned that, without the legal clarity provided by a block exemption order, carriers which are required to carry our self-assessment on their standard contracts will reduce or terminate services in Hong Kong trade routes so as to minimize the legal risks associated with the Ordinance.[44]

In the broader sense, the Order and the mechanism of applying for the issuance of a block exemption order provided legal certainty which benefits not only the shipping industry but also the general business and commercial activities in Hong Kong as a whole.

The Order will expire on 8 August 2022 and the Commission will initiate a review of the Order a year before the expiry date (*i.e*. not later than 8 August 2021). The shipping industry should monitor the review process and be prepared to respond to any change in the current position.

IV. Commitments given by the Hong Kong Seaport Alliance

The Hong Kong Seaport Alliance (the "**HKSA**") is a contractual joint

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41 Competition Ordinance, *Guideline: Application for a Decision under Sections 9 and 24 (Exclusions and Exemptions) and Section 15 Block Exemption Orders* (Communications Authority, 2015) 2.

42 *Ibid* 9.

43 HKLSA, *Supplementary Submission to Hong Kong Competition Commission* (2017) para 3.5.

44 Competition Commission (n 37) para 4.87.

venture between four port terminal operators in Hong Kong. All four members jointly control and administer their berths at Kwai Tsing port through the HKSA. The fifth port terminal operator at Kwai Tsing is not a party to the HKSA.

Members of the HKSA (the "**Members**") co-operate in a number of areas, including operational, commercial and financial coordination. The Commission had concerns that the HKSA as a horizontal co-operation agreement between separate undertakings would raise competition concerns in the gateway market, other related markets and the reciprocal overflow services to the fifth non-member operator.[45]

First, regarding the gateway market, the Members are unlikely to subject to effective competitive constraints. The reason is that other ports are not likely to be regarded by shipping line customers currently using the Kwai Tsing port as alternatives for gateway cargo due to geographic distance,[46] customs procedures and Kwai Tsing's superior power in handling specific kinds of cargo. The Members' combined market share in Kwai Tsing's gateway market was very high, up to over 90% in 2018.[47] The fifth non-member operator, the only competitor, had a restricted ability to work as an alternative service supplier. Therefore, the Members could easily increase charges or reduce service levels, which would have a detrimental effect on the interest of customers.

Second, in relation to incidental charges for gateway service provided by the Members to stakeholders other than shipping lines, such as the port security charge on truck drivers entering into the secure cargo area of the Members' premises, the Members can also raise charges for their services without substantive hindrance or pressures from competitors.

The last concern was about the reciprocal overflow services to the fifth operator. The risk of the HKSA is that the Members could jointly increase the charging rates on the fifth operator or stop providing the fifth operator with overflow services, giving HKSA the power to severely restrict or even eliminate the competition within the industry.

While it noted that the HKSA could give rise to certain benefits, the Commission considered that such benefits fail to satisfy the conditions of the economic efficiency exclusion. The Commission is particularly concerned that the HKSA could afford the Members the possibility of eliminating competition in respect of a substantial part of goods and services.

Under section 60 of the Ordinance, the Commission may accept a commitment from a person to (i) take any action; or (ii) refrain from taking any

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[45] Competition Commission, *Notice Regarding the Commission's Acceptance of Commitments in the Hong Kong Seaport Alliance Case* (30 October 2020) para 27.

[46] *Ibid* (para 44).

[47] *Ibid* (para 53).

action, where the Commission considers it appropriate to address its concerns about a possible contravention of a competition rule. If the Commission accepts a commitment under section 60 of the Ordinance, it will terminate its investigation and not bring proceedings in the Tribunal regarding the matters covered and addressed by the commitment.

Under the section 60 mechanism, the following commitments were proposed by the HKSA and accepted by the Commission:

a. In relation to shipping lines, members of the HKSA pledged to keep the charges for gateway cargo at the price prior to the HKSA's implementation. The members also commit to achieving certain service level standards specific to gateway cargo. These measures guarantee that no higher charges would be imposed and no lower service levels would be provided as a result of the HKSA. Nevertheless, under the commitment shipping lines customers might still request different charges or service levels if they appear to be more appealing in the business sense;

b. For truck operators and freight forwarders, the Members are prohibited to increase the existing charges relevant to the gateway service and that the price for any new service must be reasonable. This ensures that port users could have fair access to the port gate and be guaranteed an efficient external truck turnaround time;

c. As for shippers, it was accepted that the continuation of the HKSA would produce efficiencies for the Hong Kong port, which may benefit shippers. Therefore, the HKSA was allowed to continue to operate, at the same time reducing any anti-competitive effects that it might produce;

d. The fifth operator was allowed to continue to maintain reciprocal overflow arrangements with the Members on terms no less favorable than those applicable as at 1 April 2019; and

e. Lastly, none of HKSA's officials appointed to act as the Governing Committees of the HKSA can be directors of the terminal operators of Shekou or Chiwan ports.

The terms of most of the above commitments are limited to 8 years, except for the commitment of the restriction on the appointment of directors, which shall remain valid for the lifetime of the HKSA.

The Commission accepted that the commitments were appropriate in addressing the competition concerns arising in the gateway and related markets and were thus effective to mitigate the anti-competitive effects to the HKSA's customers and other port users. It held that the commitment is a suitable and proportionate remedy in this case and that the Members are allowed to continue with their cooperation.

V. Conclusion

While the Ordinance does not treat the shipping industry differently from other sectors, the above two instances show how common practices within the industry may be caught by restrictions under the Ordinance and by what means the industry may respond to such risks to achieve commercial efficiency and legal certainty.

International stakeholders should take note that the Ordinance applies not only to undertakings that engage in business in Hong Kong, but also provides an extra-territorial application on undertakings and activities conducted outside the jurisdiction, where the anti-competitive behaviour has the effect of preventing, restricting or distorting competition in Hong Kong.[48] The Ordinance is a relatively young legislation. It remains to be seen how the competition law regime and related case law will develop in Hong Kong. The international shipping community is advised to keep an eye on developments in Hong Kong competition law and consult local legal counsel for advice where necessary.

[48] Peter J Wang, 'Antitrust Alert: Hong Kong Finally Adopts Competition Law' (*Jones Day*, July 2012).

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Insurable Interest in Bareboat Charter Parties: A Comparative Approach between Korean and Italian law*

(focused on the KSC 2019.12.27. Docket No. 2017da208232)

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ABSTRACT

In a Korean Supreme Court case, a BBCHP vessel sank. The BBCHP charterer tried to claim insurance indemnity which was not accepted by the insurer. The charterer argued that it was a right person to receive the indemnity even though it was not listed as an insured. The KSC mentioned that the BBCHP charterer may have expectation right to obtain the vessel's title at the end of the charter period. Both a Korean scholar and Italian specialist study on the decision of the case and express their opinion respectively.

KEYWORDS: Insurable Interest, BBCHP, Bare Boat Charterer, Italian Maritime Law, Korean Maritime Law, Insurance Law, Insurance Indemnity, Expectation Right to Obtain the Title of the Vessel, Agent, Insured.

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I. Introduction

The recent Korean Supreme Court ("KSC") ruling[1] on the issue of insurable interests in bareboat charter parties offers interesting hints for a comparative analysis on the subject matter under Italian law.

When a chartered vessel sank during the charter period, the ship owner and the charterer claimed insurance indemnity against the insurer at the same time. Only the ship owner and the manager of the vessel were listed as the insured. The charterer argued that it was entitled to claim the insurance indemnity because it should be regarded as the insured even though it was not listed as the insured in the insurance policy. He alleged that the manager was its agent.

The Bare Boat Charter Hire Purchase(BBCHP) contract is a unique kind of charter party in Korea. It is a special kind of Bare Boat Charter Party(BBC). While under a simple BBC the charterer is to return chartered vessel to the owner upon expiry of the charter period, the charterer under the BBCHP obtains the title of the chartered vessel and thus the charterer does not owe a duty to return the vessel to the owner. Under a BBCHP, the charterer regularly pays charter hire in installment for the vessel's price to the owner. Therefore, the charterer has insurable interest in the chartered vessel. However, the charter party at issue was slightly different from a BBCHP. According to the charter party between the owner and the charterer, the charterer had the option to buy

[1] KSC 2019.12.27 Docket No. 2017da208232

the vessel by paying the remaining price of the vessel at the end of the charter period.

The KSC regarded the charter party at issue as a kind of simple BBC rather than a BBCHP and rendered that the charterer did not have expectation right for obtaining the title of the vessel and thus the charterer was not entitled to become an insured because it did not have insurable interest.

II. Fact

A Korean shipping company(plaintiff) chartered in the vessel X from the Panamanian shipping company under a bareboat charter party contract for 50 months. According to the contract, the plaintiff was entitled to obtain the vessel at the end of the charter period by paying remaining premium of 38,000,000Yen. The daily charter hire was 130,000Yen. If the vessel becomes a total loss, the advance hire paid to the owner should be returned to the charterer.

S company acted as a manager for the vessel X. S entered into the hull insurance contract with H insurance company(defendant). The owner and S as the manger were listed as the insured. The plaintiff paid the insurance premium.

The vessel X sank in July 2013. The plaintiff on behalf of S and the owner claimed the insurance indemnity against the insurer H. The insurance contract was made between H insurance company and the manager. The English law was the governing law. They argued that they are eligible for insurance indemnity respectively. However, H deposited the insurance indemnity with the Pusan district court, saying that it could not make certain who was the right person to obtain the indemnity.

The plaintiff said that the contract was a kind of BBCHP. It argued that it was the insured because it had an expectation right on 92% of 235,730,000 Yen(charter hire plus delivery money for the vessel) and S who was listed as the insured was its agent. It filed a law suit asserting that it had a right to obtain the insurance indemnity.

In the first instance, the court said that the charter party concerned was remarkably similar to a BBCHP, but it pointed out that the charterer should pay 20 % of the whole charter hire at the end of the charter period in order to obtain the title of the vessel. The court rendered that the charter party was different from a pure BBCHP under which the charterer does not have any remainder to pay at the end of the charter period. Therefore, it decided that the current charter party was different from a BBCHP but similar to the pure bare boat charter party(lease contract). In conclusion, the court decided that the plaintiff did not have expectation right of the vessel. Furthermore, the court rendered that in the insurance policy S, the manager, not the plaintiff was as listed as the insured and accordingly the owner of the vessel, not the plaintiff as the charterer, had the right to obtain the insurance indemnity. The plaintiff appealed to the KSC.

III. Decision of the Korean Supreme Court

There was no evidence that S expressed that it was an agent of somebody or H knew such fact, nor that S received the delegation right for entering into insurance contract from the plaintiff or S had intention to enter into the contract on behalf of the plaintiff. Therefore, there was no way for the plaintiff to be regarded as the insured because he had not been listed as the insured on the insurance policy under the undisclosed principal theory in English law.

The Pusan District Court decided that the legal nature of the current charter party was a simple lease contract rather than the BBCHP even though it has a characteristic of a BBCHP because the plaintiff as the charterer has the option to obtain the title of the vessel X at the end of the charter period. It concluded that the legal right to obtain the insurance indemnity rests with the owner(defendant)[2] The judgment of the Pusan District Court was right in this regard.

IV. General Theory of BBC

Our exercise in comparing the doctrines of insurable interest in bareboat charters between the Asian and the continental European systems has a legal foundation, an academic reason and a scientific merit.[3]

The KSC had the occasion to examine the doctrine of insurable interest under a bareboat charter party in the context of a dispute between a bareboat charterer and a ship owner on one hand and its insurer on the other hand, following a total loss of the vessel.

A bareboat charter is a ship lease contract. Under a bareboat charter the lessee is fully responsible for the operation of the vessel.[4] The advantages and

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[2] The lower court also admitted that 19,370,000Yen which would be paid by the plaintiff was a part of the unjust enrichment to be returned to the plaintiff at the end of the charter period. It regarded the total hire moneys which was paid for 50 months as a pure remuneration of the use of the vessel and thus not a kind of unjust enrichment.

[3] It is well known that Italian law, being one of the oldest systems of continental European civil law, inspired many Asian legal systems and legislators in several areas of law, including marine and insurance law. The Japanese and Chinese legal systems adopted Western-style legal codes to foster economic growth and international trade; and, more importantly, both have an underlying foundation of Confucian philosophy. The Chinese Criminal Code drew on portions of the criminal codes of Hungary, Germany, Holland, Italy, Egypt, Siam, and Japan. The Civil Code was based on the Swiss Code; and the Code of Civil Procedure was based on the Austrian Code. The Korean legal system has been deeply inspired by German law, besides an Anglo-American influx and Chinese classical thoughts. Oh, Seung Jin, "Overview of Legal Systems in the Asia-Pacific Region: South Korea" (2004). *Overview of Legal Systems in the Asia-Pacific Region (2004)*. 6. https://scholarship.law.cornell.edu/lps_lsapr/6

[4] Mark Davis, *Bareboat Charters*, LLP, at 2 (2d ed. 2005); In the Korean Supreme Court case *1975.3.31 Docket No. 74da847*, the court decided that only the bareboat charterer was liable

disadvantages of this contract from the lessor's perspective are the mirror image of those under a time charter. Under the bareboat charter the lessor does not bear the operational cost and vessel performance risk, resulting in a more predictable and stable cash flow. However, in the case of a customer default the lessor has to first secure repossession of the vessel. This could be time consuming depending on the maritime jurisdictions that are involved. Also, a customer default oftentimes goes hand in hand with a vessel that has not been maintained to an appropriate standard, such that the lessor upon repossession could face significant maintenance capital expenditures to get the vessel back into a "lease-ready" status. A bareboat charter party has proven to be a kind of lease contract of choice for the tanker industry as it is important for tanker operators to have control over the tankers because this is the service that they sell to their customers: the oil companies and traders. The contract form for bareboat charter party which the industry accepted is the Barecon,[5] elaborated and revised by BIMCO.

Under a bareboat charter party, the charterer appoints the master (subject to the owner's approval) as well as the crew and is responsible for all costs appertaining to the running of the vessel, while the owner is only responsible for asset (ship) depreciation and capital cost amortization (*i.e.*, payment of capital and interest), and perhaps may also bear the survey costs of the ship depending on the terms of the charter party.[6]

The charterer also provides the stores, bunkers and lubricants, undertakes the ship's repairs, the insurance and the dry docking, appoints the master and crew, pays for port/canal costs and gives the navigational instructions. The remuneration payable by the charterer is called "hire" and is usually paid every 15 days, 30 days, or monthly. If the vessel is unable to trade for a period of time due to some fault of the owners, the charterer does not pay for such "off-hire" periods. The charterer is responsible for paying all operating expenses, voyage and cargo handling cost, whilst the ship owner undertakes only the capital cost. A serious risk for any charterer is the loss of or the serious damage to the vessel and all or part of its cargo, caused by the dangerous properties in the cargo loaded by the charterer.

BARECON 2001 differentiates regarding the insurance against the risk of actual and constructive, compromised or agreed complete vessel loss[7]. Actual loss implies the physical loss of the insured vessel whereas constructive loss

for the damages caused by collision when a vessel under the bareboat charter party involved. The bareboat charterer, instead of the owner, is liable for damages which third-party victims suffer during the bareboat charter party pursuant to the KCC Article 850. In Hyeon Kim, *Transport Law in South Korea*, Wolter Kluwer, 2017, at 76.

[5] Barecon 1989, revised 2001, revised 2017 (copyright of BIMCO)

[6] The shipowner is further responsible for the brokerage payable to the shipbroker, as it occurs in all types of charter.

[7] See BARECON 2001, Part II, Article 13(d)

implies the loss of commercial use of the vessel. By encompassing various cases of vessel's loss, a completely new criterion for the determination of complete loss has been introduced. Namely, from the content of BARECON 89 the hull and machinery insurance covers only the physical loss and damage. In the BARECON 2001 form compromised and agreed loss of vessel has been added which can be interpreted within the scope of the agreed contract, compromise, acceptance or the settlement of the parties. The charterer is obliged to notify the owner and the mortgagee (if any) of any occurrences which are likely to result in the vessel becoming a total loss.[8] The owner is, on the other hand, obliged, upon the request of the charterer, to promptly execute such documents as may be required to enable the charterer to abandon the vessel to insurers and claim a constructive total loss.[9]

V. Issues at the case

In the aforementioned case a Korean shipping company (demise) chartered in a vessel from a Panamanian company under the terms of a bareboat charter party[10] for a period of 50 months. The contract provided for an option to the charterer to purchase the vessel at the end of the charter period in consideration of payment of a balloon price[11] agreed in the contract. Hull & Machinery insurance was arranged by ship's managers.[12] The registered owner (only) was co-insured under the policy with the ship's managers. No mention of charterers was made in the policy[13] albeit they paid the full insurance premium.[14] The Vessel sank in July 2013 when a considerable portion of the bareboat charter has been paid for by the charterer. The charterers, who at time of the loss had an expectation on 92% of the Vessel's value, comprising of the charter hire paid so far and the redemption amount, claimed against owners a full reimbursement and, in alternative, insurance proceeds from the Insurers.

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[8] BARECON 2001, Part II, Article 13(d)

[9] BARECON 2001, Part II, Article 13(e)

[10] It is unreported which industry template has been used or referred to or otherwise incorporated by the parties.

[11] A balloon payment is a lump sum owed to the lender at the end of a finance agreement. Loans with a balloon payment option typically result in lower monthly repayments, as you are deferring part of the cost to the end of the contract. In this case an amount of 38,000,000 Yen was agreed as remaining price to obtain the transfer of title at the end of the contract.

[12] We understand that ship's managers failed to indicate to the insurers whether they were buying the insurance on behalf of the registered owner or the bareboat charterers, but we must assume that it was clear to the insurers at all times that the contracting party was the company managing the ship.

[13] We also assume that no Loss Payee Clause was agreed with the insurers nor charterers' interests were otherwise noted or recorded in the policy.

[14] Unclear whether to owners or to insurers directly.

The owners, in turn, claimed against insurers for indemnity. The insurance policy was written on the London market and subject to English law.

The issues before the Korean first instance court and, later, before the KSC were the following: (i) agency relation between the ship's managers, the owners and/or charterers and its implications on the identification of the Assured under the policy; (ii) nature of the contract between owners and charterers and consequences of the option to transfer title clause; (iii) the insurable interest; (iv) the doctrine of unjust enrichment.

The KSC confirmed the first instance court's conclusions as follows:

(i) The ship's managers were the (co)insured because they were listed as the contracting party in the insurance policy. No representation was made by the managers about the fact that the insurance was stipulated on behalf of the charterers not that insurers were aware about the managers acting on charterers' behalf in contracting insurance;

(ii) The contract presented stronger similarities with a lease contract rather than with a hire purchase contract. This is due to the presence of a balloon price redemption clause which is typical only of lease contracts.

(iii) As a consequence of the above only the owners, as lessors, were entitled to insurance indemnity, being listed as co-insured in the policy and having legal title over the Vessel at the time of the total loss.

(iv) The charter hire was a remuneration of the Vessel's lease and use by the charterers and, therefore, was not to be refunded by the owners. The charterers were, however entitled to be partially refunded by the owners for amounts other than charter hire paid before the end of the charter period (*i.e.*, bunkers. *Etc.*), which the owners benefitted.

VI. BBCHP under the Korean law

The issue regarding the case was who was the right person to obtain the insurance indemnity under the BBC contract. The insurance contract was based on the ITC(Hull) with English law as the governing law.[15] Therefore, the eligible party to obtain insurance proceeds should be decided based on English law. In general, the listed party on the insurance policy is regarded as the insured. The subjective mind of the listed insured will affect the decision.

The insurance policy shows the two parties such as the owner and S as the insured. However, the plaintiff alleged that it was real insured as the BBCHP charterer and that S acted as its agent. The only way for the plaintiff to be regarded as the insured is the undisclosed agency theory. If S was an agent of

[15] Almost all of marine insurance contracts have English law jurisdiction clause even though they are actually entered into between Korean insurer and Korean insured.

the plaintiff but it did not disclose the fact that it was the agent of the plaintiff, the plaintiff might be regarded as the insured as the principal of the S as its agent. The KSC decided that there was no intention of the plaintiff to designate S as its agent and S was not the plaintiff's agent in respect of insurance policy. According to Korean and English law, the only way for the plaintiff to win the law suit was to rest upon the agency theory. S should be admitted as the agent of the plaintiff.

The lower court decided that the charter party at issue was not a pure BBCHP contract but similar to the BBC, a kind of pure lease contract. It pointed out that the BBCHP contract at issue was different from the pure BBCHP in that it was required to pay delivery cost(balloon payment) at the end of the charter period. Under the pure BBCHP there is no need for the charterer to pay the remaining money because there is no remainder of the vessel's price. The KSC also affirmed that the charter hire was just a remuneration in return of the use of the vessel and that the charter party was similar to the BBC rather than BBCHP contract. Accordingly, the KSC rendered that under the current charter party the charterer did not possess insurable interest.

The BBC is regarded as a kind of operating lease under the Korean law.[16] Under the BBC contract the owner of the vessel promises to let the vessel to the charter for a certain period. The charterer promises to pay remuneration for hiring the vessel to the owner. The charterer has obligation to return the vessel to the owner as soon as the charter period ends. However, under the BBCHP contract, in addition to leasing agreement, the charterer promises to pay the total vessel's price by monthly instalment to the owner and obtain the title of the vessel at the end of the charter period, which resulted from the legal nature of the BBCHP contract as a finance lease. According to finance lease theory, the charterer, under the BBCHP contract, obtains the vessel's reserved title by borrowing money from the owner through paying the vessel's price gradually.

It is generally agreed that under a BBCHP the charterer has insurable interest because it obtains the title of the vessel gradually by paying the price of the vessel monthly.[17] The charterer's future right on the vessel is known as a kind of expectation right for the vessel's ownership. In the meantime, a simple BBC charterer also has insurable interest in the hull insurance. However, it may not have insurable interest in the vessel's price when the vessel is lost because it has nothing to do with title of the vessel. Under a simple BBC, the vessel is to be returned to her owner as soon as the charter period expires.

The BBCHP at issue was between a pure BBCHP and a BBC. The Korean courts regarded the contract as a kind of BBC rather than a BBCHP and the payment made by the charterer was simple remuneration for hiring the vessel. The Korean courts also decided that the plaintiff as the charterer did not have

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[16] The Korean Commercial Code Article 848.

[17] In Hyeon Kim and other, *marine insurance law*, Bubmoonsa(2020), at 17.

insurable interest in the vessel's price. The authors agreed to such decision. The same conclusion will be obtained even under Korean law.

It seems that under a BBCHP the charterer has insurable interest against the title of the vessel according to KSC's decision. If the charter party was a pure BBCHP contract, the charterer has the expectation right for the chartered vessel and thus it is entitled to become an insured for the vessel's price because it had insurable interest.

In the present case, under a BBCHP the charterer was not listed as an insured. The argument that the manager was its agent became useless because the charterer did not have insurable interest. Thus, the KSC easily decided that the ship owner other than the charterer was entitled to obtain the insurance indemnity.

VII. BBCHP under the Italian law

It is of interest to compare this decision and the above related principles of law with some of the most important continental (non UK) European civil law system, including Italian law.

1. Under art. 1891 of the Italian Civil Code ("ICC") a contracting party is entitled to stipulate the insurance on behalf of (a) a third party or (b) on behalf of whoever that has an insurable title at the time of loss. However, in case sub (a) the third party (assured) must be named in the policy while in case sub (b) the assured must be unknown at the time of stipulation of the policy[18]. Moreover, the contract of insurance must be stipulated in writing in order to be validly proved (not for its validity though). As a consequence, the mandate to stipulate the insurance policy must also be issued in writing to be validly proved. The consequence of the above regulation is that, in a hypothetical Italian proceeding on the same subject matter, the charterers could have not been legally admitted to prove the existence of a mandate to the ship's managers to take out insurance on their behalf under art. 1891 ICC. The conclusion on this issue would have been therefore identical to the KSC ruling.
2. As to the nature of the bareboat charter in question, under Italian law this would have been treated as a hybrid contract where the predominant contractual nature remains a demise charter of the vessel, supplemented by a contractual option to buy the title of the vessel upon payment of a final balloon price at the end of the charter period. This

[18] As for example in cargo insurance, where the cargo is sold during transit by negotiation of the bill of lading

must be distinguished from the sale contract with reservation of title (also known as lien agreement), where the predominant part of the contractual nature is the sale of the asset, not the charter usage. It would probably be considered not too different from a leasing contract, according to the definition of leasing which is quite different from the one under Korean law. Under Italian and French law, the leasing contract is generally a financial leasing where the lessee is financing purchase through an instalment payment plan and a final balloon price. During the leasing period the lessee has possession and right of use of the leased asset, while the lessor is a bank or a financing company that bought the asset from a supplier upon indication and choice of the lessee.

3. The demise charterer is generally considered having insurable interest in the vessel's hull under Italian law. The charterer would normally appoint a vessel's manager to operate the vessel, recruit crew and assist with technical management and insurance. The standard industry templates, like BIMCO SHIPMAN 2009, provides for the disponent owner's ability to mandate managers to insure the Vessel's hull and machinery[19] as well as to stipulate (or renew) P&I cover. The manager will therefore often have contractual ability to procure insurance for the vessel. It may also be that such ability is excluded by the particular Shipman and, in such a case, the disponent owner will deal with the insurance directly. It is also possible, in this latter case, that the bareboat charter party also opted for the owners (rather than the charterers) to deal with the insurance, although this is less frequent. In this case the owners will sort out the insurance personally without relying on the demise charterers. This would be very much a question of fact.

The issue in the KSC case was whether the demise charterer could be considered as having insurable interest in the vessel and, in the affirmative, whether it was nevertheless automatically insured under the policy contracted by the ship's manager. A peculiarity of this case was that the bareboat charter party contained a redemption clause under which the charterer could activate at the end of the charter period by paying the final balloon price agreed in the contract. The exercise of this option by the charterer would determine the transfer of title of the vessel. In my opinion, as aforesaid, the demise charterer always has an insurable interest in the vessel's hull independently on any

[19] Cl. 10 Bimco SHIMPAN 2009: "The Owners shall procure, whether by instructing the Managers under Clause 7 (Insurance Arrangements) or otherwise, that throughout the period of this Agreement: (a) at the Owners' expense, the Vessel is insured for not less than its sound market value or entered for its full gross tonnage, as the case may be for: (i) hull and machinery marine risks (including but not limited to crew negligence) and excess liabilities"

redemption clause in the contract. This is particularly the case when the bareboat charter party stipulates that the charterer has an obligation to arrange insurance for the vessel. It derives anyway from the hype of obligations and liabilities of the charterer vis-à-vis the owner (generally) arising out of the bareboat charter party, especially when industry standard contracts are used by the parties.

However, even if the demise charterer has insurable interest in the vessel's hull due to contract stipulations or because of the legal liability towards the owners in case of total loss of (or damage to) the vessel, insurance will not cover it automatically unless it is mentioned in the policy or its interests are recorded or otherwise noted by the insurers (*i.e.* by a loss payee clause). As commented under 1) above, art. 1891 ICC requires that, if the assured is a known entity, its details should be noted in the policy when the contracting party is a different entity than the assured. In the case in question, no mention has been made about the bareboat charterers in the policy. Therefore, also in this respect, the conclusions of the Italian Court would have probably been in line with the KSC ruling.[20]

An odd situation would be if the total loss occurred just before the end of the charter period and "after" the charterer validly exercised its options under the redemption clause. In this case it would have acquired a legal expectation over the vessel's title (by contract) but, not being named in the H&M's policy, may not deserve protection. While, in such case, the charterer may well retain action against the ship's managers for breach of a duty of care or breach of any relevant Shipman's provisions[21]; and, the lack of an automatic right to step in and reclaim insurance indemnity as "owner-to-be" is a significant gap in the law of direct damage insurance. This, for example, will not be a problem under Scandinavian law (and the Nordic Plan).

In accordance with the Nordic tradition and the Insurance Contract Acts[22] of the Nordic countries, a marine insurance contract is a contract entered into between the *insurer* and the *person effecting the insurance.*[23] If the person effecting the insurance enters into a marine insurance contract to insure his own ship, he is both the person effecting the insurance and the assured,[24] since he is "the party who is entitled under the insurance contract to compensation" in case of a casualty. In practice, this assured owner is often called the "principal assured". The term "assured" is defined in the Plan[25] to include those not covered by the term "principal assured" as (additional) assured under the

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[20] This conclusion is based on the (very few) available information about the dispute examined by the KSC and in the impossibility to read the original decision in full.

[21] Depending what such contractual regulations state in the subject matter

[22] The Nordic Marine Insurance Plan of 2013 (Updated 2019) (the "Plan")

[23] cf. Cl. 1-1 litra (a) and Cl. 1-1 litra (b) of the Plan

[24] as this term has been defined in Cl. 1-1 litra (c) of the Plan

[25] Cl. 1-1 litra (c)

insurance contract. This result is achieved by making use of the concept of co-insurance. There may be a number of reasons why the benefit of an insurance is extended to others. In many cases, the principal assured has committed himself to do so in a separate contract with a third party.[26] The most common and practical case is that of the mortgagee. Here, the Plan[27] provides an automatic cover of the mortgagee's interest under the insurance, making the mortgagee a co-insured party. As for the other third parties, insurance is not automatically applied. For a third party to be given specific rights under the insurance, the insurance has to explicitly record the benefit of that third party.[28]

VIII. Conclusion

When a vessel sank, the BBCHP charterer who actually paid insurance premium applied for the insurance indemnity. The shipowner also applied for the insurance indemnity. The disadvantage for the charterer was that it was not mentioned on the policy as an insured. He argued that the manager which was listed as an insured was his agent, which was not admitted by the Korean Supreme Court. In the decision, the KSC stated to the effect that the current BBCHP contract at issue was different from the pure BBCHP in which the charterer has an expectation right to the title of the vessel and thus the charterer has an insurable interest. The expectation right of the charterer was not admitted because the charterer has to pay considerable amount of the balloon price at the end of the charter period.

Under the Korean law, BBCHP charterer has insurable interest. Unless it is listed as an insured, it may not admitted as an insured. There is no provision that gives charterer the right to claim the insurance indemnity. Therefore, the authors agree with the decision of the KSC. The conclusion is not different from that of the KSC under the Italian law. However, it is noteworthy to mention that under the Nordic Marine Insurance Plan the mortgagee has an automatic cover and to claim insurance indemnity, even though it is not listed as an insured.

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[26] Examples from KSC cases are (i)Shipman Contract between managers and disponent owners, (ii)bareboat charter party between registered owners and demise charterers.

[27] Chapter 7

[28] Chapter 8 is applicable to all co-insured third parties aside from the mortgagees. The protection of contractual mortgagees is exhaustively regulated in Chapter 7, but the mortgagees may obtain an extended protection pursuant to Cl. 8-7. The rules in Chapter 8 apply when a specific and explicit agreement is concluded to the effect that the insurance shall also apply for the benefit of one or more third parties other than the contractual mortgagees. The most common example is in connection with insurance of MOUs(*i.e.* Memorandum of Understandings in ship sale and purchase) cf. Cl. 18-1 litra (i)

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When the Baggage of One Becomes Heavier for Two: Student Loan Debt Distribution Effects

Claudia S. Perez[*]

ABSTRACT

This article examines the way student loan debt is treated while distributing property in a marriage dissolution proceeding. It discusses how currently, both the community property distribution system and the common law equitable distribution system often yield inequitable results when courts divide marital property (*i.e.*, assets and liabilities acquired during the marriage) equally between the spouses. This is especially true with regard to student loans that were unilaterally obtained by one spouse prior to the marriage. With close to 45 million borrowers currently owing over $1.7 trillion in student loan debt, it is imperative that state legislatures review their "distribution" systems to ensure that marital liabilities are truly equitably distributed upon dissolution of a marriage.

KEYWORDS: Student Loan, Student Loan Debt, Marriage Dissolution, Equitable Distribution, Community Distribution, Liability Distribution, Liability Allocation, Asset Allocation, Fair Results, Distribution Systems, Equitable Distribution Statute, Partnership, Challenge, Court, Repayment, Equal Distribution, Divorce, Marriage, Commingle, Commingling, Separate Character, Division of Liabilities, Education, Unfairness, Fairness, Pre-marital, Premarital, Pre-marital Assets, Premarital Assets, Pre-marital Liabilities, Premarital Liabilities, Common Law Equitable Distribution, Spouse, Common Law Principles, Law Reform, Legislation Enactment, Equal, Unequal, Premise, Assumption, Interest, Gift, Inheritance, Federal Student Aid Division, Education, Invest, Department of Education, Borrower, Borrowers, Distributable

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I. Introduction

When two people marry, the most common and natural expectation is to think the marriage will last forever.[1] We think this way, in part, because that is the inculcation we receive since we can understand words, and although we wish it to be true, no one explains that an ever-changing society makes this expectation more difficult to attain with the passing of each year.[2] Reality sets in when a couple decides to pursue a divorce and discovers that going their separate ways is not as simple as signing a paper and starting over, but rather, apart from being emotionally draining, the dissolution of a marriage can be lengthy and expensive as the litigation process can rack-up attorney's fees and other costs fairly quickly.[3] Furthermore, divorcing couples find out that the

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[1] *See* Scott & Bethany Palmer, *5 Reasons Why Money Is The #1 Cause of Divorce*, CROSSWALK (Sept. 20, 2019), https://www.crosswalk.com/family/finances/5-reasons-why-money-is-the-1-cause-of-divorce.html (stating that no one goes into a marriage wanting to get divorced).

[2] *See* Elisa Wall, *Is 'I Do' Supposed to Be Forever?*, HUFFPOST (Mar. 18, 2013), https://www.huffpost.com/entry/post_4272_b_2442820?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2xlLmNvbS8&guce_referrer_sig=AQAAABQItxuTfBENU24kRsyej7qGxJ1Gtf_zQ3Jg6CvGsTSrdDK2H4lNL1iGD6QIzX09c7tGLLe7TfLxAHfLPyCn8uMGCYjsLlFC0UPY94QNVOAFi5jCdL0Q78mT1Ymo35cqiLJ6PhnfUEz8SESvYyUx3XNyCvN3x-yu7_g_WhXiYI (noting that thinking marriage is forever is an old idea that does not always work in our modern society); *see also* ELI J. FINKEL, THE ALL-OR-NOTHING MARRIAGE: HOW THE BEST MARRIAGES WORK 5–7 (2018) (noting that we tend to use our preconceived idea of a "traditional marriage" as a standard against which we compare today's marriages. However, this comparison is disadvantaged because marriages in the past used to be mainly center on assisting "spouses meet their basic economic and survival needs").

[3] *See* Schneider v. Schneider, 32 So. 3d 151, 152 (Fla. Dist. Ct. App. 2010) (showing that a

more they comingled (*i.e.*, combined) their finances during their marriage, the more they could potentially become slaves of each other's debts even after the divorce becomes final.[4] In the past two decades, "student loans" have become one of the main sources of debt in the U.S.[5] For this reason, courts have increasingly been forced to deal with the additional difficulties of distributing this type of debt during a dissolution of marriage.[6]

This Comment addresses the negative ramifications arising from Florida courts applying equitable distribution principles to student loan debt, in particular, in cases where the student loan was unilaterally initiated by one party before the marriage, and continued throughout the marriage until the education was completed.[7] Part II of this Comment introduces Florida's Equitable Distribution Statute and exposes its tendency to yield unfair results when applied to the distribution of student loan debt that was acquired by one spouse before the marriage.[8] Part III focuses on comparing and contrasting both

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divorce process can be lengthy and expensive); *see also* Pfrengle v. Pfrengle, 976 So. 2d 1134, 1135 (Fla. Dist. Ct. App. 2008) (evidencing that dissolution of marriage proceedings can take as long as several years. In this case, the marriage lasted five years and it took four and one-half years for the dissolution of marriage litigation to culminate).

[4] *See* Fla. Stat. § 61.075(1) (2018) (setting out the initial premise that marital assets and liabilities should be distributed equally between the spouses). *See also* Steiner v. Steiner, 746 So. 2d 1149, 1151 (Fla. Dist. Ct. App. 1999) (showing the difficulty that arises in separating assets when spouses comingle their property); *Pfrengle v. Pfrengle*, 976 So. 2d 1134, 1136 (Fla. Dist. Ct. App. 2008) (explaining that one of the difficulties of separating comingled assets is that money is fungible, and it loses its non-marital character once comingled. When Mr. Pfrengle combined non-marital and marital funds in his personal account, all the funds became marital because the funds lost their separate character).

[5] *See A Look at the Shocking Student Loan Debt Statistics for 2019*, STUDENT LOAN HERO (updated Jan. 27, 2021), https://studentloanhero.com/student-loan-debt-statistics [hereinafter *Shocking Student Loan Debt Statistics]* (emphasizing the shocking statistics that approximately forty-five million Americans have student loan debts, totaling approximately $1.71 trillion).

[6] *See* § 61.075(1) (showing the authority of Florida courts to allocate debts). *See also Steiner*, 746 So. 2d at 1151 (showing how difficult it is to separate assets in cases where commingling happens).

[7] *See infra* Part I-VI; *see also* Banton v. Parker-Banton, 756 So. 155, 156 (Fla. Dist. Ct. App. 2000) (holding that the trial court erred because it failed to support with evidence when the student loans were incurred. The record showed student loan debt by both spouses but no record as of the time the loans were incurred. In its ruling, the appellate court highlighted that the trial court's categorizing of some loans as marital and others as non-marital without evidence was an arbitrary error); Fortune v. Fortune, 61 So. 3d 441, 445 (Fla. Dist. Ct. App. 2011) (reversing because the trial court erred in classifying the entire amount of a loan as marital liability without making a finding as to when the debt was incurred or what the debt was used to pay).

[8] *See infra* Part II; *see also* § 61.075(1) (setting out the initial premise that the marital assets and liabilities should be distributed equally between the spouses unless there is a justification for an unequal distribution. The statute also sets out a set of factors a court may use to determine whether such justification exists. The factors are based on different ways a couple could have comingled their assets and liabilities during the marriage).

distribution systems – the common law equitable distribution system and the community property system.[9] Part IV distinguishes student loans from other types of loans and uncovers some of the consequences that result from assigning student loan liabilities to the non-student spouse.[10] Part IV also discusses Florida's difficulties in distributing liabilities by exposing the statute's deficit in addressing the division of liabilities and how the ambiguity results in unfair distribution results.[11] Lastly, Part IV introduces California's approach to the distribution of liabilities.[12] Part V proposes that Florida enact a statute which deals with the distribution of student loan debt exclusively, using California's property distribution statute as a guide.[13] Part V concludes by explaining how enacting the proposed statute will free the courts from the burden of having to make the very difficult decision to assign student loan liability to the non-student spouse, which in turn is in agreement with the cornerstone principle of producing fair results.[14]

II. The Problem

When analyzing dissolution of marriage cases, Florida state courts refer to the laws of the Equitable Distribution Statute as the starting point to determine allocation (*i.e.*, separation) for spouses' assets and liabilities, and in doing so, the court must first set apart the non-marital assets and liabilities before applying equitable distribution to the marital portion of the assets and liabilities.[15] The underlying meaning of the term "equitable distribution" is misleading in the sense that it does not necessarily mean equal. Rather, it means that a court will divide the marital assets and liabilities in a manner that is "fair," which in turn gives the courts discretionary power in a case by case basis.[16] The

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[9] *See infra* Part III, Sections A, B, and C.
[10] *See infra* Part IV, Section A.
[11] *See infra* Part IV, Sections B and C.
[12] *See infra* Part IV, Section D.
[13] *See infra* Part V.
[14] *See infra* Part VI.
[15] *See* § 61.075(1) (governing dissolution of marriage proceedings and mandating a court to separate the spouses' non-marital assets and liabilities and then apply equitable distribution to the assets and liabilities characterized as marital). *See also* Buckalew v. Buckalew, 197 So. 3d 148, 149–50 (Fla. Dist. Ct. App. 2016) (reversing the trial court's distribution decision because erred when it failed to clearly identify the assets and liabilities. To fairly separate the assets and labilities, the statute mandates that they must be supported by factual findings).
[16] *See* Fla. Stat. § 61.001(2) (2018) (stating that one of the purposes of this chapter is to "mitigate the potential harm to the spouses"). *See also* Mo. Rev. Stat. § 452.330 (2019) (commanding to separate each spouse's nonmarital property before dividing "the marital property and marital debts in such proportions as the court deems just after considering all relevant factors including: [five named factors]"); Schecter v. Schecter, 109 So. 3d 833, 836 (Fla. Dist. Ct. App. 2013) (noting that under chapter 61, the court uses rules of fairness, rather than strict rules of law).

fundamental reasoning for this discretion is for courts to have the ability to depart from an equal distribution standard in order to fairly divide the marital estate in cases where the couple's finances have several layers (*e.g.*, bank accounts, loans, interests in stocks, retirement accounts) that have commingled in complex ways during the course of the marriage.[17] However, to use discretion, the court must first give weight to the factors delineated in the statute to determine whether there is sufficient justification to depart from the presumptive equal distribution starting point.[18]

The equitable distribution process may sound fairly simple. However, it is not because separating the spouses' non-marital portions of assets and liabilities from the marital assets and liabilities becomes particularly difficult when courts are forced to account for the innumerable possible ways in which couples can commingle their property during the course of a marriage.[19] More often than

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[17] *See* Niekamp v. Niekamp, 173 So. 3d 1106, 1108–09 (Fla. Dist. Ct. App. 2015) (reversing where the wife's business, a music studio, was classified as a non-marital asset by the trial court. The Wife admitted the error on appeal, but asserted it was harmless because: (1) there was no evidence of value and (2) the business is based entirely on her goodwill and personal services. However, as noted by the Husband, the business also had other assets, including tangible assets such as funds in bank accounts and two books it sells, and perhaps some enterprise goodwill. Further, the failure to present evidence as to value could have very well been to the Wife's detriment. When an asset is acquired during the marriage, it is presumed to be marital unless specifically established as non-marital); *see also Pfrengle*, 976 So. 2d at 1136 (holding that commingling money causes it to lose its separate character. In this case, when the husband transferred funds from his personal account (non-marital asset) into his corporate accounts (marital assets), the money was commingled in a significant enough manner to cause the funds to lose their separate character and be transformed into marital assets subject to equitable distribution).

[18] *See* Fla. Stat. § 61.075(1)(a)–(j) (2018) (mandating that a court must begin with the premise that a distribution is to be equal between the spouses. The statute outlines a set of ten factors a court must waive in order to determine if a justification exists to deviate from the standard. In circumstances in which it would be unfair to make an equal distribution, the court is allowed to make an unequal distribution after waiving the factors set out by the statute). *See also* Rogers v. Rogers, 12 So. 3d 288, 291 (Fla. Dist. Ct. App. 2009) (reversing because the trial court erred in holding that the wife was responsible for her student loan debt when the debt was incurred during the marriage. The husband argued that he would not receive the benefit of the education she obtained. The district court held that this is not a factor to be considered when allocating debt. Therefore, absent any other justification for an unequal distribution, the student loan debt that was incurred during the marriage was a marital liability to be shared equally amongst the parties).

[19] *See* Sorgen v. Sorgen, 162 So. 3d 45, 45–47 (Fla. Dist. Ct. App. 2014) (reversing because the wife's inherited asset was commingled into a joint account for which reason the wife's assets became marital property subject to distribution. In this case the wife had inherited one-third interest in a home before the marriage. During the marriage the wife purchased the rest of the interest in the home at which time, both husband and wife renovated the home using joint funds. Soon after that they started receiving rental funds from the home, which they deposited into a joint account. They also payed the taxes on the home with funds from the joint account. The couple ultimately sold the home and deposited the gains into a joint account. The court agreed with the husband's argument that because the money from the sale of the home was

not, the commingling is so great that non-marital assets or liabilities can transform into marital assets or liabilities, blurring the dividing line in such a way that it becomes extremely challenging to discern between the two, as required by section 61.075.[20] For example, in *Pfrengle v. Pfrengle*, the court held that even if an account is titled in one spouses' name alone, the fact that there has been commingling between marital and non-marital funds, makes the non-marital asset lose its "separate character," and the entire account becomes marital and subject to equitable distribution.[21] In some instances, despite the statute's mandate to exclude non-marital assets and liabilities from being subject to equitable distribution, the broad discretion given to trial courts often results in an over-reaching arm over the dividing line.[22]

In general, current distribution laws give courts abundant direction as far

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commingled in a joint account, the wife's one-third interest in the sale of the home became a marital asset and was to be counted in for distribution purposes. This result might seem harsh. However, it is a clear depiction of the difficulties that arise for marital distribution purposes in cases where the spouses' property is commingled); *see also* Williams v. Williams, 686 So. 2d 805, 808 (Fla. Dist. Ct. App. 1997) (holding that when a spouse deposits funds into a joint account and they become commingled with other funds in a way that they become untraceable, a presumption is created that the spouse made a gift to the other spouse of one-half of the funds. This rule is another clear display of how difficult it is for courts to separate spouses' property in cases of great commingling, so much as to call it "untraceable" and put forward a rule that allows judges to not have to try to separate such property).

[20] *See* Fla. Stat. § 61.075(3) (2018). *See also* Steiner v. Steiner, 746 So. 2d 1149, 1151 (Fla. Dist. Ct. App. 1999) (holding that funds that are commingled and further used to cover joint expenses, lose their separate character and become untraceable. In this case husband and wife managed a rental property, for which reason the earnings from the rental were marital property. When the husband deposited rental money into his personal bank account and paid joint living expenses with the commingled funds, the entire bank account became marital property. This rule is a clear display of how difficult it is for courts to separate spouses' property in cases of great commingling, so much as to call it "untraceable" and make a rule that allows them to not have to try to separate such property); *Pfrengle*, 976 So. 2d at 1136–37 (reversing because the trial court failed to classify funds from a commingled account as a marital asset and moreover to include it in the equitable distribution. Here, the court explained that when the husband transferred funds to his corporate account from his personal account, the funds in the corporate account also became commingled. The court further explained that commingling marital and non-marital funds in the same account results in the non-marital asset losing its separate character and transforming into a marital asset).

[21] *See* Fla. Stat. § 61.075(1) (2018) (mandating to consider factors a-j. These factors give the courts discretion in cases where the standard equal distribution would be unfair. In turn, the discretion given to the court is evidence that the drafters of the statute were aware that in some cases the spouses' property would be commingled in such great dimensions that discretion was necessary to yield fairer results). *See also Pfrengle*, 976 So. 2d at 1136 (stating that money is fungible and loses its "separate nonmarital character" once it gets commingled. In this case, the husband transferred funds from his personal account into his corporate account. In doing so marital and non-marital funds became commingled).

[22] *See* § 61.075(1) (mandating the non-marital assets and liabilities be separated from the marital assets and liabilities. Only those assets and liabilities considered as marital are subject to equitable distribution).

as dividing the assets, whereas guidance as to the division of liabilities is deficient in comparison.[23] The difficulty for courts to fairly divide student loan liability becomes especially challenging in cases where one spouse unilaterally obtains a student loan before the marriage, but having been renewed to complete the education, the loan continues throughout the marriage.[24] In this perspective, the dominant "unfairness" argument rests on the fact that the non-student spouse did not have a say in obtaining the student loan because the student spouse made that decision, unilaterally, before the marriage. The unnecessary burden that these cases place on the courts to separate what should not be separated, along with the great discretion allowed by the statute, returns unfair equitable distribution results regarding student loan liability.[25]

III. Background

A. Property Distribution Law in General

There are two regimes employed by U.S. Courts to determine ownership of property and debt responsibility during marriage dissolution proceedings: forty-one states use the common law property system (*i.e.*, equitable distribution) while the remaining nine states use the community property system.[26] Each system has its own unique way of dealing with separation of property. Because each state has its own constitution and statutes, additional

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[23] *See* Mo. Rev. Stat. § 452.330 (2019) (stating that the court "shall divide the marital property and marital debts in such proportions as the court deems just after considering all relevant factors"). *See also* Schecter v. Schecter, 109 So. 3d 833, 836 (Fla. Dist. Ct. App. 2013) (explaining that courts will use basic rules of fairness, rather than the strict rule of law).

[24] *See* § 61.075(1) (giving jurisdiction to Florida courts to allocate spouses' debts in a discretionary manner according to the circumstances of the specific case).

[25] *See* § 61.075(1) (setting forward the factors that give discretion to the courts by being able to waive them in every particular circumstance). *See also* Jason Delisle & Alexander Holt, *Why Student Loans Are Different*, NEWAMERICA (Mar. 2015), https://static.newamerica.org/attachments/2358-why-student-loans-are-different/StudentLoansAreDifferent_March11.7a1d0dc1b65e4892bb132e1309d51335.pdf (explaining the undue burden that student loan debts impose on people that are not the person that obtained the education).

[26] *See* HARRY D. KRAUSE & DAVID D. MEYER, FAMILY LAW IN A NUTSHELL § 8.6 at 97–98 (5th ed. 2007) (describing the common law marital property system); *see also* Carolyn J. Frantz & Hanoch Dagan, *Properties of Marriage*, 104 COLUM. L. REV. 75 (2004) at 124 (stating that there are nine community property states. This implies that the other forty-one states are governed by common law equitable distribution); Richard Stim, *Property Division by State*, DIVORCENET, https://www.divorcenet.com/states/nationwide/property_division_by_state (last visited Mar. 20, 2021) (listing the "nine community property states: Arizona, California, Idaho, Louisiana, Nevada, New mexico, Texas, Washington, and Wisconsin").

variations exist within each system.[27] One of the biggest differences between the two is that the common law equitable distribution system focuses on the fairness of property division, which is the reason why courts that use this system have discretion to divide unequally in cases where the standard equal distribution would be unfair.[28] In contrast, the general rule for courts that use the community property distribution system is to divide all community property equally between the spouses in accordance with the principle that each spouse gains an automatic fifty percent ownership interest in all assets acquired during the marriage, regardless of which spouse actually acquired it.[29]

Another main difference between the two regimes is how the ownership of property is viewed during the marriage.[30] In most common law property states, the spouses generally retain their separate identity during the marriage, which means that when one spouse acquires an asset, he or she retains full ownership during the marriage, and likewise when one spouse individually acquires a debt, he or she is responsible for repayment.[31] However, at the time

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[27] *See Global Issues in Family Law Symposium: The Equitable Distribution of Marital Debts*, 79 UMKC L. REV. 445, 449 (2010) [hereinafter *Global Issues in Family Law*] (stating that the division of the spouses' assets and liabilities depends on whether the state employs the common law or the community property system); *see also* Scott Greene, *Comparison of the Property Aspects of the Community Property and Common-Law Marital Property Systems and Their Relative Compatibility with the Current View of the Marriage Relationship and the Rights of Women*, 13 CREIGHTON L. REV. 71, 72 (1979) (reiterating that the laws within the community property states vary slightly because each state is free to adapt constitutions and statutes that best suit their population demographics).

[28] Robertson v. Robertson, 593 So. 2d 491, 493 (Fla. 1991) (explaining that the court begins with the premise that the distribution is to be equal between the spouses. However, the court's main task is to distribute the marital assets and liabilities in whatever manner "necessary to do equity and justice between the parties"); *see also Global Issues in Family Law*, *supra* note 27, at 461 (stating that the discretion the courts have when allocating marital assets and liabilities under equitable distribution laws, gives the courts the aim for an ultimately fair distribution rather than an equal distribution).

[29] *See Global Issues in Family Law*, *supra* note 27, at 449 (explaining that in community property states each spouse owns fifty percent of the "community assets." Community assets are those assets acquired during the marriage by either spouse separately or together); *see also* KRAUSE & MEYER, *supra* note 26, § 8.8 (stating that the nine states that use community property to divide marital property function under the principle that each spouse gains an immediate one-half interest in the community property).

[30] *See Global Issues in Family Law*, *supra* note 27, at 445 (contrasting the common law equitable distribution system and the community property system by noting that unlike community property states, the forty-one common law property states deem the spouses as keeping their separate identity during the marriage. Consequently, the assets and debts acquired by one spouse during the marriage, remain the separate property or debt of the spouse that actually acquired it); *see also* KRAUSE & MEYER, *supra* note 26, § 8.8 (explaining some of the major differences between the common law and the community property regimes).

[31] *See Global Issues in Family*, *supra* note 27, at 445 (explaining that due to the fact that in common law equitable distribution states the spouses retain their separate identity in respect to assets and liabilities, responsibility for debt repayment during the marriage is assigned

of distribution, the model of separate financial ownership and debt liabilities shifts to allow the courts discretion to make financial orders that will affect both spouses as it deems fairest.[32] In contrast, in community property states, the principle that each spouse owns fifty percent of all community property during the marriage remains the same at the time of divorce, for which reason state courts default to divide marital property equally between the spouses.[33] Despite the fact that the Constitution does not prohibit federal involvement in family law-related issues, federal courts choose to stay out of these matters, predominantly with the intention to give freedom to the states to adapt laws that better fit their specific needs and demographics.[34] Currently in the United States, forty-one states including Florida have adopted the common law equitable distribution system while the other nine employ community property marital distribution principles.[35]

B. Common Law Equitable Distribution

The common law property system originated in England, however, by the time it reached the American colonies, it had a strong French influence as a

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through contract laws); *see also* KRAUSE & MEYER, *supra* note 26, § 8.8 (explaining that the common law principle that preserves the spouses' separate identity during the marriage in regards to ownership of assets and responsibility for debts is presumed to be so, absent a gift to the other spouse).

[32] *See* Fla. Stat. § 61.075(1)(a)–(j) (2018) (setting out the factors that Florida courts must waive in order to determine whether a justification exists to deviate from the initial premise of an equal distribution. A deviation from an equal distribution means that the court saw a necessity in equitably distributing the marital property in order to avoid unjust results). *See also Robertson*, 593 So. 2d at 493 (stating that the court's main focus in an equitable distribution is to divide the marital assets and liabilities in the manner that yields just equitable results for both parties).

[33] *See* Cal. Civ. Code § 5110 (West Supp. 1979) (defining the community property of the spouses as all property acquired by the spouses during the marriage). *See also* Paul H. Dué, *Origin and Historical Development of the Community Property System*, 25 LA. L. REV. 78 (1964) (explaining that the main reason for the emergence of community property systems was for states to get away from the early common law, which fostered a man dominated right to property. This origins help explain the automatic fifty-fifty ownership right between spouses in community property states).

[34] *See* De Sylva v. Ballentine, 351 U.S. 570, 580 (1956) (holding by Justice Harlan that "there is no federal law of domestic relations, which is primarily a matter of state concern"); s*ee also* KRAUSE & MEYER, *supra* note 26, § 1.3 (reiterating how federal courts chose to stay out of family law matters even in cases where it has jurisdiction based on diversity of citizenship).

[35] *See Global Issues in Family Law*, *supra* note 27, at 449 (stating that the existence of nine states that currently use community property laws to govern decisions regarding allocation of property ownership and debt responsibility between spouses and forty-one states that use common law property distribution for the same purpose); *see also* Frantz & Dagan, *supra* note 26 (stating that there are nine community property states, which by implication leaves the other forty-one states to be governed by common law equitable distribution).

derivative of the Norman conquest.[36] The early common law property system was characterized by several principles that were widely rejected in its early years. For example, when a couple became married, the husband automatically became the owner of his wife's property even when he did not have title to the property.[37] Needless to say, this practice wiped away any legal right a wife once had before the marriage to litigate or enter into a contract independently from the husband.[38] Additionally, the work women did, such as housekeeping and raising children was not accounted for at all by the courts when dividing property.[39] This disparate treatment had the tendency to yield harsh results that left women without any security after a divorce.[40] To remedy the obvious disparity that existed in the treatment of property rights between spouses, equity begun its efforts to develop laws that lessen the violation against the married. The subsequent addition of law reforms shaped the common law to be what we know today as the law of equitable distribution.[41]

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[36] *See* Greene, *supra* note 27 (explaining the English origin of the common law property system); *see also* Ben Johnson, *The Norman Conquest*, HISTORIC UK, https://www.historic-uk.com/HistoryUK/HistoryofEngland/The-Norman-Conquest/ (last visited Oct. 14, 2019) (narrating how the Duke of Normandy, historically known as William the Conqueror, invaded and occupied England. After winning a battle with the King of England, William was crowned the new English King in 1066 and by 1072 the Normans were firmly established).

[37] *See* 2 FREDERICK POLLOCK & FREDERICK WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 725 (2d ed. 1968) (stating that the husband is entitled to take possession and make his own any movables the wife might own at the date of the marriage. Additionally, the husband is equally entitled to any movables the wife might come to own during the marriage); *see also* Greene, *supra* note 27, at 77 (explaining how the wives' legal identity completely merged into that of the husbands and how they were submitted to total domination by their husbands when the law stripped them of their property interests the moment they got married).

[38] *See* KRAUSE & MEYER, *supra* note 26, § 8.5 (stating that in the early common law, husband and wife were considered to be one, but in reality what that meant was that the women merged into the identity of the husband in such a way that her own identity disappeared); s*ee also* POLLOCK & MAITLAND, *supra* note 37 (stating that the wife had no power to alienate her own land without her husband's permission).

[39] Fla. Stat. § 61.075(1)(a) (2018) (reflecting the move away from discriminating against the wives by common law equitable distribution systems. The current Florida statute considers "contributions to the care and education of the children and services as homemaker" to be factors that need to be considered before making an unequal distribution). *See also* Dué, *supra* note 33 (noting that community property systems originated from the efforts to equalize treatment of property interest between husbands and wives).

[40] *See* Dué, *supra* note 33 (explaining that the main cause for the birth of community property systems was to provide some protection for wives from the oppressive power of the husbands); *see also* Greene, *supra* note 27 (noting that before equity provided some measures, the disparity between marital rights of the husbands and those of the wives were profound in the early common law property system).

[41] *See* Greene, *supra* note 27 (explaining the doctrine of the wife's equity to a settlement, which required a husband to make sure his wife could be supported from a certain property before he could ask the court to enforce his marital property rights against the wife for the same property. Additionally, equity developed a method in which a wife was allowed to create a separate

Throughout the years the outdated common law principles evolved from being grossly unjust to the now underlying cornerstone principle that drives the laws of equitable distribution to be one of "fairness.[42] The laws of equitable distribution emphasize distributing the assets and liabilities of divorcing spouses in a way that yields the fairest results under each individual circumstance.[43] To achieve fairness, the drafters of the Equitable Distribution Statute understood they had to account for cases in which the spouses have commingled their finances in unimaginably complex ways, and for that reason the statute gives courts discretion to be able to maneuver through the difficult circumstances on a case by case basis.[44] The court must begin with the premise that the distribution should be equal between the spouses, however, the court has discretion to award an unequal distribution in cases where the facts would make it unfair to equally divide the marital estate.[45] In order to deviate from an equal distribution, the court must first find sufficient justification by analyzing factors (a-j) as delineated under section 61.075 of the Florida Statute.[46]

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estate that was out of the reach of the husband's marital property rights and this way the wife could enjoy the full benefits of the property); s*ee also* POLLOCK & MAITLAND, *supra* note 37 (stating that the wife had no power to alienate her own land without her husband's permission).

[42] Mo. Rev. Stat. § 452.330 (2019) ("[T]he court shall set apart . . . and shall divide the marital property and marital debts in such proportions as the court deems just after considering all relevant factors including [five named factors]."). *See also Global Issues in Family Law*, *supra* note 27, at 462 (explaining that a non-discretionary standard would produce unfair results).

[43] *See* Greene, *supra* note 27 (explaining that the common law equitable distribution system emphasizes mainly on yielding results that are fair at an individual level); *see also Global Issues in Family Law*, *supra* note 27, at 462 (reiterating that court's power to have discretion in making a decision will yield the best results).

[44] *See* Pfrengle v. Pfrengle, 976 So. 2d 1134, 1135 (Fla. Dist. Ct. App. 2008) (holding that even if an account is titled in one party's name, the fact that the non-marital and marital funds are commingled made the entire account marital. This case evidences how non-marital property loses its non-marital character once commingled and can turn a non-marital asset into a marital asset); *see also* Holden v. Holden, 667 So. 2d 867 (Fla. Dist. Ct. App. 1996) (finding that the evidence did not support the finding that certificates of deposit held in the wife's name, which were purchased with distributions on the wife's shares of stock in her family's business constituted marital. The husband who brought suit against his wife failed to establish that distributions were commingled with marital assets. The certificate of deposits remained non-marital, not subject to equitable distribution).

[45] *See* Fla. Stat. § 61.075(1)(a)–(j) (2018) (mandating trial courts to begin with the premise that a distribution is to be equal between the spouses. However, the statute outlines a set of factors a trial court can waive in order to determine if a justification exists to deviate from the standard. In circumstances in which it would be unfair to make an equal distribution, the court is allowed to make an unequal distribution after waiving the factors set out by the statute). *See also Global Issues in Family Law*, *supra* note 27 and accompanying text.

[46] *See* § 61.075(1)(a)–(j) (setting out the factors that a trial court must analyze in order to find justification to make an unequal distribution. Trial courts look at factors such as, inter alias, the duration of the marriage, the contribution to the marriage by each spouse, the economic standing of each spouse, and "the contribution of each spouse to the acquisition, enhancement, and production of income or the improvement of, or the incurring of liabilities to, both the

Pursuant to section 61.075, regardless of whether the distribution is equal or unequal, the court must first separate the non-marital assets and liabilities, to then apply the equitable distribution laws to the marital assets and liabilities.[47] In doing so, each asset and liability must be identified and valued regardless of its classification as marital or non-marital.[48] The statute defines non-marital assets and liabilities, inter alia, as "[a]ssets acquired and liabilities incurred by either party prior to the marriage, and assets acquired and liabilities incurred in exchange for such assets and liabilities."[49] Additionally, it defines marital assets as those "[a]ssets acquired and liabilities incurred during the marriage, individually by either spouse or jointly by them."[50] To ensure that the identification, separation, and distribution are done in fair manners, Florida courts must support every distribution of marital or non-marital assets or liabilities with competent substantial evidence.[51]

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marital assets and the nonmarital assets of the parties."). *See also* Rogers v. Rogers, 12 So. 3d 288, 291 (Fla. Dist. Ct. App. 2009) (holding that not receiving the benefit of the education, for which the student spouse incurred student loan debt during the marriage, is not a factor for the courts to consider when allocating debt. In this case, the district court reversed the trial court's ruling that the wife was responsible for the student loan debt she incurred during the marriage. Therefore, absent any other justification for an unequal distribution, the student loan debt that was incurred during the marriage was marital liability to be shared equally amongst the parties).

[47] *See* §61.075(1) (governing dissolution of marriage proceedings and mandating trial courts to set apart the spouses' non-marital assets and liabilities before applying equitable distribution to the assets and liabilities characterized as marital). *See also* Robertson v. Robertson, 593 So. 2d 491, 493 (Fla. 1991) (emphasizing that the Florida statute differentiates between two categories of assets and liabilities; "(1) marital assets and liabilities and (2) non-marital assets and liabilities.").

[48] Fla. Stat. § 61.075(3) (2018) (mandating that in marriage dissolution proceedings, "any distribution of marital assets or marital liabilities shall be supported by factual findings in the judgment or order based on competent substantial evidence with reference to the factors enumerated in subsection (1). The distribution of all marital assets and marital liabilities, whether equal or unequal, shall include specific written findings of fact."). *See also* Buckalew v. Buckalew, 197 So. 3d 148, 149–50 (Fla. Dist. Ct. App. 2016) (explaining that the trial court erred when it failed to clearly identify the assets and liabilities).

[49] *See* Fla. Stat. §61.075(6)(4)(b) (2018) (defining non-marital assets and liabilities for Florida trail courts to be able to separate them from the marital assets and liabilities). *See also Robertson*, 593 So. 2d at 493 (noting the categorization of assets and liabilities by the Florida statute).

[50] *See* Fla. Stat. §61.075(6)(a) (2018) (defining the assets and liabilities that qualify as marital for equitable distribution purposes). *But see* Alpha v. Alpha, 885 So. 2d 1023, 1028 (Fla. Dist. Ct. App. 2004) (affirming the trial court's decision that assets acquired before marriage are not marital assets and remain the property of the owner spouse, unless there is evidence of a gift or conveyance of the assets to the owner's spouse. In this case, although the husband owed the property prior to the marriage, he sought for both his and the wife's name to be on the deed. The express wording in the document indicated it was a deed of gift and the property was considered a marital asset for the equitable distribution).

[51] *See* Fla. Stat. § 61.075(1) (2018) (mandating that all distributions, equal or unequal, include specific written findings of facts regardless for all marital and non-marital assets and liabilities). *See also* Jalileyan v. Jalileyan, 4 So. 3d 1289 (Fla. Dist. Ct. App. 2009) (overturning the trial

C. Community Property System

The driving force behind the origin of community property laws was the desire to move away from the common law tendency to protect the property interests of the husband over those of the wife.[52] As a result, the community system emerged under the ideology that each spouse performs duties within the marriage and that makes them equally entitled to the fruits of the community property generated by the partnership.[53] Under this distribution system, the spouses' property is classified either as community property or separate property.[54]

Community property is considered to be any property that is acquired by one or both spouses during the course of the marriage.[55] To keep up with its original purpose of equalizing distributions between spouses, as a general rule under the principles of community property laws, each spouse automatically gains fifty percent ownership in the community property while they remain married.[56] In other words, each spouse is entitled to a half interest in any property acquired during the marriage regardless of its source or which spouse

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court's decision for absence of factual findings. In this case, the trial court made an unequitable distribution of the marital assets by awarding the former wife the marital residence without making any factual findings to explain or justify the disproportionate equitable distribution).

[52] *See* Dué, *supra* note 33 (stating that community property systems originated from the efforts to equalize treatment of property interest between husbands and wives); *see also* Greene, *supra* note 27, at 76 (discussing that the origin of community property laws was an effort to equalize distribution results between spouses. This origin is consistent with the current community property laws, which give spouses an automatic fifty percent ownership on all assets acquired during the marriage).

[53] *See* Greene, *supra* note 27, at 82 (stating that community property laws function under the philosophy that each spouse contributes equally to the marriage partnership.); *see also Global Issues in Family Law*, *supra* note 27, at 449 (explaining that in community property states each spouse owns fifty percent of the "community assets." Community assets are those assets acquired during the marriage by either spouse separately or together).

[54] *See* Cal. Fam. Code § 2550 (2016) (forbidding community property courts from dealing with divorcing spouses' separate property. However, the courts are allowed to deal with community property to divide it 50/50). *See also* Greene, *supra* note 27 (explaining terminology for community property).

[55] *See* Greene, *supra* note 27 (stating that community property is defined as all property that is acquired during the course of the marriage regardless of who acquires it); *see also Global Issues in Family Law* , *supra* note 27, at 449 (explaining how assets acquired during the marriage by one or both spouses become "community assets," which means that each spouse has a fifty percent ownership interest in such assets. Consequently, community assets are subject to a 50/50 distribution if the couple was to get a divorce in a community property state).

[56] Cal. Fam. Code. § 760 (2016) (stating that "[e]xcept as otherwise provided by statute, all property, real or personal, wherever situated, acquired by a married person during the marriage while domiciled in this state is community property"). *See also* Greene, *supra* note 27 (explaining that each spouse gains one-half ownership on all assets that are acquired during the marriage "regardless of its source and regardless of which spouse is directly responsible for the acquisition of the property.").

actually acquired it.[57]

On the other hand, separate property is generally defined as the property the spouses owned prior to getting married, which includes property a spouse might receive during the marriage by way of a gift or by inheritance.[58] Because states are free to adapt different laws as they best fit the individual state's needs, some provisions included in community property statutes vary between the nine states that use it.[59] For example in some community property states, income received during the marriage that derived from spouses' separate property will keep the classification of separate property, while in other states such income would transform into community property.[60]

Similar to equitable distribution, community property statutes require courts to set aside the spouses' separate property from the community property and exclude it from being subject to distribution.[61] When it comes to liabilities, both spouses are usually liable for debts incurred by either spouse during the marriage.[62] If the couple decides to get divorced, community assets may be

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[57] *See* Greene, *supra* note 27 (explaining that financial rewards during the marriage are subjected to a 50/50 split between the spouses because the idea behind community property system is that the husband and wife are considered a unit); *see also Global Issues in Family Law*, *supra* note 27, at 449 (explaining that assets acquired by either spouse during the marriage are called "community assets").

[58] *See* Greene, *supra* note 27 (stating that separate property is the property the spouses owned before the marriage and it is excluded from being counted into a marriage dissolution distribution); *see also Global Issues in Family Law*, *supra* note 27 (explaining that gifts a spouse might receive during the marriage is deemed to be separate property for purposes of distribution).

[59] *See* Fam. § 2550 (defining non-marital assets under community property). *See also* Greene, *supra* note 27 (explaining that community property statutes vary from state to state for which reason courts results also vary in some cases. However, despite the differences, "the basic principles and general outline of the community property system are present in all community property states.").

[60] Ariz. Stat. §25-213(a) (1976) (stating that "A spouse's real and personal property that is owned by that spouse before marriage and that is acquired by that spouse during the marriage by gift, devise or descent, and the increase, rents, issues and profits of that property, is the separate property of that spouse"); Nev. Rev. Stat. § 123.130 (1973) (stating that "All property of a spouse owned by him or her before marriage, and that was acquired by him or her afterwards by gift, bequest, devise, descent or by an award for personal injury damages, with the rents, issues and profits thereof, is his or her separate property.").

[61] *See* Fam. § 2550 (mandating community property courts to not deal with spouses' separate property when deciding property distribution matters). *See also* Fla. Stat. § 61.075(1) (2018) (mandating non-marital assets and liabilities to be separated before applying equitable distribution to the marital assets and liabilities. In the same as the property community system, the common law excludes non-marital property from marital distribution).

[62] *See Global Issues in Family Law*, *supra* note 27, at 450 (stating that both spouses are liable for debts incurred during the course of the marriage); *see also* Greene, *supra* note 27 (stating that community property laws function under the philosophy that each spouse contributes equally to the marriage partnership, for which reason they are equally entitled to the community property and equally liable for debts).

vulnerable to creditors to satisfy outstanding community debt.[63]

IV. Discussion

A. Distinguishing Student Loans from Other Types of Loans and the Negative Implications of Assigning Student Loan Liabilities to the Non-Student Spouse.

Most traditional loans such as a car loan or mortgage loan, yield some type of benefit the moment the borrower signs documents promising to pay back a specific amount of money in a specified amount of time. Unlike traditional loans, student loans do not deliver any tangible assets to the borrower at the time the loan is initiated.[64] Education is an investment that generates present costs but does not materialize until the education is completed; nevertheless, the student spouse receives the benefits of the non-student spouse's support while getting through school and the benefit of obtaining a degree in the intangible form of "increased earning capacity."[65]

A unique feature that differentiates student loans from other types of loans is the repayment aspect. Unlike traditional loans, student loans do not have a monthly payment at the onset of the loan.[66] The cost to attain a college education is high and involves other expenses and efforts that go beyond paying tuition. For example, student borrowers also have to purchase books and other school materials. Additionally, they often have to work less hours or opt not to work at all at the same time they are given the choice to borrow more money each semester to cover living expenses.[67] Not having a monthly payment at the time the loan begins coupled with the various variables that can increase the

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[63] *See Global Issues in Family Law*, *supra* note 27, at 449 (noting that in case of a divorce, creditors can go after community assets to satisfy payment for any community debts. Community debts are debts incurred by one or both spouses during the marriage); *see also* Greene, *supra* note 27 (explaining that spouses are equally liable for community debt).

[64] *See* Tamar Lewin, *Burden of College Loans on Graduates Grows*, N.Y. TIMES, Apr. 12, 2011, at A1 (expressing a different perspective on how student loans could fall into the category of good debt because they return benefits over a person's whole life cycle); *see also* Delisle & Holt, *supra* note 25 (distinguishing student loans from other types of loans).

[65] *But see* Lewin, *supra* note 64, at A1 (noting that many economists and policy experts regard student loan debt as a healthy investment); *see also* Justine Elgas, *"Supported Spouse's Contribution" to Supporting Spouse's Advancement*, 22 THE J. CONTEMP. LEGAL ISSUES 139, 142 (2014) (emphasizing that one spouse sacrifices their own well-being to support the other spouse in pursuing an education in efforts to increase earning capacity).

[66] *See* Delisle & Holt, *supra* note 25.

[67] *See* Delisle & Holt, *supra* note 25; *see also* Elgas, *supra* note 65, at 150–51 (reasoning that for one spouse to work part-time or not work at all while attending school, they have to rely on other sources to cover their living expenses and many times the other spouse is such source).

total to be paid when the student loan finally becomes due makes it almost impossible to be able to calculate what the monthly loan payments will be.[68] A 2015 study represented by six diverse focus groups of student loan borrowers shows that students are shocked when they learn of the monthly payment amount they are required to pay when their student loans matured.[69]

Another particular characteristic of student loans is the borrower's ability to defer payments for months, and even years, after the education is completed. However, delaying payments after the student loan becomes due results in a balance increase, because the interest continues to accrue.[70] Taking this option will places an additional burden on the non-student spouse if liability for the student loan is assigned to him or her through distribution in a marriage dissolution.[71]

B. The Difficulties of Distributing Liabilities

One of the main difficulties regarding the distribution of liabilities stems from the fact that most common law equitable distribution statutes are either silent or give the courts very limited direction as to how it should address debt distribution.[72] Because a marriage dissolution cannot be accomplished absent an acknowledgement of the spouses' debt responsibilities, many states have taken the reins to assume jurisdiction over debts to be able to allocate these debts between the spouses in a way that the end financial results are the fairest possible.[73] Some states have assumed authority over debts by construing the

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[68] *See* Delisle & Holt, *supra* note 25 (mentioning some choices a student can make while attending school that will increase the total balance to be repaid when education is completed); *see also* Elgas, *supra* note 65, at 150 (reiterating than more goes into attaining education than the mere cost of tuition).

[69] *See* Delisle & Holt, *supra* note 25.

[70] *See* Fla. Stat. § 61.075(1) (2018) (reflecting the main purpose of the statute, which is to yield fair results. Allocating a loan to the non-student spouse, which balance has increased due to deferment by the student spouse would not yield fair results). *See also* Delisle & Holt, *supra* note 25 (commenting on the ease of deferring a student loan and the consequences of doing so).

[71] *See* § 61.075(1) (emphasizing that fair results is the main purpose of equitable distribution laws). *See also* Delisle & Holt, *supra* note 25 (explaining the burden that delaying payments will cause to the non-student spouse).

[72] Pa. Cons. Stat. § 3502(a)(3) (Supp. 2010) (stating that the relevant factors for their state courts to consider in an equitable distribution of marital property include: ". . . [t]he age, health, station, amount and sources of income, vocational skills, employability, estate, liabilities and needs of each of the parties." (emphasis added)). *See also Global Issues in Family*, *supra* note 27, at 447, 450 (explaining that some common law equitable distribution states address the distribution of debts by including liabilities in the factors to be considered by trial courts on whether an equitable distribution may be appropriate).

[73] *See Global Issues in Family Law*, *supra* note 27, at 450, 451 (recognizing the importance of having legislation allowing for the division of marital debt by noting that a distribution for a marriage dissolution cannot be done without acknowledging the existence of spousal debt).

language of their respective statutes, while other states have established their jurisdiction over debts by relying on the underlying principle of common law equitable distribution to yield fair results when the divorce is complete, or by introducing amending legislation to add allocation of debts to existing statutes that previously only addressed asset distribution.[74]

Another aspect that makes the distribution of liabilities difficult is the stigma attached to being in debt.[75] The courts' reluctance to fully address the division of liabilities as much as they do with the assets, is a loud reflection of their recognition of the sociocultural burden and the negative financial impact with which debt scars its possessors.[76]

In the past two decades, with the exception of mortgage loans, student loan debt has steadily grown to surpass any other type of loan debt in the United States.[77] According to the Federal Reserve, over half of young adults who went to college in 2018 financed their education largely with student loans.[78] Empirical data recorded by the Federal Student Aid division of the Department of Education shows that in the past ten years $657 billion in outstanding federal student loans, taken out by approximately 32 million borrowers, has increased to approximately $1.4 trillion in outstanding student debt taken out by 42 million borrowers.[79] As expected, states with larger numbers of residents have

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But see Levy v. Levy, 291 S.E.2d 201, 202 (S.C. 1982) (showing that the state high court "refuse[d] to hold, as a matter of law, that the judge must order the sharing of debts as well as the sharing of assets.").

[74] *See* Filkins v. Filkins, 347 N.W.2d 526, 528–29 (Minn. Ct. App. 1984) (noting that "the statute does not give specific authority to apportion debts as property," however, ruled that the Minnesota statute allowed for apportioning the debts); *see also Global Issues in Family Law*, *supra* note 27, at 451–52 (explaining different ways in which courts have established authority over debts despite the lack of direction by the statutes).

[75] *See Global Issues in Family Law*, *supra* note 27, at 447–48 (giving two examples to show the difference in fairness when a person gets assigned liabilities); *see also* Lewin, *supra* note 64, at A1 (explaining that increasing debt has broad implications, including "[t]hings like buying a home, starting a family, starting a business, saving for their own kids' education may not be options for people who are paying off a lot of student debt.").

[76] *See Global Issues in Family Law*, *supra* note 27, at 447 (giving two examples to demonstrate the difference in fairness when a person gets assigned liabilities rather than assets).

[77] *See* Zack Friedman, *Student Loan Debt Statistics In 2019: A $1.5 Trillion Crisis*, FORBES (Feb. 25, 2019, 8:32 AM), https://www.forbes.com/sites/zackfriedman/2019/02/25/student-loan-debt-statistics-2019/#78aaecea133f (explaining that student loan debt has surpassed America's cumulative credit card debt and has gained first place as the most substantial type of non-mortgage consumer debt); *see also Shocking Student Loan Debt Statistics*, *supra* note 5.

[78] *See* Board of Governors of the Federal Reserve System, *Report on the Economic Well-Being of U.S. Households in 2017 – May 2018*, FEDERALRESERVE, https://www.federalreserve.gov/publications/2018-economic-well-being-of-us-households-in-2017-student-loans.htm (last updated June 19, 2018) (stating that student loans are the most common form of debt used to finance education); *see also Shocking Student Loan Debt Statistics*, *supra* note 5.

[79] *See* Fed. Student Aid, U.S. Dep't of Educ., *Federal Student Loan Portfolio*, STUDENTAID,

a correlated higher aggregate student loan debt; amongst them are California, Texas, New York, and Florida.[80] These statistics evidence that the stigma accompanying debt, derives in part from the student loan trend being experienced by modern American society.[81]

C. Reasons Why Student Loan Debt Should Be Considered as a Non-Marital Liability to Be Allocated to the Borrowing Spouse.

Florida courts have established that earning capacity is not a distributable asset.[82] In *Rogers v. Rogers*, the court held that not receiving benefits from the other spouse's education, is not a factor the courts will consider when allocating student loan liability for equitable distribution purposes.[83] The intangibility of the earning capacity gained through education coupled with the courts' unwillingness to consider the non-student spouse not getting to enjoy the benefits of such increase in earning capacity as a factor for distribution, have negative implications and unfair results for the latter.[84]

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https://studentaid.ed.gov/sa/about/data-center/student/portfolio (last visited Dec. 6, 2019) (showing the dramatic increase in outstanding student loan debt by correlation data between outstanding federal student loans and the number of borrowers in the past ten years. The Federal Aid office of the Department of Education is responsible for compiling an outstanding federal student loan portfolio); *see also* Friedman, *supra* note 77 (explaining that a decrease in outstanding private loans is irrelevant to the big picture of the student loan crisis because private loans comprise a small percent of the total outstanding student loans. In 2012, about twenty percent of student loans were private loans).

[80] *See* Friedman, *supra* note 77 (stating that California, Texas, New York, and Florida owe more than twenty percent of the total national student loan debt between the four). *But see* Lewin, *supra* note 64, at A1 (reflecting a different perspective on student loans. Cecilia Rouse, of Princeton, who served on President Obama's Council of Economic Advisers said "[c]ollege is still a really good deal." Ms. Rouse explained that persons with a college degree will earn more over their lifetime than persons that do).

[81] *See Global Issues in Family Law*, *supra* note 27, at 447–48 (recognizing the stigma-debt correlation). *But see* Lewin, *supra* note 64, at A1 (reasoning that student loans are a good type of debt to have).

[82] *See* Rogers v. Rogers, 12 So. 3d 288, 291 (Fla. Dist. Ct. App. 2009) (reversing the trial court's decision because it made an unequal distribution of the marital debt); *see also* Delisle & Holt, *supra* note 25 (explaining that the earning capacity that comes from education is an intangible asset that does not benefit the borrower in the present).

[83] *See Rogers*, 12 So. 3d at 291 (reasoning that absent any other justification, the student loan debt acquired by one spouse during the marriage is deemed to be a marital liability subject to equitable distribution); *see also* Delisle & Holt, *supra* note 25 (noting that student loans have a mismatched timing between the time the loan is actually incurred and the time the benefit is received).

[84] Cal. Fam. Code § 2641(b)(2) (1992) (stating that "[a] loan incurred during marriage for the education or training of a party shall not be included among the liabilities of the community for the purpose of division pursuant to this division but shall be assigned for payment by the party."). *But see Rogers*, 12 So. 3d at 291 (rejecting the husband's argument that it would be unfair to make him responsible for half of the wife's student loan because the wife was going

While the student spouse benefits twice, once when he receives support from the other spouse during the marriage to earn the education and again when he receives the degree that increases his earning capacity, the non-student spouse ends up with little or no assets to gain through distribution and a standard of living lacking in comparison to what it would have been if the earning capacity were to benefit her.[85] Consequently, the non-student spouse gets the short end of the stick three times: once when she sacrifices her own well-being to invest in the husband's career threshold, again when she has to continue to support herself without the possibility of the increased earning capacity ever benefiting her, and a third time when she is assigned part of the responsibility for her former husband's student loan debt.[86]

The reason why the starting premise for an equitable distribution is to equally distribute the marital assets and liabilities unless it is considered unfair is because marriage is deemed to be a partnership unit.[87] For student loan liability, the discrepancy begins when the partnership principle is missing from the initial decision making regarding the loan.[88] When one spouse unilaterally obtains a student loan to benefit himself before the marriage, the future spouse does not have an opportunity to agree or disagree with that decision.[89]

The national increase in student loan debt correlates with the number of cases where the allocation of student loan liability is disputed during marriage dissolution proceedings.[90] Courts struggle to separate the pre-marital and marital portions of a student loan that carries both and the current binding statute does not alleviate the court's burden.[91] The statute gives Florida courts

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to be the one to benefit).

[85] *See* Fla. Stat. § 61.075(1) (2018) (mandating an exception on an equal distribution between the spouses in cases where it would be unfair to do so). *But see* Lewin, *supra* note 64 and accompanying text.

[86] *See* § 61.075(1) (specifying that fairness is the driving principle of equitable distribution). *But see Rogers*, 12 So. 3d at 291 (ruling that not receiving a benefit from the spouse's education is not a factor to be considered for distribution purposes).

[87] *See* § 61.075(1) (setting out the initial premise that unless unfair in the giving circumstances, the marital assets and liabilities should be distributed equally between the spouses). *See also* KRAUSE & MEYER, *supra* note 26, § 8.5 (reflecting the partnership unit concept that started from the early common law, in which even though distribution laws were unfair at the time, the husband and wife were considered to be one).

[88] *See* Fla. Stat. § 61.075(1)(a) (2018) (reflecting the move away from the early common law discrimination against wives. The current law rest on the principle that equitable distribution needs to be fair). *See also* Greene, *supra* note 27 (explaining some ways in which early common law was extremely discriminatory against the wives).

[89] *See* § 61.075(1) (allowing for an unequal in cases where equally distributing would generate unfair results); *See also* Fam. § 2641(b)(2) (allowing for student loan liability to be assigned solely to the spouse that received the education).

[90] *See* Fortune v. Fortune, 61 So. 3d 441, 445 (Fla. Dist. Ct. App. 2011) (reflecting the chances a trial court has to be reversed for error); *see also* Friedman, *supra* note 77 (noting that Florida is amongst the states with the highest student loan debt).

[91] *See* Steiner v. Steiner, 746 So. 2d 1149, 1151 (Fla. Dist. Ct. App. 1999) (explaining the

discretion to waive ten factors in cases where the initial equal distribution is unfair, which turns into one of the main reasons it is so challenging to predict how the court will divide student loan debt in an equitable distribution proceeding.[92]

D. Another Approach

California once used the same approach as Florida – which denied a spouse a share in the value of the benefit from the other spouse's increase in earning capacity derived from the education attained during the marriage – until the legislature amended the Family Law Act in 1985.[93] Under the new amendment, a professional degree was still not considered divisible property, but it provided for reimbursement of funds contributed to help a spouse obtain a professional education.[94] In 1992, California enacted legislation that moved even further from the notion that education obtained during the marriage, which in turn enhanced the earning capacity of a spouse, is not to be considered in property distribution cases.[95] As a result, California courts are now relieved from having to allocate liability for student loan debt at all because Section 2641 allows for outstanding loans to be assigned to the spouse that obtained the education.[96]

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difficulties of discerning the portions of marital and non-marital assets in cases where commingling happens); *see also Global Issues in Family Law*, *supra* note 27 (explaining the difficulties of separating the non-marital and marital portions of student loans that started before the marriage and continue through the marriage).

92 *See* Fla. Stat. § 61.075(1)(a)–(j) (2018) (delineating the factors that give Florida courts great discretion to deviate from an equal distribution. *See also* Krafchuk v. Krafchuk, 804 So. 2d 376, 380 (Fla. Dist. Ct. App. 2001) (reflecting the great discretion possessed by the courts under section 61.075 of the Florida Statute).

93 *See* Rogers v. Rogers, 12 So. 3d 288, 291 (Fla. Dist. Ct. App. 2009) (setting precedent that the benefit from increased earning capacity is not a distributable asset); *see also* In Re Marriage of Sullivan, 691 P.2d 1020, 1022 (Cal.1984) (rejecting the wife's argument that she was entitled to a share of the husband's education because his medical degree was obtained by the efforts and sacrifices of the couple. Similarly to Florida, the court concluded that the husband's education was not to be considered as distributable community property).

94 *See* Cal. Civ. Code § 4800.3 (West Supp. 1985) (allowing reimbursement for "community contributions to education or training of a party that substantially enhances the earning capacity of the party"). *See also* Elgas, *supra* note 65, at 146 (explaining that under the new amendment, outstanding student loan balances are treated as separate property that belongs to the spouse that obtained the education).

95 *See Rogers*, 12 So. 3d at 291 (arguing against considering education as property to be divided in a distribution case); *see also* Elgas, *supra* note 65, at 145 (explaining that the reimbursement system carried over the current law without substantive change).

96 *See* Cal. Fam. Code § 2641(b)(2) (1992) (introducing a remedy that allows courts to assign outstanding loan debt solely to the spouse that received the education). *But see* Fla. Stat. § 61.075(1) (2018) (delineating ten factors a Florida court must waive to be able to assign student loan in any other way that is not equal).

V. Solution

Allocating repayment responsibility for student loan debt to the non-student spouse who had no opportunity to be part of the initial decision to acquire the student loan has far more negative implications than positive ones for our evolving American society.[97] The Florida legislature did not take into account the socioeconomic impacts of student loans when drafting laws to divide marital liabilities. However, it is undeniable that America's new student loan trends have transformed into an epidemic of in-debt young citizens that calls for an immediate reformation of the law.[98] Student loan debt that carries both non-marital and marital liabilities because one spouse unilaterally obtained the loan before the marriage with the initial intention to benefit him or herself should be treated as one single student loan that started before the marriage, and the sole responsibility should be allocated to the student spouse.[99]

To keep in line with the main equitable distribution philosophy of providing fair results, a statute similar to California's should be enacted in Florida.[100] The statute should be element-based and give the court little discretion to deviate from assigning sole responsibility for any outstanding student loan to the spouse that actually incurred the loan and obtained the education.[101] During equitable distribution proceedings, the spouse claiming

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[97] *See* Mo. Rev. Stat. § 452.330 (2019) (stating that in distributing marital property, the court shall do so in a manner that is just). *See also Global Issues in Family Law*, *supra* note 27, at 451 (reiterating that achieve fair economic results is the main goal envisioned by equitable distribution principles).

[98] *See* Adam Harris, *What Happens When a Billionaire Swoops in to Solve the Student-Debt Crisis*, THE ATLANTIC (May 19, 2019), https://www.theatlantic.com/education/archive/2019/05/morehouse-commencement-speaker-robert-smith-loan-debt/589792/ (explaining how legislators, politicians, and philanthropists are beginning to recognize that forty million people in debt due to student loans is a legitimate problem in the U.S. and are starting to take action and propose ideas to take back the rains and regain control on this situation); *see also* Lewin, *supra* note 64, at A1 (making reference to the Loan Forgiveness legislation passed during the Obama administration, which made it easier for low-earning students to get out of debt).

[99] *See* § 61.075(1) (explaining that the initial premise for distribution of the marital assets and liabilities is that it should be divided equally between the spouses unless circumstances would produce unfair results). *See also* Fam. § 2641(b)(2) (mandating that loans incurred during the marriage for the education of one spouse, be excluded from the community liabilities for the purpose of division).

[100] *See* Fam. § 2641(b)(2) (showing that the California statute supports the proposed statute as a coherent and feasible solution. California enacted this statute to address the fairness problem that comes with having to allocate debt responsibility to a spouse that will not benefit from the education the loan paid for). *See also Global Issues in Family Law*, *supra* note 27, at 451 (emphasizing that the goal of common law equitable distribution is to achieve fair economic results).

[101] *See* Fam. § 2641(b)(2) (giving no discretion to distribute student loan debt in cases where the loan is incurred during marriage for the education or training of one of the spouses). *But see*

the student loan debt is non-marital shall have the burden to prove with competent substantial evidence that (1) the disputed debt derived from a student loan; (2) that the student loan was in fact unilaterally acquired by the other spouse before the marriage began; (3) that he or she had no knowledge or real opportunity to influence the initial decision of the other spouse to borrow money for education purposes, and (4) that he or she did not receive the benefit from the increased earning capacity due to the education.[102]

Additionally, the statute shall be clear that a showing of whether or not the student spouse actually completed the education is irrelevant for the remedy – assigning sole responsibility for student loan debt to the borrowing spouse – to be available if all the elements are met.[103] Lastly, the statute should include a provision that allows courts to presume that the non-student spouse has substantially benefited from the education of the other spouse in cases where divorce proceedings are commenced ten years after the completion of the education.[104]

The above proposed statute enactment is more appropriate as a solution than amending the current Florida statute to include "not receiving the benefit from the education" as a factor to be considered in distributing student loan liabilities because this alternative would fail to account for other significant factors such as the fact that the non-student spouse did not have a say in the initial decision to acquire the loan. Thus, the partnership principle of marriage was absent.[105]

Fla. Stat. § 61.075(1)(a)–(j) (2018) (giving the court broad discretion to consider the factors actors delineated by the statute. The proposed solution would not allow for the court's discretion in these specific cases).

[102] *See* Fla. Stat. § 61.075(8) (2018) (mandating the burden of proof to be on the spouse that questions the marital character of an asset or liability. The proposed solution is in accordance with Florida's statute regarding the burden of proof). *See also* Fam. § 2641(b)(2) (supporting the proposed solution).

[103] *See* Fam. § 2641(b)(2) (supporting the proposed solution by addressing the remedy – assigning student loan debt responsibility to the spouse that obtained the education – without giving discretion to the court to deviate). *See also See* § 61.075(1)(a)–(j) (allowing discretion to allow fair results. Not offering a remedy to a spouse because the student-spouse did not complete the education would not be fair).

[104] *See* Cal. Fam. Code. § 2641(c)(1) (1992) (presuming that the community benefited from the community contributions to the education after ten years in the marriage). *See also* Elgas, *supra* note 65, at 146 (explaining the ten year provision under section 2641 of the California statute).

[105] *See* Cal. Civ. Code § 4800.3 (West Supp. 1985) (introducing the notion that financial contributions a spouse makes to enable the education of the other are to be considered for distribution purposes. This statute allows for reimbursement of such financial contributions). *See also* Rogers v. Rogers, 12 So. 3d 288, 291 (Fla. Dist. Ct. App. 2009) (ruling that "not receiv[ing] any benefit from the other party's education" is not a factor to be considered when allocating student loan debt for distribution purposes).

VI. Conclusion

Equitable distribution laws have been developed throughout the years to arrive at the best possible combination of laws that keep in line with the central theme of fair results.[106] The disturbing increase in the amount of student loans a person can borrow has placed a high burden on our society and on the courts.[107] Because the partnership aspect is often missing in the initial decision to obtain the student loan, yielding disparate results that are unfair to the non-borrowing spouse, it would be in the best interest of public policy to consider the entire loan as non-marital liability that should be exclusively assigned to the spouse that actually received the education.[108] By enacting a statute to this effect, Florida courts will be released from the burden of having to divide this unique type of loan and distribution results will be consistent and fair.[109]

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[106] *See* § 61.075(1)(a)–(j) (mandating courts to deviate from the initial premise that a distribution is to be equal between the spouses in cases where otherwise would be unfair. The statute delineates ten factors for courts to have broad discretion to be able to deal with all possible circumstances). *See also* Schecter v. Schecter, 109 So. 3d 833, 836 (Fla. Dist. Ct. App. 2013) (stating that this court uses rules of fairness).

[107] *See supra* Part IV.

[108] *See supra* Part IV.

[109] *See supra* Part V.

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Definition of Autonomous Vessels and Tort Liability Arising from the Collision in Korea*

*Hyeon Kyun Lee***

ABSTRACT

The changes of 4th industrial revolution are also affecting the shipping sector, such as Autonomous Vessels. Technology on this field is developing in United States, Europe, and Asia as well in South Korea.

However discussions on responsibility and insurance for the commercial use of Autonomous Vessel are underway, but have not been clarified.

In this paper, we discussed the responsibility and insurance based on the technological development stage, automation vessels, radio-controlled vessels, and fully autonomous vessels. The reason for classifying the vessels in three levels is to clarify responsibility by identifying who manages, supervises and controls the vessel. The issue on who manages, supervises and controls the vessels is important in the area of the responsibility.

This will depend on future technological development. However, in case of a system failure, the burden of responsibility should be fairly divided between the shipyard, the system manufacturer, and the vessel's owner. Also, insurance product must be developed to cope with this situation.

KEYWORDS: Autonomous Ship, Liability, Maritime Law, Tort Liability, Collision, Product Liability, Marine Insurance

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I. Introduction

In the old SF movies, we all may have experience of watching amazing scenes, such as unmanned cars running on the streets, artificial intelligence robots working in the factories and houses instead of humans, artificial organs transplanted to sick people, but few people actually believed it would be realized.

Although these won't be possible in the near future, they are turning into reality now. Klaus Schwab called the change, that would result from hyper-connectivity of superintelligence, such as artificial intelligence, the internet of things, and the big data, as the 4th industrial revolution.[1] Technological development in the 4th industrial revolution is affecting various industries. For example, autonomous vehicles and drone have already finished the actual test run, and also discussions for technical tests and legal systems for commercial applications are actively being done.[2]

These changes are also affecting the shipping sector, autonomous vessels for example. Technology on this field is improving in United States, Europe, and Asia as well in South Korea where large company such as Daewoo Shipbuilding & Marine Engineering(hereafter abbreviated as "Daewoo SME"), Hyundai Heavy Industries(hereafter abbreviated as "Hyundai HI") and Samsung Heavy Industries(hereafter abbreviated as "Samsung HI") are actively pursuing technology development.

However, in order to commercialize these autonomous vessels, it is

[1] Klaus Schwab, The Fourth Industrial Revolution, Portfolio Penguin, 2016.
[2] Lee, Hyeon Kyun, "A Study on The liability of Maritime Autonomous Surface Ships", Thesis for the Degree of Doctor, Korea university, 2018, at 2.

necessary to establish the legal basis for technology development.[3] Currently, legal discussions on autonomous vessels are at an early stage, including the establishment of concepts, the establishment of a legal basis for test operations, the standardization of unmanned vessels, and so on.

However, in order to operate unmanned vessels commercially, it is necessary to first establish the regulation about who is responsible when the collision of a vessel occurs. Also liability insurance for the autonomous vessels should be newly developed for the vessel's owners and the manufacturers to effectively cope with such liability issues.

In this paper, we will discuss the responsibility issues for the development of Autonomous Vessels and the insurance for the autonomous vessels.

II. Status of Autonomous Vessels in South Korea

2.1. Technological Status in Korea

2.1.2. DAEWOO SME

DSME is striving to develop smart ship, economical navigation, eco-friendly technology, and platform technology, including autonomous navigation technology, to cope with the next generation smart ship market.

In particular, it is known that it has developed an autonomous navigation system through collaboration with Fraunhofer(German), and is undergoing internal testing in a simulation environment. The category of the smart ship technology under development at Daewoo SME is divided into smart ship development, economic operations & environment-friendly technology, and platform technology.[4]

2.1.2. Hyundai HI

Hyundai HI is in the operation of the 'Smart Ship Project' for next-generation ship development and is currently in Phase 2 of Phase 1 ~ 3.

Hyundai HI is promoting shipbuilding-related fusion services, such as developing a smart ship system through the fusion of shipbuilding and ICT, establishing Hyundai Global Service, an Aftermarket subsidiary that integrates ship parts distribution and services, and building new ships with next-generation technologies.[5]

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[3] Kim, In Hyeon, "Various Legal Matters under new maritime circumstances in the first half of the 21st century - Focused on the container, SPC and unmanned vessel –", *Commercial Law Review* Vol.35 No.2, Korea Commercial Law Association, 2016, at 107-09.

[4] Korea Telecommunications Technology Association(TTA), ICT Standardization Strategy Report ver.1, 2017, at 426.

[5] Jang, Kyung-Suk, "Current and Future of Autonomous Ship", KB Knowledge Vitamin Vol.18-05, Kookmin Bank Research Center, 2018, at 6.

2.1.3. Samsung HI

Samsung HI has been developing the technology for smart ship development step by step from 2011 to the present. Smart ship technology development by Samsung Heavy Industries includes Vessel Portal Service, EN-Saver, BIG platform, Intelligent Ship, and SMART.[6]

2.1.3. State-run research project

Korea Research Institute of Ships & Ocean Engineering is developing autonomous vessels (Aragon), and The Ministry of Trade, Industry and Energy, and Ministry of Oceans and Fisheries have collaborated on the research. After passing a preliminary feasibility test in October 2019, it is planned that Level 3 autonomous vessels will be developed by 2025 and Level 4 fully autonomous vessels will be developed by 2030.

2.2. Legal and Political Statue in Korea

Recently, several Korean researchers, actively carried out the studies about the legal aspect of the Maritime Autonomous Vessel. Nevertheless, it did not lead to the actual legislation so far. The perception that the commercialization of Autonomous Vessel will not be realized in the near future was the biggest obstacle.

Furthermore, the conflict about sailor's job also existed in Korea because it inevitably reduces the number of sailor's seats.

In the meanwhile, fortunately, Korea Ministry of Oceans and Fisheries launched “Committee of Abolition of Restrictions on the Autonomous Vessel”. The Committee found the legal obstruction and discussed the solutions and improvements about them. The discussion results of the Committee presented “Abolition Roadmap of Restrictions about Maritime Autonomous Vessel”.[7] These activities are expected to lead to the actual legislation.

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[6] Samsung HI website <http://www.samsungshi.com>.

[7] Korea Ministry of Ocean and Fishery website <https://www.mof.go.kr>.

III. Definition and Categorization of Autonomous Vessels

Countries around the world are undertaking various research projects to develop the technology of autonomous vessels and establish the relevant legal system, for example, EU's 'MUNIN project', Rolls-Royce, Norwegian unmanned cargo ship 'Yara Birkeland' and the Chinese Ship Industry Group(CSSC)'s Research and development, 'SSAP project' in Japan. In Korea, as stated below, Daewoo SME, Hyundai HI, Samsung HI, and State-run research project are conducting research on Autonomous Vessels.

Before legislation about Autonomous Vessel, the definition and categorization of it should be confirmed. On the other hand, in terms of Autonomous Vehicles in Korea, the 「Motor Vehicle Management Act」 was revised on February 12, 2016, to explicitly define the concept of autonomous vehicles. According to Article 2 (1) 3 of the 「Motor Vehicle Management Act」, autonomous vehicles are defined as "vehicles capable of driving by themselves without any manipulation by the driver or passenger".

According to Article 2 (1) 3 of the 「Motor Vehicle Management Act」, autonomous vehicles include the highest level of the fully autonomous driving vehicle that does not require the intervention of the driver or the passenger as well as the vehicle in which the autonomous driving mode and the driver mode are mixed. That is, autonomous vehicles are a broad concept that includes all the stages of autonomous driving in the evolutionary process.[8]

However, according to Article 2 (1) 3 of the 「Motor Vehicle Management Act」, autonomous vehicles' concept (the concept) was decided temporarily in order to make it possible to carry out test and research purposes, due to Article 27 (1) of the 「Motor Vehicle Management Act」 that says "A person who intends to operate an autonomous driving vehicle for testing or research purposes must . . . obtain permission for provisional operation from the Minister of Land, Infrastructure, and Transport.[9]

Definition and categorization of Autonomous Vessel have been discussed on several international research projects and organizations, such as WTP, MUNIN, IMO, etc. In Korea, the definition and categorization of Autonomous Vessel was first officially discussed on the "Committee of Abolition of Restrictions on the Autonomous Vessel", but it could not draw a conclusion.

On the below, We would like to look at WTP, MUNIN, IMO, and also

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[8] Yoon Ji-young et al., "Advancement of Criminal Justice with Forensic Science (VI)", Korean Institute of Criminology, 2015, at 188.

[9] Lee, Joon Seop, "Improvement of Road Traffic Act for Level 3 Autonomous Driving Vehicle", Journal of Ajou law science, 2017 at 94.

Autonomous Vehicle. Then, we could discuss a valid conclusion of the definition and categorization of Autonomous Vessel.

3.1. Waterborne Technology Platform(WTP)

According to the Waterborne Technology Platform (WTP)[10] under European Commission, an unmanned vessel is defined as "a vessel with the next-generation wireless equipment and integrated control system on both ships and onshore and a vessel running by ship control system without the operation and steering of the ship's operator," and it is classified into three categories: remote control vessel, automated vessel, autonomous vessel based on technical classification.[11]

As summarized, it can be seen that technology will be advanced, for example, remote control vessels, automated vessels, and autonomous vessels, and accordingly, the degree of intervention of the human factor like crews will be gradually reduced.[12]

In remote control vessels, crews do not board vessels, but the vessels have to be remotely controlled by the onshore control station having direct control power. In automated vessels, only sailing plans and navigation information must be input before departure, which is sufficient.

Also, autonomous vessels can operate themselves by artificial intelligence systems without human intervention and can deal with problems and errors themselves. Generally, the shape of unmanned vessels imagined by people is this autonomous vessel.

3.2. Maritime Unmanned Navigation through Intelligence in Networks(MUNIN)

According to the Project MUNIN (Maritime Unmanned Navigation through Intelligence in Networks; MUNIN Project) consisting of partners from

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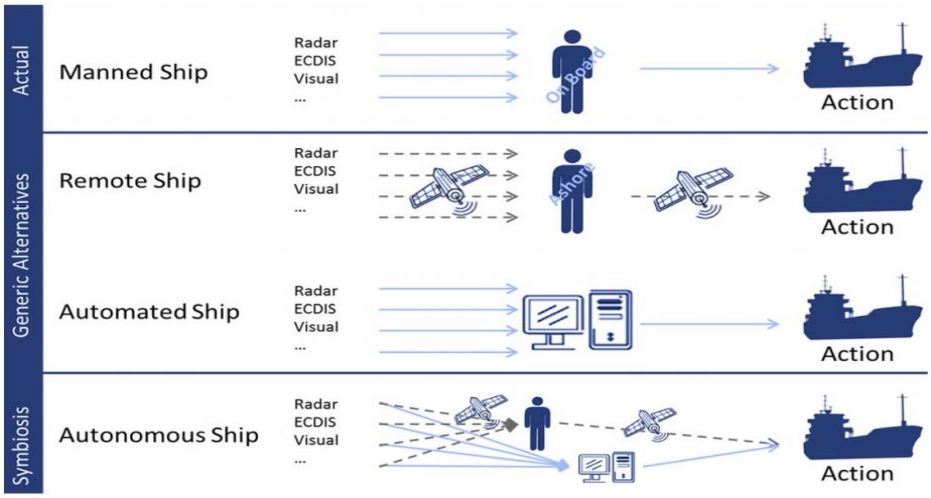
[10] The WATERBORNE TP (Technology Platform) working group was established in the European Commission in 2014 to offer suggestions and comments on new technologies of marine industries. This working group contributes to the technical support and activation of the marine industry, and it also sets standards for new technologies. WATERBORNE TP's major marine industries include renewable technologies, deep sea, offshore plants, yachts, cruises, maritime tourism, shipping, fisheries and maritime security. <https://www.waterborne.eu/projects/digitisation-and-autonomy/autoship, search date: May 19. 2021>.

[11] Michal Chwedczuk, "Analysis of the Legal Status of Unmanned Commercial Vessels in U.S Admiralty and Maritime Law", Journal of Maritime Law and Commerce, Vol.47 No.2, 2016, at 128-30.

[12] Choi, Junghwan and Lee, Sang-il, "A Study on Legal Considerations and Major Issues of Unmanned Commercial Ship", *Maritime Law Review* Vol. 28 No. 3, 2016, The Korea Institute of Maritime Law, at 295.

eight countries including Germany, Norway, Sweden, Iceland, and centered on the European Commission, the unmanned ship is technically classified into three categories: remote control vessels, automated vessels, autonomous vessels, similar to those of WTP.[13] However, there is a slight difference in the definition, and the MUNIN explains the concept through <Figure-1>.



<Figure-1> Autonomous Ship Concept of MUNIN Project[14]

As shown in <Figure-1>, the remote ship and the automated ship of the MUNIN are the same as the concept of WTP, but the autonomous ship from MUNIN project is slightly different from that of WTP.

Since the core of the MUNIN project is to create a suitable combination of a remote ship and an automated ship, it can be seen that the autonomous ship in MUNIN is the combination of a remote ship and an automated ship.

However, discussions on the classification of these unmanned ships by stages of technology development were not legislated and the discussions were not still unified.

3.3. IMO 99th MCS

Internationally, IMO's definition of Autonomous Vessels and step-by-step classification will be established. As well, in South Korea, such a discussion is underway, and it should be enacted into law like the case of autonomous vehicles.

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[13] The MUNIN website <http://www.unmanned-ship.org/munin/about/the-autonomus-ship/, search date: November 15, 17>, WTP is using vessel, MUNIN project is using ship, but I think there is no big difference in terminology.

[14] The MUNIN website <http://www.unmanned-ship.org/munin/about/the-autonomus-ship/>.

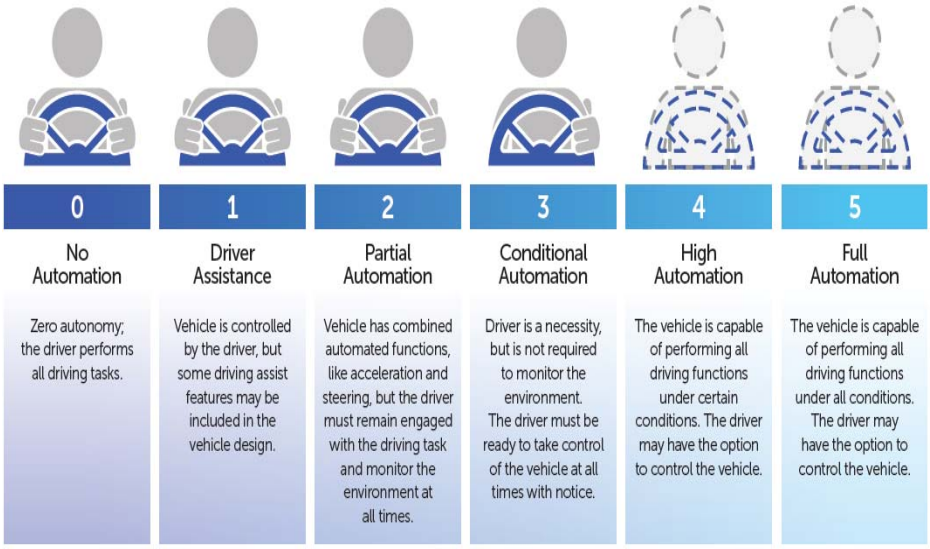
IMO 99th MSC defined Autonomous Vessels for 4 steps, as shown at <Table-1>.

<Table-1> Step-by-step classification of IMO 99th MSC

classification	Characteristics
Level 1	Vessel installed with Supporting system of Automated decision-making (Smart vessel)
Level 2	Remote Control vessel with a minimum crew
Level 3	Unmanned Remote Control vessel
Level 4	Fully Autonomous Vessel

3.4. Comparative Study of Autonomous Vessel

Autonomous vehicles are classified according to the stages of development based on the classification of 0 ~ 5 stages of the SAE (Society of Automotive Engineers). There is also a law on the regulation of each stage of development.



<Figure-2> SAE's autonomous vehicles development phase[15]

[15] NHTSA, "Automated Driving Systems 2.0: A Vision for Safety", 2017, NHTSA, at 4.

The characteristics of each stage according to this classification are as follows.

Level 0 is the level of traditional driving without autonomous driving, and the driver is responsible for all operations.

At level 1, the vehicle contains driving assistance functions protecting the driver's driving.

At level 2, where the automation begins, the automation system performs part of the driving operation, and the driver operates other functions, such as monitoring driving circumstances.

At Level 3, the vehicle also controls the entire driving depending on the road environment and situation. However, in the event of a request for the driving control from the automatic system, the driver must be able to control the operation.

At level 4, the automation system performs the overall operation and monitors the driving environment. The driver does not need to control the drive, but there is still room for the driver to intervene under certain circumstances because the automation system can only operate under certain circumstances and conditions.

However, at level 5, the automation system controls and monitors all driving under all conditions, so no driver intervention is required.

These step-by-step standards have influenced legislation in countries such as Germany and the United States, among which Germany is the one that has allowed autonomous driving of the highest-level autonomous vehicles. Article 1(a) of the German Road Traffic Act, amended in June 2017, explicitly allowed road driving of autonomous vehicles in stages 3 and 4.[16]

However, even if the vehicle is operated by the autonomous function system in stages 3 and 4, if the system requests the transference of the operation or if the autonomous function is no longer available, the driver should be ready to take over the vehicle.[17]

That is, even if the vehicle is operated by the system instead of the person's direct driving, the person is regarded as the driver, so the responsibility is on the person, not the manufacturer.

3.5. How to enact the definition and categorization of Autonomous Vessel?

For full-scale legislation and commercialization of Autonomous Vessel,

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[16] Lee, Hyeon Kyun, *op.cit.*, at 40.

[17] Jo, Yong-Hyuk and Jang, Won-Kyu, 「A Study on Improvement of MOTOR VEHICLE MANAGEMENT ACT for Deployment of Autonomous Vehicle」, Korea Legislation Research Institute, 2017, at 69.

the definition and categorization of them should be confirmed preferentially. In Korea, as of 2021, there is no provision about the definition and categorization of Autonomous Vessel such as in Article 2 (1) 3 of the 「Motor Vehicle Management Act」.

Considering that the step-by-step standards of SAE have influenced legislation in Germany and the United States, the provision about Autonomous Vessels would be seriously affected by IMO's classification.

At this stage, meaningful discussion would be about Manned Vessel (Level 1 Smart Vessel, Level 2 Remote Control Vessel with minimum crew), and Level 3 Unmanned Remote Control Vessel, Level 4 Fully Autonomous Vessel. Since Manned Vessels do not pose new problems that would cause legal changes, our discussion on the provision of definition will be focused on the other three.

In conclusion, 「Ship Act」 should be revised to include a definition of Autonomous Vessels. In addition, definitions for Remote Control Vessels and Fully Autonomous Vessels also be contained in Sub-provisions. Since the definition of a Ship is stipulated in article 1-2 of 「Ship Act」 in Korea, it would be appropriate that the definition of Autonomous Vessels be inserted into the same article.[18]

IV. Tort Liability arising from collision of Autonomous Vessel

4.1. Introduction

In unmanned vessels, the intervention of the crew and captain gradually decreases with the stages of technological development. In the final stage, it is very unlikely that accidents caused by human negligence will occur. Then, when an accident occurs, and along with it the issue of responsibility, and the responsibilities of the manufacturer can often be discussed.

In the current development stage of unmanned vessels, accidents caused by technical problems or system defects have not occurred yet. However, as technology develops and the commercialization of unmanned vessels becomes draws near, the probability of such accidents will increase. There is no doubt that a legislative solution to this problem is a precondition for the commercialization of unmanned vessels.

In the area of autonomous vehicles, during the test driving of the Google autonomous vehicle, an accident occurred on February 14, 2016, at Mountain

[18] Lee, Hyeon Kyun, *op.cit.*, at 45.

View, California, due to a fault in the autonomous vehicle, and this incident started in earnest the discussion about the responsibility for accidents caused by autonomous vehicles.[19]

In case of an accident, generally, responsibility is attributed to the carrier such as the vessel's owner and the captain,[20] but in case of autonomous unmanned vessels, responsibility will be shifted from the carrier to the vessels themselves. In conclusion, responsibility of the vessel's owner will be reduced while the responsibility of the manufacturer (shipyard) will be increased.

4.2. Criteria for calculation of negligence and responsibility in case of vessels collision

Since vessel collisions, which usually occurs at sea, involve a two-way conflict, all the parties involved in the accident include the offender and victim at the same time and both have a responsibility of joint tort.

In general, joint tort results in a untruthful joint and several liability according to civil law. However, in the case of collisions of ships, the parties involved share divisional liabilities for material damages in proportion to the relative seriousness of the faults, in accordance with the special rules provided in Articles 878 and 879 of 「Korean Commercial Code」.[21]

In this case, responsibility is assessed with respect to the captain and the crew who are employed by the owner of the vessel.[22] If unmanned vessels are introduced, the question is that ship owner's responsibility should be discussion based on who's fault. In our opinion, in the case of automation vessels, the captain and the crew are still on board, so responsibility should be calculated based on the captain and crew based on the existing criteria. In the case of radio-controlled vessels, responsibility should be calculated based on the onshore operator, and in the case of autonomous navigation vessels, the vessel itself would be the ground for the judgment.

In principle, the responsible party in a collision of vessels is the vessel's owner (Articles 878, 879 and 880 of the 「Korean Commercial Code」). However, if the vessel's charterer (vessel's lessee, bareboat charterer) operates and hires its crew members, the vessel's charterer takes the responsibility (Article 850 (1) of 「Korean Commercial Code」). According to the Korean Supreme Court's decision, if a time charterer operates the vessel, the vessel's

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[19] Ryu, Chang-Ho, "A Study on the Application of Products Liability to Autonomous Driving Cars", *Ajou Law Review*, Vol. 10, No. 1, Law Research Institute of Ajou University, 2016, at 31.

[20] Kim, In Hyeon, *Maritime Law*, 6th edition, 2020, at 404-05.

[21] Kim, In hyeon, *op.cit.*, at 408-09.

[22] Kim, In hyeon, *Transport Law in South Korea*, 2nd Edition, Wolters Kluwer, 2013, at 75.

owner, and not the time charterer, takes responsibility.[23]

In principle, the vessel's owner is held responsible because the owner not only hires the captain and crew, but also manages and supervises the entire operation.[24]

This logic applies to vessel charterers and time charterers. In the case of charterers, the charterer borrows only the vessels themselves and employs the captains and crew to manage and supervise them. On the other hand, in the case of time charterers, the time charterers just use the vessels while the captain and crew are already recruited, so the vessel's owner is still responsible for the actual management and supervision.

Considering this logic, the question of who should be responsible for vessel collisions caused by unmanned vessels is the same as the question of who actually manages and supervises said unmanned vessels.[25]

In the case of Level 1 Smart vessels and Level 2 Remote Control Vessel with a minimum crew, most of the systems necessary for operation are automated, but the captain and some crew are still on board, so the person who hires the captain and the crew, and manages and supervises the vessel, should take responsibility.[26]

In the case of Level 1 Smart vessels and Level 2 Remote Control Vessels with a minimum crew, the current system will be maintained. In principle, the vessel's owner will take responsibility. In the case of vessel's charter, the vessel's charterer will take responsibility, while in the case of time charter, the time charterer will take responsibility.

The Autonomous vessel which is currently developed is a hybrid type of the AI and the controller at the shore. In other words, Level 4 fully autonomous vessel is hard to commercialize in short term, and Level 3 unmanned Remote Control vessels are the realistically feasible type of autonomous vessels.

In the case of Level 3 unmanned Remote Control vessels, the role of the captain and crew on board will be replaced by the onshore operator in the Shore Control Center as shown in <Figure-3>. Therefore, who controls and supervises the onshore operator will be an important factor in determining the subject of responsibility.

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[23] Korean Supreme Court 2003. 8.22. Docket No. 2001 Da 65977 ruling.

[24] Kim, In Hyeon, *op.cit.*, at 75.

[25] The same logic would apply to carriage of goods by sea. The carrier is liable for cargo damages caused by the crew's negligence(Article 795 of KCC). In case negligence of onshore operator, the carrier who supervises the onshore controller will be liable for the conduct of the performance assistant, onshore controller.

[26] ZHU Zuoxian, "How to reform maritime law with respect to unmanned merchant ships?", 「11th East Asia maritime law forum」, 2018 November 3, at 86-87.

<Figure-3> Concepts for the operation of Level 3 Unmanned Remote Control Vessel[27]

If the onshore operator hired directly by the vessel's owner, the vessel's owner has to bear vicarious liability. On the other hand, if an independent onshore management corporation hires the onshore operator and runs the onshore control center, we may need further discussions about special rules for the independent onshore operator.

Even though they are difficult to commercialize in the short term, questions of liability in the case of Level 4 fully autonomous vessels can serve as expansive ideas.

Level 4 fully autonomous vessels are operated by the unmanned autonomous navigation system, so the question of responsibility is where the responsibility for the fault of systems lies. There is no complete conclusion about fully autonomous vessels in South Korea. However, there are various discussions in progress about autonomous vehicles, and in this paper, I will introduce three views.[28]

(i) The owner is responsible because the owner controls the operation

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[27] Ministry of Trade, Industry & Energy and Korea Institute for Advancement of Technology, *Technology and Policy trends for smart vessel in europe*, Global tech korea Report, 2017, at 44.

[28] Where cargo damage occurs by AI's errors, opinions about responsibility vary. But this researcher believes that the carrier should assume liability because the carrier benefits from the unmanned autonomous vessel, and carrier also manages the unmanned autonomous vessel.

using the unmanned system. (ii) In the case of unmanned systems, there is little room for the vessel's owner to intervene, and as such the manufacturer is responsible for the management and supervision of the system. Thus the manufacturer should take the responsibility. (iii) In order to protect victims, both the vessel's owner and manufacturer should take untruthful joint and several liability.

In our opinion, the vessel's owner should take the responsibility because the owner obtains operating profits from the unmanned vessels, and controls the autonomous navigation system by an unmanned system. Of course, it is possible to claim compensation from the manufacturer in cases where a fault caused by the manufacturer exists.

4.3. The responsibility of the manufacturer[29]

In South Korea, vessels are being built with the SAJ standard contract. According to the SAJ, the shipyard is approved by the vessel's owner at every stage. The materials required by the owner are manufactured in the manner stipulated by the owner. Therefore, it is rare for shipyards to bear responsibility for faults in the products, because it is rare for the shipyard to make intentional and gross negligence.[30]

According to Article 4 (1) of the SAJ, the builder submits the design and drawings of the vessels to be constructed to the client, the client shall send approval and comment to the builder within 14 days and according to Article 4 (2), the client appoints a representative, and according to Article 4 (3), the client attends the inspection conducted by the builder's inspection team and supervises it.

Due to these regulations, errors in the design and manufacturing processes are rarely attributable to the shipyard. And even if such errors occur, the vessel owner can be liable for the product liability, because it has been carried out under the vessel owner's approval and supervision of the representative of the vessel owner.[31]

On the other hand, in the case of unmanned vessels, there will be equipment companies that develop unmanned navigation systems, and they may be liable for the product liability.

The Scope of the products contains the ship itself, including the Autonomous system installed in the ship, the Control system of the control

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[29] Lee Hyeon Kyun, "A Study on The Legal Issues on Commercial Law related to Maritime Autonomous Surface Ship", *Advanced Commercial Law Review*, Vol.94, 2021, at 121-25.

[30] Jung, Hae Duk, "Liability of Ship builder and Product Liability in General", *Risk&Insurance*, vol.121, 2016, at 11.

[31] Andrew Tettenborn, "Shipping : Product liability goes high-tech", *New Technologies, Artificial Intelligence and Shipping Law in the 21th Century*, Routledge, 2019, Ch.9.

center on the shore, and the communication network with the vessel and the control center on the shore. Thus, each manufacturer of all the products bears product liability.

According to the Korean Product Liability Act, product liability is the responsibility of the manufacturer to pay damages because defects that lack the safety normally expected, and property damage that occurs only in the product itself are excluded from the product liability. (Article 1, 3 (1) of 「Korean Product Liability Act」).

Also, Liability shall be limited to the manufactured or processed chattel. (Article 2, (1) of 「Korean Product Liability Act」). The South Korea Supreme Court ruled that a hardware of an unmanned vessel is chattel and thus, an unmanned vessel system is also subject to product liability. Although the unmanned vessel system is intangible, and thus does not satisfy the requirement of a chattel, we think that it is necessary that artificial intelligence or system using it should be included in the range of products of the product liability.

'Product defect' means the product's 'lack of safety normally expected' predicted from the appearance of the product, the reasonable use of the product , and the circulation time of the product. Product defects are classified into manufacturing defects: design defects, and display defects (Article 2 (2) of 「Korean Product Liability Act」).

According to the Product Liability Act, when an unmanned navigation system vessel is operated and damage is caused by a system defect, the shipyard or the vessel's owner may claim compensation from the system manufacturer for the responsibility of the sale contract. This is because the shipyard or the owner purchased the unmanned navigation system through a contract of sale. Besides, product defects can damage the vessel or other vessels by causing vessel collision, and also can damage property, life or property, and thus, the manufacturer should assume that system defect is included in the product liability.

However, the responsibility theory between the shipyard, the system manufacturer, and the vessel's owner can change dramatically depending on future technology development and the type of contract. So, Further discussion should be processed with technology development.

4.4. The Insurance Issue for the Unmanned Vessels

Current marine insurance refers to indemnity insurance aimed at compensating for damages on ships, cargoes, freight caused by marine accident (Article 693 (1) of 「Korean Commercial Code」). Marine insurance can be devided, depending on insurable interest, into hull insurance, protection &

indemnity(P&I), cargo insurance, freight insurance, insurance on profits on goods, and loss of earning insurance.

Among the current marine insurance, hull insurance and P&I insurance are paid only if the ship owner compensates the victim, because hull insurance and P&I insurance pre-require the insured's liability for compensation,[32] which is a burden on the ship owner.

Therefore, there is a problem that the victim cannot be compensated until the fact that the accident occurred by AI system defects is proved.

In the case of Level 1 Smart vessels, Level 2 Remote Control Vessel with a minimum number of crew, and Level 3 Unmanned Remote Control Vessel, human such as the captain and the onshore operator are still involved, so there may be some changes in the insurance rates and the liability calculation, but the existing vessels insurance system should be able to cope with the issues sufficiently.

However, in the case of Level 4 Fully Autonomous Vessel, it is difficult to identify who is responsible for the fault of the autonomous navigation system. If the system fault is attributed to the vessel's owner and thereafter the manufacturer is liable for product liability or the vessel's owner can claim for reimbursement, the vessel's owner may be overburdened. Therefore, a new insurance system should be developed to divide the responsibility fairly.

Of course, according to the statistics of the International Chamber of Shipping and the International Shipping Federation, about 80% of marine casualties are caused by human-related reasons such as intention, negligence and carelessness of the crew.[33]

Thus, if the autonomous vessel is introduced, it is expected that the number of these accidents will decrease dramatically and the insurance claims will be reduced accordingly.[34]

Initially, there would be anxiety about the technology, which would increase the insurance rate, but if accidents due to human fault decrease and confidence in technology is formed, the insurance rate will gradually decrease.

However, apart from the reduction of accidents and claims, compulsory insurance should be considered in order to equitably share the responsibility of the damages caused by system failures. In order to distribute the responsibilities to the system manufacturer and the shipyard in accordance with the Product Liability Law, a certain portion of product liability insurance should be enforced and in the case of the vessel owner operating unmanned vessels, the

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[32] This research didn't much address topics about cargo insurance because this researcher believes that there won't be much change in cargo insurance.

[33] Phil Anderson, *The ISM code: A practical guide to the legal and insurance implications*, 2nd edition, Informa(London), 2012, at 15.

[34] Paul W. Pritchet, "Ghost Ships: Why the Law Should Embrace Unmanned Vessel Technology", *Tulane Maritme Law Journal*, Vol.40 No.197, 2015, at 201.

liability insurance for unmanned vessels apart from the existing insurance should be mandatory to divide some part of the damage caused by system defects,.

In this regard, in the case of Level 4 fully autonomous vehicles in the autonomous vehicle segment, introducing no-fault insurance being used in the United States should be considered. This is a way to give compensation to the victim regardless of who is responsible for the car accident.[35]

In the case of vessels, it is difficult to uniformly regulate certain damages because it can cause more damages than automobiles. However, since it is difficult to calculate responsibility and to prove the causal relationship caused by the defects of the autonomous navigation system, it is also possible to consider introducing a modified 'no-fault insurance'.[36]

Meanwhile, on June 7, 2016, Adrian Flux, Insurance Brokers in the UK and Trinity Lane, Insurance Company, developed and launched an insurance product on the road driving and trial operation of Level 4 fully autonomous vehicles. According to this product, car damage caused by hacking, damage due to software update failure, and vehicle damage due to the manual switch failure are compensated by re-procurement value.[37]

For the concrete contents, as mentioned in the responsibility, additional research should be carried out according to the direction of the technological development, but the responsibility due to system defects must be equitably shared.

V. Conclusion

Rapid technological development on autonomous vessels around the world is in progress. As well, in South Korea, relevant discussion about the autonomous vessels has also been progressed considerably, such as the definition of autonomous vessels, equipment standards, and regulations for operation.

However, although discussions are underway on responsibility and insurance for the commercial use of Autonomous Vessel, discussions have yet to be clarified.

In this paper, we discussed the responsibility and insurance based on the technological development stage. The responsibility and insurance may change depending on the stage of the technological development, but it can be the basis

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[35] Lee, Hyeon Kyun, "A Study on the car leasing chareges and cost of car reparing for autonomous vehicle", *Sogang Journal of Law and Business*, Vol.9 No.2, Sogang University, 2019, at 164.

[36] Lee, Hyeon Kyun, *op.cit.*(Thesis for Degree of Doctor), at 206.

[37] Adrianflux website <http://www.adrianflux.co.uk>.

for some discussion.

When we classified these issues according to the technological development stage, we discussed three kinds of vessels which are automation vessels, radio-controlled vessels, and fully autonomous vessels for convenience. Since the technological development stage can be composed of four or five stages as in the case of autonomous vehicles or unmanned drones, the issue of who controls and supervises the vessels is important in the responsibility part. Although the autonomous vehicle or unmanned drones are divided into four levels or five levels, the reason for organizing the vessels in three levels is to clarify responsibility by identifying who manages, supervises, and controls the vessel.

In the case of Level 1 Smart vessels and Level 2 Remote Control Vessel with a minimum number of crew, the captain and the crew are still on board, so the liability should be calculated based on the captain's fault. In the case of Level 3 Unmanned Remote Control Vessel, it should be calculated based on the liability of the onshore operator. In the case of automation vessels and radio-controlled vessels, the liability will be the same as now, and there might be some changes in the insurance system, but the current system will be applied as it is.

However, as Automation progresses, responsibility should be attributed to the owner or the manufacturer of the vessels on the basis of system defects, but proving the existence of defects and causality may be difficult. It is clear that as technology develops and operations by unmanned systems increase, the likelihood of accidents caused by technological problems or system defects will increase, and thus the responsibility of the manufacturer will increase.

This will depend on the future technological development. However, in case of a system failure, the burden of responsibility should be fairly divided between the shipyard, the system manufacturer, and the vessel’s owner. Also, insurance products must be developed to cope with this situation.

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CASE NOTE

K Line PTE Ltd v Priminds Shipping (HK) Co Ltd (The "Eternal Bliss") [2020] EWHC 2373 (Comm)

Sir Bernard Eder[*]

Table of Contents

I. Introduction

This was a most important case decided by the Commercial Court in London in 2020. Somewhat unusually, the case came before the Court on assumed facts by agreement between the parties for the determination of a question of law arising in the arbitration.

The Judgment of Andrew Baker J has provoked much interest because it concerned a point of long-standing uncertainty as a matter of shipping law with regard to the nature of demurrage payable under a voyage charter when the charterer has failed to load or discharge the ship within the laytime allowed.

In short, the issue was: where a Charterer fails to complete the discharge of cargo within the agreed laytime, can the Owner claim not only the agreed demurrage but also damages over and above the agreed demurrage for extra loss that the Owners have suffered as a result of the additional loss? Or is the Owner restricted to the agreed demurrage and no more?

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II. Facts

The assumed facts in the case were relatively straightforward. In summary, on those assumed facts, it was common ground that (i) the Charterer failed to discharge the cargo at the discharge port within the agreed laytime; (ii) the Charterer was liable to pay the agreed demurrage; and (iii) the Charterer had committed no breach of the Charterparty other than the failure to discharge the cargo within the agreed laytime.

However, it was the Owner's case that by reason of the prolonged retention of the cargo on board due to that breach, it deteriorated albeit without any other fault on the part of the Charterer, and that the cargo would have been in sound condition if timely discharged.

In essence, the Owner claimed that as a result, it was confronted with damages claims brought by the cargo owners and their insurers that were reasonably compromised by the Owner at a total cost of c.US$1.1 million. If all that was proved in arbitration, the Owner submitted that it would be entitled to an award requiring the Charterer to compensate it in respect of that cost, by way of damages or under an implied indemnity.

However, the Charterer submitted that the demurrage payable by it under the Charterparty was, in effect, the Owner's exclusive remedy for the breach and that the Owner was therefore unable to claim any further damages over and above the demurrage rate.

III. Judgment

In the course of the Judgment, the Judge reviewed the earlier case-law and the conflicting views expressed in the leading text-books and various learned journals – stretching back almost 100 years. In essence, the controversy turned on the proper interpretation of the judgments of the Court of Appeal in *Akt. Reidar v Arcos* [1927] KB 352, in particular after what was said about them in *Suisse Atlantique d'Armement Maritime SA v N.V. Rotterdamsche Kolen Centrale* [1967] 1 AC 361 and later case-law.

As stated by the Judge at [21]: "The main point of principle involved asks what it is that demurrage liquidates. It is well-established that demurrage is by nature liquidated damages, but in respect of what does demurrage, calculated in accordance with the voyage charter, fix (and therefore limit) the owner's recovery?". In other words: "…What *does* the law take to be covered by a demurrage rate? What *does* demurrage liquidate? . . ." [27]. In essence, those

were the legal questions at the heart of the dispute in this case.

At the centre of the debate was a previous decison some 30 years ago in *Richco International Ltd V. Alfred C. Toepfer International G.M.B.H. (The "Bonde")* [1991] 1 Lloyd's Rep. 136 where Potter J. held that where a charter-party contained a demurrage clause, then in order for the owners to recover damages in addition to demurrage for breach of the charterers' obligation to complete loading within the lay days, it was a requirement that the owners demonstrate that such additional loss was not only different in character from the loss of use but stemmed from breach of an additional and/or independent obligation. The reasoning in that case was relied on heavily by the Charterer in support of its vase that it was not liable to damages beyond the demurrage rate.

However, in the event, the Judge rejected the Charterer's case and held in favour of the Owner. In summary, the Judge's conclusions were as follows:

a. The reasoning in *The Bonde* was flawed. The case was wrongly decided and, although it had stood for some 30 years, it would not be followed: [127] and [145].

b. In principle, a demurrage rate gives an agreed quantification of the owner's loss of use of the ship to earn freight by further employment in respect of delay to the ship after the expiry of laytime, nothing more. Where such delay occurs, the demurrage rate provides an agreed measure by which the parties are bound for the owner's claim for damages for detention, but it does not seek to measure or therefore touch any claim for different kinds of loss, whatever the basis for any such claim. [61]

c. On the facts assumed in that case, the damage to the cargo was quite distinct in nature from, and was additional to, the detention of the ship as a type of loss. [44]

d. Accordingly, the Charterer would be liable to compensate or indemnify the Owner in respect of the loss, damage and expense by way of damages for the charterer's breach of contract in not completing discharge within permitted laytime. The Court left open the question of whether the Owner could recover on the basis of an implied indemnity. [152].

IV. Opinion

By way of postscript, I should mention two additional points.

First, the Judge expresses surprise at [142] that one of the leading textbooks – *Scrutton on Charterparties* – expresses a view on the point at issue without referring to *The Bonde*. If that were so, that would be a glaring and unforgiveable omission ! However, as the previous Senior Editor myself of that great book, I am pleased to say that the Judge was wrong – albeit that the misconception may have arisen because the case is referred to by its full title rather than by reference to the name of the vessel in that case. The reference appears in footnote 28 to Article 170 of the 24th Edition of *Scrutton on Charterparties* under the heading *"Nature of Demurrage"*.

Second, it should be noted that the Charterers have now appealed – and, as I understand, the case is due to be heard by the Court of Appeal later this year.

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