

WaveLength

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The amendment to the provision for valuable goods exemption in the Commercial Code of Japan

*Masayuki Sakae**

Introduction

In Japan, the Commercial Code (Transport law and Maritime commerce law) has been revised for the first time in 120 years¹, which will come into force on 1st April 2019. Many of the provisions in relation to the transport law have been the subject to the amendment, the provision for the valuable goods exemption (hereinafter: Clause) has been amended as well.

The amended Clause applies to all transport, that is to say, land transport, sea transport and air transport, and also applies *mutatis mutandis* to Japanese Carriage of Goods by Sea Act (hereinafter: Japanese COGSA).

It is said that the Clause is unusual in the other countries, accordingly, the author believes it important to introduce this new Clause referring to its purpose, revised points and also the points which can be controversial even after the amendment.

Outline of the Clause

1. Article 577(1) of the amended Commercial Code provides as follows:

“The carrier shall not be liable to compensate for loss of, damage to, or delay in delivery of cash, negotiable instruments of value or other expensive goods unless the shipper declared the type and value of it upon entrusting such goods for transport.”

According to the Clause, the carrier is, in principle, exempted from liability on the damage of valuable goods, unless the shipper declared its type and value.

2. The meaning of valuable goods is not defined in the Commercial Code, which is open to interpretation. The Supreme Court² determined that valuable goods means the goods which is significantly expensive as compared with its volume or weight, and that the goods, the volume and weight of which are considerably huge, which is apparently valuable, does not fall within it. The meaning of valuable goods is defined in some of

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¹ The Commercial Code was enacted in 1899.

² Supreme Court, 21 April 1970

the general standard forms for transport.

For instance, article 9(1)3 of Hyojun Kamotsu Jidosha Yakkan which is applied to Motor Truck Transportation Business provides that valuable goods means the goods, the value of which exceeds 40 thousand yen per 1kg including containers and packing, except for animals. The meaning of valuable goods in general standard forms for transport would serve as a useful reference for interpreting the meaning of it in the Clause.³

3. As mentioned above, the carrier is basically discharged from liability on the damage of valuable goods except in the case where the shipper declared its type and value upon entrusting such goods for transport. In the case of the damage of valuable goods, the carrier may assume the obligation for compensation, the amount of which is expensive and unforeseeable, because the risk of its damage seems to be huge due to its nature and the damages can be significant. The purpose of the Clause is to give the carrier an opportunity to consider whether to enter into a contract by the declaration of the type and value of valuable goods by the shipper. Also, assuming that the carrier enters into a contract, the purpose is to give the carrier an opportunity to receive an appropriate freight for the carriage considering the valuable goods, and to avoid risks by concluding an insurance contract, in addition, to encourage the carrier to carry it carefully to prevent damages.
4. The Clause requires the shipper to declare the type and value of valuable goods to the carrier. It is, however, somehow unclear whether the clause imposes the duty to declare on the shipper or not, but only allows the carrier to be exempted from liability on the damage to valuable goods.

A court precedent⁴ held that the failure of the declaration falls within the negligence in the judgement of comparative negligence. However, as far as the author perceives, there seem to be no court precedent which have explicitly determined that the shipper assumes the duty to declare.

Unlike the case of dangerous cargo, even if the shipper failed to declare the type and

³ The United States Limitation of Liability Act of 1851, 46 USC Section 30503 provides as follows;

(a) In General. - If a shipper of an item named in subsection (b), contained in a parcel, package, or trunk, loads the item as freight or baggage on a vessel, without at the time of loading giving to the person receiving the item a written notice of the true character and value of the item and having that information entered on the bill of lading, the owner and master of the vessel are not liable as carriers. The owner and master are not liable beyond the value entered on the bill of lading.

(b) Items. - The items referred to in subsection (a) are precious metals, gold or silver plated articles, precious stones, jewelry, trinkets, watches, clocks, glass, china, coins, bills, securities, printings, engravings, pictures, stamps, maps, papers, silks, furs, lace, and similar items of high value and small size.

⁴ Tokyo High Court, 25 September 1979

value of valuable goods, it would not be assumed that the failure causes damage to the property of the carrier or any third party. Given that, there's no need to impose the duty to declare on the shipper, but it seems to be enough for the carrier to be exempted from liability on the damage to valuable goods, if the shipper failed to declare.

However, the purpose of the Clause is to give the carrier an opportunity to consider whether to enter into such a high risk contract, and also to encourage the carrier to deal with the cargo carefully to avoid any damage to it. In order to achieve its purpose, it seems to be necessary to impose the duty of declaration on the shipper.

The amendment to the Clause

1. Article 577(1) of the amended Commercial Code is as described above. This clause maintains basically article 588 of the former Commercial Code.
2. Article 577(2) of the amended Commercial Code provides as follows:

“The provision of the preceding paragraph shall not apply in case

- (1) the carrier was aware at the time of conclusion of a contract that the goods was valuable goods.
- (2) the loss, damage, or delay occurred intentionally or by gross negligence of the carrier.”

Regarding (1) above, it had been argued before this amendment that the Clause should apply even if the carrier was aware of valuable goods. The academics supporting the view had insisted that since the Commercial Code requires the case to be dealt with in a uniform and typical way, accidental elements such as carrier's awareness of valuable goods should not be considered, and that the declaration of the goods should be encouraged.

Following this amendment, it has been provided that the carrier is not exempted from liability if the carrier was aware of it at the time of conclusion of a contract. It seems to be arguable whether the Clause applies or not in case the carrier found it after the contract, including at the time of cargo collection, during the time of carriage. However, in such cases, there seems to be room for the Clause to apply, because the amended Clause has explicitly established the standard for judging carrier's awareness as above.

Regarding (2) above, it had been argued by some academics before this amendment that the Clause applies even if the damage to valuable goods was caused by the gross

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negligence of the carrier, since the declaration of it could prevent the gross negligence of the carrier.

However, the recent court precedent⁵ held that the carrier could not be protected by the Clause in case the damage to valuable goods was caused by the gross negligence of the carrier, by the application of article 581⁶ of the former Commercial Code or the purpose of the provision.

The amended Clause has been enacted in conformity to the recent court precedent above. As a result of it, the carrier is not exempted from liability relying on the Clause in case valuable goods was lost, damaged, or delayed due to the gross negligence of the carrier.

By the way, Japanese court is prone to accept the gross negligence of the carrier relatively easily and not to accept the valuable goods exemption. On the other hand, in order to lead to a reasonable conclusion, Japanese court tends to consider the failure of the declaration of valuable goods as comparative negligence⁷. However, gross negligence has been understood to mean the state that lacks attention considerably, almost the same as intention, under Japanese law. It seems therefore to me that the court should not accept the gross negligence of the carrier easily contrary to the court precedent in relation to the gross negligence in Japan, even though the intention of the court is to settle the case flexibly.

3. Article 587 of the amended Commercial Code provides as follows:

“The provision of article 576, 577, 584 and 585 shall apply *mutatis mutandis* to the carrier’s liability for damages in relation to the damage to or the loss or delay of the cargo based on tort to the shipper or the consignee provided, however, that this shall not apply to the carrier’s liability to the consignee in the case where the consignee refused the transportation to be entrusted by the shipper in advance.”

Before this amendment, there had been an argument as to whether the carrier can rely on the Clause or the provision of the same kind in the contract of carriage regarding shipper’s claim in tort against the carrier. Following this amendment, the Clause applies *mutatis mutandis* to the carrier’s liability for tort against the shipper or the consignee in

⁵ Tokyo High Court, 25 September 1979; Tokyo District Court, 28 March 1990.

⁶ Article 581 of the former Commercial Code provides that if goods are lost, damaged, or delayed due to an intentional action of the carrier or due to gross negligence, the carrier is liable to compensate for all damage arising therefrom.

There was a discussion as to whether the provision applies to the provision for valuable goods exemption, as the provision is the exception to article 580 of the former Commercial Code.

⁷ Tokyo High Court, 24 December 1993

accordance with the Supreme Court Case in Japan⁸. The application of the Clause to the consignee would be inappropriate if the consignee, in advance, refused the carriage to be entrusted by the shipper. Therefore, in such cases, the Clause does not apply *mutatis mutandis* exceptionally.

In addition, following this amendment, although the consignee is not the party to the contract of carriage, the Clause applies *mutatis mutandis* to the carrier's liability for tort against the consignee in accordance with the Supreme Court Case. In the case, the transport of valuable jewelry, the value of which exceeds the amount limit to be carried by low-cost home delivery service, was entrusted to the carrier. As the goods was lost, the consignee compensated the owner of the goods for the loss. As a result of the compensation, the consignee acquired a right to claim damages in tort by subrogation, then, the consignee claimed against the carrier based on the right. The Supreme Court held that it is not permitted for the claimant to claim for damages which exceed the amount limit against the carrier on the ground of *bona fides*, in case the consignee, at least, had approved in advance that the goods would be transported by the service above.

Given that the amendment of the Clause had been made in accordance with the Supreme Court Case, in my personal opinion, the carrier seems to be able to assert the valuable goods exemption against those who had approved in advance that the goods was transported by the carrier, as is the case with the consignee.

4. Article 588 of the amended Commercial Code provides as follows:

- (1) In case the liability of carrier for damage to or loss or delay in delivery of the goods is exempted or limited pursuant to the preceding article, the liability of the carrier's employee in tort for the damage to the carried goods against the shipper or the consignee shall also be exempted or limited to that extent.
- (2) The precedent paragraph shall not apply to the case where the damage to or the loss or the delay in delivery of the goods was arisen out of intentional act or gross negligence of the carrier's employee.

This amendment adopts what is called a Himalaya clause in the Commercial Code following Japanese COGSA. It should be noted that subcontractors of the carrier are, generally, included in the subject of the protection in Himalaya clause. In contrast, the clause above does not prescribe that they can rely on the clause (The clause allows only carrier's employees to invoke it.). As the carrier who entered into a contract with the

⁸ Supreme Court, 30 April 1998

original carrier who had concluded a contract of carriage with the shipper (hereinafter: the Sub-Carrier) does not fall into “employees” of the original carrier, the clause would not apply to the Sub-Carrier.

In modern days, however, the original carrier takes advantage of the carriage by another carrier on a daily basis. The original carrier can be exempted from liability by the application of the Clause or relying on the provision of the same kind in the contract concluded with the shipper. In contrast, as mentioned above, the clause would not apply to the Sub-Carrier. Also, since the Sub-Carrier is not the party to the contract of carriage between the original carrier and the shipper, the clause in relation to valuable goods exemption in the contract does not seem to apply to the Sub-Carrier unless a common Himalaya clause is provided for in the contract.

However, although the consignee cannot make a claim against the original carrier due to no declaration of valuable goods by the shipper, in case the original carrier happened to conclude a contract of carriage with the Sub-Carrier, which would allow the consignee to claim for damages against the Sub-Carrier. This seems to be against the purpose of the Clause. In addition, in case the Sub-Carrier is not exempted from liability by the application of the Clause, the Sub-Carrier would claim in tort against the shipper for the damages to be forced to compensate to the consignee on the grounds that the shipper failed to perform the obligation of declaration in relation to valuable goods. This also seems to be roundabout.

As stated above, article 588 allows the carrier to invoke the valuable goods exemption against the consignee under the circumstances where the consignee had approved the contract of carriage in advance, although the consignee is not a party to the contract of carriage itself. If that is the case, from my point of view, the provision seems to be analogically applicable to the Sub-Carrier, as it is considered that the Sub-Carrier usually undertakes the carriage of goods, giving its consent to the contract of carriage between the shipper and the original carrier. Also, in order not to ignore the purpose of the Clause, it is conceivable that the carrier can be exempted from liability by the analogous application of article 588. However, further discussion will be necessary in this regard.

Conclusion

Some of the issues in relation to the valuable goods exemption have been solved by this amendment of the Commercial Code. There still remain many issues, like the application of Article 577(2) to the carrier who was aware of valuable goods after the contract, the analogous application of article 588 to the Sub-Carrier, regarding the new Clause, thus, further discussion and accumulation of court cases of this new matter are required.

Revision of the Commercial Code of Japan on Collision, Salvage and General Average

*Hajime Sasaki**

I. Introduction

The Act for Partial Revision of the Commercial Code and the Act on International Carriage of Goods by Sea (Act No. 29 of 2018; ‘Revised Act’) was enacted in the Japanese Diet on 18th May, 2018 and was promulgated on the 25th of the same month. The Revised Act will come into effect on 1st April, 2019 (the Commercial Code revised by the Revised Act is hereinafter referred to as the ‘Revised Commercial Code’).

Provisions of the Transportation Law and the Maritime Commerce Law in the Commercial Code had not been substantially reviewed until this Revised Act since the Commercial Code’s enactment in 1899. Meanwhile, transportation had completely changed compared with a century ago. As for provisions of the Maritime Commerce Law, such as vessel collision and salvage, it was necessary to reconsider methods of discipline based on global trends in related conventions and so on. In the Revised Act, fundamental and numerous revisions modernized the Transportation Law and the Maritime Commerce Law in the Commercial Code in response to changes in social and economic circumstances since the Code’s establishment.¹

The Revised Act’s changes cover all aspects of the Transportation Law and Maritime Commerce Law, including those related to land and air transportation. Among all the revisions, this paper reviews those on collision of vessels, salvage and general average.

II. Collision between Vessels

1. Outline of Revisions

Japan has ratified the Convention for the Unification of Certain Rules of Law with Respect to Collisions between Vessels, 1910 (‘Collision Convention’), and the Revised Commercial Code’s provisions apply when the Collision Convention does not. In other words, discipline on collision of vessels under the Revised Commercial Code is mainly applied when a trial is conducted in Japan, and (1) two Japanese vessels collide or (2) a

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¹ Nobukazu Matsui and Akihiro Oono, *Q&A: Revision of the Commercial Code 2018* (Shojihomu 2018) (hereinafter referred to as ‘Q&A’) p1.

Japanese vessel collides with a vessel of a non-contracting country of the Collision Convention, or (3) a vessel of a non-contracting country of the Collision Convention collides with another vessel of a non-contracting country.

Before the revision by the Revised Act ('Revision'), Japan had not revised the Commercial Code to conform to the Collision Convention, and discrepancies in case results occurred between applications of the Collision Convention and the Commercial Code. Therefore, in revising the Commercial Code, its relationship with the Collision Convention was carefully examined, so revisions would conform, as much as possible, to provisions of the Collision Convention.²

The Revised Commercial Code provides the following changes regarding collision of vessels:³

- (1) When both collided vessels are negligent, the court must consider the weight of each vessel's negligence to determine liability for damages and the amount thereof (the first sentence of Article 788);
- (2) With respect to damages due to infringement of property caused by vessels' collision, the right to claim compensation based on torts is subject to 2 year's extinctive prescription from the time of tort (Article 789);
- (3) A new provision to the effect that provisions relating to collision of vessels apply *mutatis mutandis* on semi-collision between vessels (in case of damaging another vessel by approaching sharply without collision) (Article 790); and
- (4) A new provision to the effect that provisions relating to collision and semi-collision of seagoing vessels apply *mutatis mutandis* to accidents between seagoing vessels and non-seagoing vessels (Article 791).

2. Apportionment of Responsibilities between Shipowners

(1) Relationship between Shipowners

(i) If only one vessel is negligent between collided vessels, based on the general principle of tort liability under the Civil Code (Article 709 of the Civil Code), only the negligent vessel's shipowner is liable for damages.

(ii) If there is negligence by both collided vessels, the court determines the liability of each shipowner for damages due to the collision and the amount thereof, considering the weight of each vessel's negligence (the first sentence of Article 788 of the Revised Commercial Code). When determining the weight of each negligence is not possible, liability for damages and the amount thereof are borne equally by each shipowner (the second sentence of Article 788 of the Revised Commercial Code).

² Takashi Hakoi, 'Maritime Commerce (Vessel, Collision, Salvage and Lien, etc.)' (2018) 1524 Jurist 38 (hereinafter referred to as 'Maritime Commerce'), p40.

³ Q&A p132.

Although the first sentence's discipline was admitted only by interpretation of the Commercial Code before the Revision⁴, explicit provision is established in this revision. The Collision Convention provides similar provisions, as does Article 788 of the Revised Commercial Code (Article 4, Paragraph 1 of the Collision Convention).

(2) Relationships to Third Parties

(i) If only one vessel is negligent between collided vessels, based on the general principle of tort liability in the Civil Code (Article 709 of the Civil Code), only the negligent vessel's shipowner is liable for damages suffered by the third party.

(ii) If both collided vessels are negligent, as in joint tort liability stipulated by Article 719 of the Civil Code, both shipowners are interpreted as jointly and severally liable to third parties.

The Collision Convention stipulates that both shipowners shall bear joint and several liability for personal injury, as does Article 719 of the Civil Code (Article 4, Paragraph 3 of the Collision Convention). On the other hand, with respect to property damages such as vessels, cargoes and personal effects, etc., the Collision Convention stipulates that each shipowner shall bear split liability according to the proportion of negligence without joint liability (Article 4, Paragraph 2 of the Collision Convention).

Therefore, treatment of property damages incurred by a third party due to vessels' collision is not congruent between cases in which Japanese law is applied and those in which the Collision Convention is applied.

The Revised Commercial Code does not provide any special regulation to conform to the Collision Convention's content because modern legislation was chosen to emphasize respect for human life and protection of victims.⁵

3. Extinctive Prescription

(1) Property Damage

The Revised Commercial Code stipulates that for damages due to infringement of property caused by collision of vessels, the right to claim compensation based on torts shall be subject to 2 year's extinctive prescription from the time of tort (i.e. from the time of vessels' collision) (Article 789 of the Revised Commercial Code).

Although before the Revision, the Commercial Code stipulated that the period of extinctive prescription was 1 year, the period of extinctive prescription has been extended to 2 years under the Revised Commercial Code to conform to Article 7, Paragraph 1 of the Collision Convention.

⁴ Maritime Commerce p40.

⁵ Ibid p40 and p41.

Regarding the period of extinctive prescription's starting point, before the Revision, the Commercial Code lacked an explicit provision. The Revised Commercial Code stipulates that the starting point is at the time of tort (i.e. at the time of vessels' collision) to conform to Article 7, Paragraph 1 of the Collision Convention.

(2) Personal Injury

Regarding the right to claim compensation in case of personal injury, the Revised Commercial Code contains no provision. In accordance with the Civil Code, which is the general law, the period of extinctive prescription is 3 years (this period will be further extended to 5 years after enforcement of the Civil Code's 2017 revision, which is scheduled to come into effect on 1st April, 2020), and the starting point thereof is 'the time when the victim or his/her legal representative comes to know of the damages and the identity of the perpetrator' (Article 724 of the Civil Code).

Article 7, Paragraph 1 of the Collision Convention, which provides the period of extinctive prescription as 2 years, applies not only to property damages, but also to personal injuries. Therefore, not only the period of extinctive prescription's starting point, but also its length differs significantly between the Collision Convention and the Revised Commercial Code. This difference results from contemporary consideration of provisions of the Collision Convention prescribed more than a century ago from the viewpoint of respect for human life.⁶

4. Semi-Collision

A semi-collision of vessels means one vessel's sharp approach to another due to acts related to the voyage and causing damage to another vessel or person/property in the other vessel, but without physical collision.⁷

The Revised Commercial Code stipulates that discipline on collision of vessels shall apply *mutatis mutandis* to semi-collision of vessels (Article 790 of the Revised Commercial Code).

Before the Revision, the Commercial Code made no provision for semi-collision of vessels. On the other hand, Article 13 of the Collision Convention stipulates that it applies also to vessels' semi-collision. Accordingly, the Revised Commercial Code now conforms to the Collision Convention.⁸

5. Scope of Application

The Revised Commercial Code stipulates that provisions of collision or semi-collision for

⁶ Ibid p41.

⁷ Q&A p137.

⁸ Ibid.

seagoing vessels under Articles 788 to 790 shall apply *mutatis mutandis* to accidents between seagoing vessels and non-seagoing vessels (Article 791 of the Revised Commercial Code).

The term ‘non-seagoing vessel’ as used in the Revised Commercial Code means a vessel to be exclusively used for the voyage in water areas other than the sea, including lakes, rivers, ports and harbours for the purpose of commercial transaction (excluding boats or vessels that are operated solely using oars and paddles, or vessels that are operated mainly using oars and paddles) (Article 747 of the Revised Commercial Code).

Before the Revision, the Commercial Code made no provision for collision and semi-collision between seagoing vessels and non-seagoing vessels. On the other hand, the Collision Convention stipulates that it applies in such cases (Article 1 of the Collision Convention). Accordingly, the Revised Commercial Code makes the provision above to conform to the Collision Convention.

Regarding collision between non-seagoing vessels, the Revised Commercial Code does not make any provision related to such collision because the Collision Convention does not and for other reasons.⁹

III. Salvage

1. Outline of Revisions

Japan has ratified the Convention for the Unification of Certain Rules of Law respecting Assistance and Salvage at Sea, 1910 (‘Salvage Convention 1910’). Provisions of the Revised Commercial Code apply when the Salvage Convention 1910 does not. In other words, the discipline on vessels’ salvage under the Revised Commercial Code is mainly applied when a trial is conducted in Japan, and (1) all interested parties are Japanese citizens or Japanese corporations, or (2) both the salvaging vessel and the vessel salvaged have a flag in non-contracting countries of the Salvage Convention 1910.¹⁰

With respect to salvage, the International Convention on Salvage, 1989 (‘Salvage Convention 1989’) has also been established. Japan has not ratified the Salvage Convention 1989, but it has largely been considered in the revision work of the Revised Commercial Code.¹¹

The Revised Commercial Code mainly changes the following regarding salvage:¹²

(1) Applying the provisions of salvage not only when salvaging without contract (voluntary salvage), but also when salvaging based on contract (contractual salvage)

⁹ Ibid p138.

¹⁰ Ibid p140.

¹¹ Maritime Commerce p42.

¹² Q&A p139 and p140.

(Article 792);

(2) Adding the amount of labour and expense required to prevent or reduce marine pollution as a consideration by the court in determining the amount of salvage charges (Article 793);

(3) Including the amount of ‘freight charge’ of salvaged cargo in determining the maximum amount of salvage charges (Article 795);

(4) With regard to distribution of salvage charges for the vessel engaged in salvage, classifications of steamship/sailboat and captain/seamen are abolished; two-thirds of salvage charges are paid to the shipowner, and one-third thereof is paid to seamen. However, when the salvor is a salvage company, the full amount of salvage charges is paid to that company (Article 797);

(5) A new provision to the effect that the salvor who takes measures to prevent or reduce marine pollution can claim special compensation (Article 805);

(6) The right to claim salvage charges or special compensation is subject to 2 year’s extinctive prescription from the time of salvage (Article 806); and

(7) A new provision to the effect that provisions relating to salvage for seagoing vessels apply mutatis mutandis on salvage of non-seagoing vessels and their cargoes (Article 807). Although many other revision points concern salvage, the main points mentioned above are reviewed in the following.

2. Treatment of Contractual Salvage

The Revised Commercial Code applies provisions of salvage not only when salvaging without contract (voluntary salvage), but also when salvaging based on contract (contractual salvage) (Article 792 of the Revised Commercial Code).

Before the Revision, the Commercial Code was interpreted so that salvage based on contract (contractual salvage) was not included in the definition of salvage stipulated thereby. This revision is based on the Salvage Convention 1989 being applied to contractual salvage.¹³

3. Consideration Factor for Calculating Amount of Salvage Charges

The Revised Commercial Code adds the amount of labour and expenses to prevent or reduce marine pollution as a consideration for the court in determining the amount of salvage charge (Article 793 of the Revised Commercial Code).

Before the Revision, the Commercial Code had no such provision. This revision is based on the Salvage Convention 1989 raising ‘the skill and efforts of the salvors in preventing or minimizing damage to the environment’ as one consideration for determining salvage

¹³ Ibid p141.

charges for promoting vessel salvage that causes marine pollution (Article 13, Paragraph 1, Item (b) of the Salvage Convention 1989).¹⁴

4. Calculation of the Maximum Amount of Salvage Charges

The Revised Commercial Code adds the amount of freight charges of salvaged cargoes in calculating the maximum amount of salvage charges (Article 795 of the Revised Commercial Code).

Before the Revision, the Commercial Code stipulated that unless there are special provisions to the contrary, the amount of salvage charges may not exceed the value of the property salvaged. This is because if the amount of salvage charges exceeds the value of the property salvaged, those who are salvaged are supposed to think that such salvage is unnecessary. On this assumption, as well as according to the Salvage Conventions of 1910 and 1989, it is reasonable to determine the maximum amount of salvage charges by adding the amount of the freight charge if the cargo is salvaged and the right to claim freight charge does not disappear, so this revision was made.¹⁵

5. Distribution of Salvage Charges Between Shipowner and Seamen

The Revised Commercial Code mainly changes the allocation of salvage charges between shipowner and seamen as follows:¹⁶

(1) Abolition of Classifications of Steamship/Sailboat and Captain/Seamen

Under the Revised Commercial Code, those who are salvaged are obliged to pay two-thirds of salvage charges to the salvaging vessel's shipowner and one-third to seamen (including a captain) of the salvaging vessel (Article 797, Paragraph 1 of the Revised Commercial Code).

Before the Revision, the Commercial Code had classifications of steamship/sailboat and captain/seamen when determining distribution of salvage charges. With the Revised Act, the provision on sailboats is deleted, and the classification between a captain and seamen is abolished.

(2) Establishment of the Right to Request Increase or Decrease of Proportion of Salvage Charges

The Revised Commercial Code stipulates that one of the shipowners or seamen may request increase or decrease of the proportion of salvage charges against the other. In that case, the court decides the proportion by considering all circumstances, such as the degree

¹⁴ Ibid p143.

¹⁵ Ibid p144.

¹⁶ Ibid p146.

of danger and the result of salvage (Article 797, Paragraph 3 of the Revised Commercial Code). Such provision did not exist in the Commercial Code before the Revision.

(3) Establishment of a Special Provision Relating to the Salvage Company

The Revised Commercial Code stipulates that in the case of salvage by a salvage company, which is generally practiced, those who are salvaged are obliged to pay the full amount of salvage charges to such salvage company (Article 797, Paragraph 5 of the Revised Commercial Code). Such provision did not exist in the Commercial Code before the Revision.

This revision is based on the fact that in salvage by a salvage company, seamen of the salvaging vessel obtain salaries from the salvage company as compensation for providing their services.

6. Special Compensation

The Revised Commercial Code provides that persons engaged in salvage operation of a vessel that causes marine pollution may claim special compensation, which corresponds to the cost required, or is beneficial, to prevent or reduce marine pollution, even if they fail to salvage the vessel or cargo, etc. (Article 805 of the Revised Commercial Code).

This revision modifies the traditional principle of ‘No Cure, No Pay’ in salvage, that is, the principle that salvage charges can be claimed only when the salvage succeeds.¹⁷

Such provision did not exist in the Commercial Code before the Revision. On the other hand, the Salvage Convention 1989 (Article 14) and salvage contract forms such as Lloyd’s Open Form (‘LOF’) and JSE Form contain similar provisions for special compensation.

If danger of marine pollution is caused by oil leakage from a vessel due to a marine accident, measures to prevent or reduce it should be promoted. Accordingly, the Revised Commercial Code stipulates a new provision for a special compensation based on the fact that the Salvage Convention 1989 introduces such special compensation.¹⁸

7. Extinctive Prescription

The Revised Commercial Code stipulates that the right to claim salvage charges or special compensation is subject to 2 year’s extinctive prescription from the time of salvage (Article 806 of the Revised Commercial Code).

Before the Revision, the Commercial Code stipulated the period of extinctive prescription as 1 year. This revision conforms to the Salvage Convention 1910 (Article 10) and the Salvage Convention 1989 (Article 23).¹⁹

¹⁷ Maritime Commerce p42.

¹⁸ Q&A p151.

¹⁹ Maritime Commerce p42.

8. Scope of Application

The Revised Commercial Code stipulates that provisions of salvage for seagoing vessels shall apply mutatis mutandis to salvage on non-seagoing vessels or cargoes therein (Article 807 of the Revised Commercial Code).

Before the Revision, the Commercial Code had no discipline on salvage of non-seagoing vessels. This revision is based on the fact that the Salvage Convention 1910 applies to salvage of non-seagoing vessels (Article 1) and that the necessity to promote salvage is similar for such vessels.²⁰

IV. General Average

In the field of general average, the necessity of international unification has been recognized from early days, and unified rules, known as the York-Antwerp Rules, have been created. The York-Antwerp Rules, which are not conventions, but rules arbitrarily used between parties, are widely adopted in marine contracts such as charter parties, bills of lading, insurance policies, etc. Accordingly, the York-Antwerp Rules are important, practical and unified rules used globally.²¹

The York-Antwerp Rules have already been revised several times. Based on the York-Antwerp Rules 1994, a version generally used in practice, the Commercial Code that was previously inconsistent with them, was revised to conform to them.

The Revised Commercial Code mainly changes the following regarding general average:²²

- (1) As a requirement for establishment of general average, enabling persons other than a captain to dispose for avoidance of common peril (Article 808, Paragraph 1);
- (2) As a requirement for establishment of general average, including not only cases in which common perils occur to a vessel and cargo, but also cases in which common perils occur on things in a vessel other than cargo, such as fuel (Article 808, Paragraph 1);
- (3) As a requirement for establishment of general average, removing the necessity of a causal link between a disposal for avoidance of common peril and the result of preserving a vessel or cargo (Article 810, Paragraph 1);
- (4) Establishment of the discipline that (i) freight charges that cannot be claimed due to cargo disposal are also treated as general average and that (ii) with respect to calculation of the amount thereof, (a) the amount of all expenses no longer required to be paid due to loss of cargo, etc. by a carrier should be deducted from (b) the amount of freight charges that could have been charged at the place and time of landing (Article 809, Paragraph 1,

²⁰ Q&A p155.

²¹ Takashi Hakoi, *Basic Lecture: Modern Maritime Commerce Law* (3rd edn, Seibundoh 2018) p223.

²² Q&A p156 and p157.

Item 4),²³ and

(5) Deleting the provision to the effect that provisions of general average shall apply *mutatis mutandis* to expenses required for vessels to berth at departure ports, etc. due to force majeure, even if such expenses fall under particular average (semi-general average, Article 799 of the Commercial Code before the Revision).

Before the Revision, the Commercial Code stipulated the discipline on general average, but it was rarely applied in practice.²⁴ Even after the Revision, general average is considered to be handled in practice according to the York-Antwerp Rules and that the provisions on general average under the Revised Commercial Code should be rarely applied. Therefore, in this paper, detailed explanation of revisions on general average is omitted.

V. Conclusion

As described above, concerning collision of vessels, salvage and general average, the Revised Act made fundamental, numerous revisions to modernize the Commercial Code's provisions in consideration of related conventions, standard contract forms such as the LOF, and unified rules such as the York-Antwerp Rules. However, contractual salvage based on standard contract forms such as the LOF is common in practice for salvage, and the York-Antwerp Rules are commonly used for general average. Accordingly, the Revised Commercial Code's provisions on salvage and general average are unlikely to be applied in practice.

Therefore, among these revisions, important in practice are the revisions concerning collision of vessels. In particular, as for the right to claim damages in the event of vessels' collision, it is important to note that the period of extinctive prescription for the right to claim property damages is extended from 1 to 2 years. Notably also, the period of extinctive prescription for the right to claim personal injuries is extended from 1 to 3 years, and, as mentioned above, this period will be further extended to 5 years after enforcement of the Civil Code's 2017 revision, which is scheduled to come into effect on 1st April, 2020.

²³ Ibid p161.

²⁴ Masaru Ishii and Jiro Kubo, 'Marine Insurance and General Average' (2018) 1524 Jurist 44, p47.

The governing law of Maritime Lien under Japanese practice

*Yutaka Akatsuka**

Introduction

Recently, Japanese maritime commerce code has been revised, and it will be in force on 1st April, 2019. The main issue of this revised code has been discussed in the previous *WaveLength*¹. However, with regards to Maritime Lien and the governing law of it, even though there were several discussions during revision procedure, the amendment of code is not critical. Although the clarification for governing law of maritime lien is significantly important since the vessel sails not only one sovereignty, Japanese law has not established the clear rule. On the other hand, recently, Japanese court has handed down several cases about governing law of maritime liens under Japanese Choice of Law rules. All of them are not Supreme Court case, yet it seems that Japanese court has tried to establish rule.

This paper will firstly demonstrate the stance of Japanese law about maritime lien and modification discussion, then, for comparison, the leading case law in UK and recent Australian case will be introduced. Also, following these cases, the recent Japanese cases will be listed and explained.

Maritime Lien under Japanese Maritime Law

1. Maritime Lien

Japan has not ratified any arrest conventions, and beside worldwide trend as to the claims that is secured by maritime lien, under Japanese law, many kinds of claims will be secured as prescribed in Commercial Code, Act on Limitation of Shipowner Liability, Act on Liability for Oil Pollution Damage, and Japanese COGSA. The detail is as follows.

- (i) the costs for an auction of the ship and its equipment, as well as the costs for the storage of the same after the commencement of the auction procedure;
- (ii) the costs for the storage of the ship and its equipment incurred at the last port;
- (iii) the taxes imposed on the ship in connection with the voyage;
- (iv) the pilotage charge and towage charge;

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¹ see Kenji Sayama, “The Revision of the Transport Law and the Maritime Commerce Law in the Commercial Code of Japan”, (2016) 61 *WaveLength* 12

- (v) the salvage charge and the general average to be borne by the ship;
- (vi) any claims which arise from the necessity of continuing the voyage²;
- (vii) any claims of the captain and other mariners which arise from employment contracts;
- (viii) in the case where the ship has not made any voyage after it was sold or manufactured, any claims which arise from the sale or manufacture and the outfitting of the ship, and any claims which arise from the outfitting of the ship, food and fuel that are required for its last voyage;³
- (ix) a limited claim based on damages resulting from a loss of life, personal injury, loss of property other than the Ship in question, or damage to property other than that Ship, which occurs on board a Ship or in direct connection with the operation of a Ship⁴;
- (x) the limited claim pertaining to Tanker Oil Pollution Damage⁵; and
- (xi) the cargo claim which is related to the sub-charterparty⁶.

As well as other nations, there was argument and a court case, which indicated that the claims secured by maritime lien should be limited. Thus, during revision procedure, Legislative Council has discussed to limit the said claims, however, finally, the outline of said claims is maintained⁷, while some claims which become inappropriate to recent practice, such as claim (viii) will be deleted and claim related to loss of life and personal injury will be listed as the first priority, and the salvage and GA claim (Claim (v)) will be listed as the second one⁸. Therefore, it can be said that, the concept of Maritime Lien under Japanese law has developed in a way unique to Japan, reflecting Japanese maritime, insurance and ship finance practice.

2. Choice of Law rule

In Japan, the choice of law rule is legislated in Act on General Rules for Application of Laws (“Act on General Rules”). However, under this Act, there is no specific rule as to the governing law for Maritime lien. This is because the drafter of the previous Act, of which the basic concept is passed down in Act on General Rules, intended to establish special legislation for maritime matters and establish that choice of law rule in it, although that special act has not been legislated as of today.

² this claim includes bunker charge claim

³ (i) to (viii) are prescribed in Article 842 of Commercial Code

⁴ Article 95 of Act on Limitation of Shipowner Liability

⁵ Article 40 of Act on Liability for Oil Pollution Damage

⁶ Article 19 of COGSA

⁷ The detail of discussion is recorded in the minutes of Legislative Council http://www.moj.go.jp/shingi1/shingikai_syoho.html accessed 21th January, 2019.

⁸ Article 842 of revised Commerce Law

With acceptance on this point, under Japanese practice, Maritime lien is regarded as real right (*right-in-rem*), and the governing law of it is prescribed in Article 13 of Act on General Rule⁹. However, since this article is set for general choice of law rule for real right, it leaves room for different interpretation. Especially, the meaning of “the law of the place where the subject property of the right is situated” and “at the time when the facts constituting the cause of the acquisition or loss were completed” in Article 13(2) is not clear for the choice of law for maritime lien. Therefore, in this regards, Japanese courts have issued variety judgments as to this point.

Roughly speaking, court precedents can be classified into 4 theories. First one is that Maritime lien is established based on dual application of the law of the secured claim and the law of the flag, but the force of it is decided by the law of the flag only. Second, the establishment and force of Maritime lien is governed by the dual application of the law of the secured claim and the law of the flag. Third, the establishment and force of it is based on the law of the forum (*lex fori*). Whereas, in the recent court case, the theory that the establishment and force of Maritime lien should be based on the dual application of the law of the secured claim and the law of the place where the subject property of the right is situated at the time when the facts constituting the cause of the acquisition or loss are completed, as fourth one which is direct application of Article 13(2) of Act on General Rules. The detail of these recent court decisions are explained and discussed later.

Court Precedents

1. English case and Australian Case

a) In order to point out the position of Japanese law and practice, the standpoint of the leading English case and the recent Australian court case should be introduced for comparison.

b) In UK, the leading of the governing law rule of Maritime lien is *Halcyon Isle*¹⁰. In this case, the American ship-repairer that had conducted the assigned repair and supplied materials to the vessel during her staying in the port of New York and had maritime lien under US law, arrested the vessel in Singapore, in an action in rem as well as the mortgagees. Finally, the ship was sold by the order of the Court and distribution procedure was carried out. The issue was that whether in that distribution the mortgagees have

⁹ Article 13

- (1) A real right to movables or immovables and any other right requiring registration shall be governed by the law of the place where the subject property of the right is situated.
- (2) Notwithstanding the preceding paragraph, acquisition or loss of a right prescribed in said paragraph shall be governed by the law of the place where the subject property of the right is situated at the time when the facts constituting the cause of the acquisition or loss were completed.

¹⁰ [1980]2 Lloyd's Rep 325

priority over the claim of the ship-repairer. Under Singapore law, i.e. *lex fori*, the ship-repairer cannot obtain maritime lien, while under US law which is contractual governing law, they can. The Privy Council judged that governing law of Maritime lien should be the law of the forum. This judgment mentioned that the English authorities establish the theory that Maritime lien can be enforceable in action in rem in English court and this theory is in conformity with the International Convention of 1952 on the Arrest of Sea-going ships in which Convention should not create Maritime lien which is not established in the place of ship arrest¹¹.

c) In response to this, Federal Court of Australia has issued the judgment, “*Sam Hawk*”¹², concerning the governing law of Maritime lien under Australian choice of law rule. The fact of this case is that the bunker supplier which had the bunker supply contract with the time charterer of the Hong Kong registered vessel, “*Sam Hawk*”, filed an in rem writ in respect of unpaid invoice for bunker supply in Istanbul, and arrested the vessel in Australia. Under the said time chartererparty, the charter had no authority to purchase the necessaries for voyage on behalf of the owner, and bunker was arranged by the charterer at their expense. Further, the owner sent the notice to the physical bunker supplier and let them recognize that the owner was not the party of bunker supply contract. Also, in the policy of bunker supplier include the governing law clause in which the governing law of contract is Canadian law, and the existence of Maritime lien shall be based on the law of United States regardless of the courts in which the bunker seller institutes legal proceedings.

The main issue of this case was that under Article 15 of Admiralty Act 1988¹³, whether Australian court has jurisdiction, and in this regards, Australian court analyzed the governing law of Maritime lien. The primary judge decided, in accordance with the dissenting opinion of *Halcyon Isle*, that since Maritime lien is substantial right, the governing law of Maritime lien should be the governing law of the contract¹⁴.

¹¹ Article 9

“Nothing in this Convention shall be construed as creating a right of action, which, apart from the provisions of this Convention, would not arise under the law applied by the Court which was seized of the case, nor as creating any maritime liens which do not exist under such law or under the Convention on maritime mortgages and liens, if the latter is applicable.”

¹² [2016]2 Lloyd’s Rep 639

¹³ 15 Right to proceed *in rem* on maritime liens etc.

(1) A proceeding on a maritime lien or other charge in respect of a ship or other property subject to the lien or charge may be commenced as an action *in rem* against the ship or property.
(2) A reference in subsection (1) to a maritime lien includes a reference to a lien for:
(a) salvage;
(b) damage done by a ship;
(c) wages of the master, or of a member of the crew, of a ship; or (d) master’s disbursements.

¹⁴ [2016]1 Lloyd’s Rep 3 Further, the primary judge referred that this judgment is based on the recent Australian case and the clause 15(2) of Admiralty act does not limit the secured claim because of the wording of “includes”.

Whereas, the appeal court has denied this primary judge's decision and followed the majority opinion of *Halcyon Isle*. In the judgment, the chief judge¹⁵ mentioned that the court should apply a two-step approach when the court decide whether to recognize a maritime lien which would have been enforceable against a ship under a foreign law system of law. He demonstrated that the first step is the characterization of the claim which Maritime lien secure under the governing law of that claim, and second step is the characterization of that claim under Australian law, i.e. Article 15 of Admiralty Act 1988 as *lex fori*, in order to determine whether it is a maritime lien recognized by Australian law. Regarding this theory, the leading judge mentioned this theory is not the dual application theory, and this is in conformity with the majority opinion of *Halcyon Isle*. He indicated that 1) this theory is conformable to the international convention and another maritime regulation, 2) it has clarity, simplicity and predictability, 3) it maintain the priority order under the law of the forum, and 4) it is in conformity with other Australian international private law, such as Personal Property Security Act 2008. Finally, he concluded that even though Maritime lien is established under the contractual governing law, such Maritime lien is not recognized under Australian law.

2. Japanese Case

a) As mentioned above, Japanese court precedent has developed uniquely. It is said that this is because Japanese Code of civil procedure has no action in rem procedure, and Maritime lien has developed under common law practice, while Japanese law is categorized as Civil law. So, Japanese court has established several theories of the governing law of Maritime lien. The recent remarkable cases will be summarized as below for the comparison of UK and Australian case.

b) Tokyo District Court 15 December, 1992 ("*Nagasaki Spirit*")¹⁶

This case was ship collision case. The claimant's vessel collided with Liberian vessel, *Nagasaki Spirit* at Malacca straight. The claimant has applied to seize the insurance claim of the *Nagasaki Spirit* owner at Tokyo District Court. Under Japanese law, this seizer is recognized as the effect of Maritime lien.

In the decision, Court judged the issue of the governing law of Maritime lien. Court indicated that the establishment and force of Maritime lien should be governed by the law of the forum (*lex fori*). The reasons are as follows.

1) Most country, especially UK and USA which is the leading nation of maritime

¹⁵ In this judgment, there are 3 opinions (1)Chief judge and Justice Edelman, 2) Justice Kenny and Justice Besanko, and 3) Justice Rares) , and Justice Rares has dissenting opinion as to the interpretation of Article 15, although the conclusion is the same with other judges. Only the opinion of Chief judge and Justice Edelman is referred here.

¹⁶ [1993] 811 *Hanrei Times* 229

industry, adopted the law of the forum as governing law.

- 2) Japanese law regarding Maritime lien was established in order to apply an international convention, so even though Japanese law would apply as governing law, the result is not unpredictable for relevant parties.
- 3) If the governing law is the law of the flag, a research of that is going to be a long time.
- 4) The force of Maritime line can be related to a public order of the forum.

c) Mito District Court 20 March, 2014¹⁷

This case was bunker purchase case. In this case, Panamanian flag vessel that was time chartered by Chinese company and sub-chartered by Korean company. Sub-charterer had bunker supply contract (“Contract”) with Korean bunker supplier and bunker was supplied by Singaporean company in Singapore. Contract included the governing law clause in which it was USA law. Korean bunker supplier claimed bunker charge, however, the sub-charterer did not pay and applied bankruptcy in Korea. Then, Korean bunker supplier had applied to arrest the vessel when she called at Kashima port.

The owner of the vessel submitted the objection against ship arrest arguing that the governing law of Maritime lien should be based on the dual application of the law of contract, and the law of the place where the vessel was actually existed when the claim accrued, or the law of the forum. However, Court dismissed this objection. Then, the owner took an action for declaratory judgment of non-existence of maritime lien and applied for suspension of the enforced sale.

In this proceeding, Court accepted the owner’s allegation and held that the governing law of Maritime lien should be based on the dual application of the law of contract, and the law of the place where the vessel was actually existed when the claim accrued. The reason is as follows.

- 1) Maritime lien is formulated at the place of navigation, as the right in rem for security of a claim based on the legislation regardless of registration of the vessel.
- 2) In general, Creditors predict whether they have Maritime lien based on the law of the place in which the claim actually accrued.
- 3) This conclusion is consistent with Article 13(2) of Act on General Rules.

d) Tokyo District Court 3 April, 2014¹⁸

This case was ship collision case. In this case, Panamanian vessel which was time chartered by Japanese company collided with the opponent container vessel and she had sunken with her bunker oil which was the property of the charterer, within Japanese

¹⁷ [2014]2236 *Hanrei Jihou* 135 This case was analyzed by the lawyer of the ship owner in WaveLength No.59.

¹⁸ [2015]227 *Kaijihou Knekyukaishi* 26

territorial water. The charterer had applied to seize the insurance claim of the vessel against her hull underwriter at Tokyo District Court. The issue of this case was also the governing law of Maritime lien.

Court judged that the governing law should be the law of the forum, however, Court did not mention the reason of that decision in detail.

e) Fukuoka District Court, Kokura Branch 4 December, 2015¹⁹

This case was bunker purchase case. Panamanian vessel was time chartered by Hong Kong Company. Japanese bunker supplier provided the bunker to her at the port of Moji and Dalian, but bunker supply contract was made between the charterer and Hong Kong company which was stated to be the agent of Japanese bunker supplier. After bunkering, Japanese bunker supplier arrested the vessel since Charterer did not pay bunker charge, and Court decided to proceed the enforced sale procedure. In response to this, Charterer submitted the objection stating that this ship arrest and sale procedure was wrongful due to lack of the evidence which prove the existence of Maritime lien²⁰, and stating that the governing law of Maritime lien should be Chinese law under which bunker charge claim is not secured by Maritime lien.

Court finally held that Maritime lien should be governed by the law of the secured claim and the law of the place where the vessel was actually existed when the claim accrued. The reason of this decision was almost the same as Mito District Court case. In addition to Mito case, this court pointed out as follows.

- 1) In case that the supplier provide the necessities, such as a bunker, the place of supply is the most closely related place, so the law of the place where the vessel was actually existed when the claim accrued, should be governing law of Maritime lien.
- 2) The law of flag is not in conformity with Article 13(2) of Act on General Rule.
- 3) If the governing law of Maritime lien is the law of the forum, there is a risk of Forum Shopping.

Court concluded that the law of the secured claim was Japanese law, and, since under Chinese law, bunker supply claim is not protected by Maritime lien, the arrest

¹⁹ [2016]232 *Kaijihou Knekyukaishi* 70

²⁰ This is required by Article 189 and 181(1)(iv) of Civil Execution Act.

Article 181 (1)

Exercise of a real property security interest shall be commenced only when any of the following documents has been submitted:

(iv) In the case of a general statutory lien, a document proving its existence

Article 189

The provisions of Section 2, Subsection 2 of the preceding Chapter and Articles 181 to 184 shall apply mutatis mutandis to an auction for exercise of a security interest in a vessel. (The rest is omitted.)

procedure which was based on only the claim of bunkering in Moji was legitimate, however, there was no evidence which proved the authority of Hong Kong company, thus, Japanese bunker supplier had no Maritime lien²¹.

f) Kobe District Court 21 January, 2016²²

This case was also bunker purchase case and the relevant parties other than the ship owner, are the same as Case e). In this case, Japanese bunker supplier bunkered Liberian vessel in Shanghai and Osaka, but the bunker purchase contract was made between the charterer and Hong Kong company. Japanese bunker supplier arrested the vessel based on unpaid bunker charge and Court proceeded commence the enforced sale procedure. Then, the charterer applied an objection alleging that Japanese bunker supplier had no Maritime lien.

As with Case e), Court held that the governing law of Maritime lien should be the dual application of the law of the secured claim and the law of the place where the vessel was actually existed when the claim accrued. The reason was not demonstrated in detail, however it seems to be almost the same with Case e).

Further, Court concluded that even though the bunker charge claim as to bunkering at Osaka was legitimate under Japanese law, there was no evidence which proved the existence of Maritime lien²³.

g) Tokyo High Court 30 June, 2017²⁴

This case was ship collision case, but it was not genuine Maritime lien case. Japanese fishing vessel had collided with Korean vessel near Nagasaki, Japan, but the collision point was located at high sea. The owner of fishing vessel alleged that they had tort claim secured by statutory lien which was established by Japanese insurance act²⁵, and applied to seize the insurance claim of Korean vessel. Then, Court approved this application and issued the order of seizure. In response to this order, underwriters had submitted objection stating that Japanese court had no jurisdiction regarding this case and, based on the governing law, lien should not be established.

²¹ This evidence issue is decided based on Japanese law since Japanese bunker supplier and Hong Kong company agree that (see Article 7 of Act of General Rule). In this case, Hong Kong company has negotiated the bunker charge with Japanese supplier, and they issued the invoice to the charterer under their name.

²² [2016]232 *Kaijijhou Knekyukaishi* 70

²³ In this case, any contract had no governing law clause, so Court decided the governing law of the secured claim is Japanese law based on Article 8 of Act of General Rule.

²⁴ [2017]1446 *Hanrei Times* 93

²⁵ Insurance Act Article 22(1)

“A person that has a claim for compensation for damages against an insured under a liability insurance policy arising from an insured event under said policy shall have a statutory lien over the right to claim the insurance payment.”

Court held that the governing law of this lien should be the dual application of the law of the secured claim and the law of the place where the subject property of the right was situated at the time when the facts constituting the cause of the acquisition or loss were completed. Then, Court indicated that since the object of this lien was a right to claim, the law of the place where the subject property of the right was situated should be the law of the possible seized claim. In this regard, the governing law of seized claim was English law under insurance policy. And, Court mentioned that as the site of collision was in high sea, the governing law of secured claim should be dual application of the laws of collided vessels' flag. Finally, Court concluded that the governing law should be Korean, Japanese and English law, and Korean and English law has no system such a Japanese Insurance Act, so this statutory lien should not be established.

3. Conclusion

At the begging, as pointed out, under Japanese law, especially Act of General Rule, there is no special clause for the governing law of Maritime lien, while, Act of General Rule includes that rule for real right. Japanese court precedents have started from this standpoint. On the other hand, Japanese law accepts wide range claims secured by Maritime lien, especially, claims which arise from the necessity of continuing the voyage, although UK and some other countries does not acknowledge.

Under this situation, it seems that recent cases have tried to protect the party's expectation for Maritime lien and interpreted Article 13(2) of Act of General Rule for that expectation. Therefore, as to the bunker charge claim case, Court seemed to decide that the governing law of Maritime lien should be the dual application of the law of the secured claim and the law of the place where the vessel was actually existed when the claim accrued, since that law is appropriate for parties to project the existence of Maritime lien. Whereas, with regards to collision case, it seems that Court precedents has not established the concrete rule. It seems that in the collision case, it is not necessary to protect the expectation of parties, and Court took the public order of forum into consideration instead.

Under UK and Australian law, Maritime lien is recognized as a kind of hypothecation and Maritime lien can be realized only through legal proceedings, i.e. action in rem, however, under Japanese law, it is not. Therefore, the concept of the governing law of Maritime lien under Japanese practice has developed along their own paths, and Japanese court, regarding bunkering case, seems to establish own principle although many scholars has not agreed with that principle.

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