早稲田商学第 440 号
２０１４年６月

Marine Insurance Law in Japan
—A Structure Based on a Combination of Civil Law and English Marine Policy Wordings—[1]

Satoshi NAKAIDE[2]

1. Introduction

Marine insurance plays an important role in facilitating marine business and international trade. Since marine insurance is conducted as a legal contract, marine insurance law plays an important role. As shown below, Japanese marine insurance law is based on civil law, while English law has the dominant role worldwide in marine insurance practice. To attain global competency, Japanese insurers introduced a bridge between the civil law and English policy conditions. The bridge is that the English law governing clause is to be used for international transactions. On the one hand, this helps insurers to promote their businesses overseas but creates various legal issues on the other hand.

This article is designed to provide a brief introduction to Japanese marine insurance law as well as some legal issues concerning marine insurance contracts in Japan[3]. The Japanese approach to attaining international

---

(1) This article is derived from the author's presentation at the 6th East-Asia Maritime Law Forum held at Korea University on 26 October 2013. The author expresses many thanks to Professor Captain In Hyeon Kim, Korea University, for the opportunity.

(2) Professor, Waseda University. BA (Hitotsubashi), LL.M (London/London School of Economics and Political Science), Diploma in Legal Studies (Cambridge).

competitiveness while using the civil law basis and the difficulties created by it as well, will be shown.

The author focuses the discussion mainly on the law of hull and cargo insurance conducted on a commercial basis by non-life insurance companies in Japan(4).

2. Classes of Marine Insurance and its Contractual Terms

(1) Hull Insurance

Hull insurance contracts may be categorised into two types:

i) Hull policy with Japanese conditions written in Japanese. Contracts based on these conditions include both the Japanese jurisdiction clause and Japanese governing law clause.

ii) Hull policy with Institute Time Clauses (Hulls), or Institute Time Clauses -Amended, a policy written in English aimed at producing the same scope of coverage as the Japanese written hull insurance conditions. For these policies, 'Law and Jurisdiction Clauses' as shown below are added to the clauses.

---

(3) For an explanation of Japanese marine insurance law in English, see John Dunt, ed., *International Cargo Insurance*, 2012, at 145; Noboru Kobayashi et al., *Insurance Law in Japan*, 2011; I.S.J. Series, *Marine and Inland Transit Insurance in Japan*, 2010, The Non-Life Insurance Institute of Japan.

(4) Broadly speaking, marine insurance embraces any kind of insurance on property or interest exposed to marine risks. Insurance on cargo transported by air, truck, or train might not be regarded as marine insurance as they do not involve any marine element in their risks. However, they are treated similarly as marine cargo insurance in practice in Japan when the cargo is transported across different countries. P&I insurance must be regarded as a branch of marine insurance though operated on a mutual basis among members. Various contracts of insurance for fishermen are carried out in Japan by a mutual aid co-operative system called *Kyosai*. Some of the cover protecting them for the loss of and/or damage to their fishing boats and their liability caused by their fishing boats may rightly be regarded as marine insurance. However, the part of the cover for the life of the fishermen and compensation for loss of earnings may be outside the scope of marine insurance even if it involves marine risk.

Law and Jurisdiction Clauses[5]

Article 1 English law and practice shall apply as to liability for and settlement of any and all insurance claims. In all other respects, including issues as to the existence and validity of this insurance, this insurance is subject to Japanese law and practice.

Article 2 This insurance shall be subject to the exclusive jurisdiction of the Tokyo District Court of Japan, except as may be expressly provided herein to the contrary.

(2) Cargo Insurance

Cargo insurance contracts used in Japan are also divided into two types:

i) Cargo insurance policy with Japanese conditions written in Japanese. Contracts based on these conditions include a Japanese jurisdiction clause and Japanese governing law clause.

ii) English policy with Institute Cargo Clauses or other standard clauses used in London. These policies are for international trade. The clause below, known as the Foreign Governing Law Clause, is added to the clauses[6].

'Notwithstanding anything contained herein or attached hereto to the contrary, this insurance is understood and agreed to be subject to English law and practice only as to liability for and settlement of any and all claims'.

3. Law Applicable to Marine Insurance in Japan

(1) Insurance Business Law

The Insurance Business Law enacted in 1939 and amended in 1995 sub-

(5) Those used by the Tokio Marine and Nichido Fire Insurance Co., Ltd. Wordings vary according to company.

(6) Those used by the Tokio Marine and Nichido Fire Insurance Co., Ltd. Wordings vary according to company.

stantially[7] makes it an obligation for the insurer to obtain a separate licence for each respective class of insurance from the Financial Services Agency[8]. To obtain a licence, an insurance company needs to provide general conditions of insurance policy and methods of calculating rates of premium. The Insurance Business Law regulates various aspects of the insurance business including regulations on the sale of insurance. Marine insurance business have to comply with these regulations when conducting business.

(2) Sources of Insurance Contract Law

The Civil Code of 1896 (Law No. 89, 27 April 1986) has provisions on civil contracts in general in its Book 3, Chapter 2. These provisions apply to marine insurance. The Commercial Code 1899 (Law No. 48, 9 March 1899) had, in its former Book 3, provisions on insurance contracts covering both non-life insurance (Articles 629–672) and life insurance (Articles 673–683). These provisions were replaced by the new Insurance Act (Law No. 56, 6 June 2008)[9] enacted in 2008, and came into effect on 1 April 2010. The Commercial Code in its present Book 3, Chapter 6 contains provisions on marine insurance (Articles 815–841bis). These provisions have not had any major amendment since 1896, and a thorough revision is necessary. In applying the law, special law has priority to more general law. Thus, the order of application of the law to a marine insurance contract is, first, provisions of the Commercial Code on marine insurance, second, Insurance Act 2008, and last, the general contract law contained in the Civil Code.

The provisions in the Code and the Act are very general and show basic principles only. In practice, general insurance conditions and special conditions contain a wide range of provisions covering various issues, including

(7) Insurance Business Law has been amended almost every year after 1996, a reflection of the rapid change in the regulatory environment.

(8) Carrying out insurance business without a licence is an offence under the Insurance Business Law.

(9) The expression 'Insurance Law' seems to embrace various laws including case law. For this reason, the writer has translated it as 'Insurance Act'.

those stated in the Code and the Act.

(3) Insurance Act of 2008

The Insurance Act applies to all kinds of insurance contracts whether the contract is called insurance, co-operative agreement called *Kyosai*, or others. Therefore, it applies to various types of marine insurance, including insurances provided by non-life insurance companies, protection and indemnity insurance by the P&I Club and *Kyosai* for fishing boats.

The Insurance Act classifies insurance contracts into non-life insurance[10], life insurance and injury and sickness fixed amount insurance and sets out basic rules on insurance contracts. Rules for non-life insurance apply to marine insurance.

The provisions of the Insurance Act may be divided into three categories based on its nature: discretionary, unilateral mandatory or mandatory. The Act does not show whether a provision is discretionary or mandatory. The nature of the provision must be inferred by considering public policy and legislative intent. The Insurance Act contains unilateral mandatory provisions and specifies which of the provisions are of this nature in the Act. The unilateral mandatory provisions invalidate any contractual agreement less favourable to policyholders or assured than the provisions. Any agreement is valid if it is more favourable to a policyholder or an assured than the provisions. These unilateral provisions are introduced to protect consumers and the unilateral effect does not apply to the following commercial lines of insurance:

(a) marine insurance,

(b) property insurance for aircraft or cargoes carried by aircraft, or liability insurance for aircraft accidents,

(c) property insurance for nuclear facilities, or liability insurance for

---

[10] This category embraces an insurance providing indemnity against actual loss through injury or sickness.

nuclear facility accidents, and

(d) in addition to the above, non-life insurance which covers loss arising out of business activities by corporations, other organisations, and individuals who conduct business (excluding injury and sickness non-life insurance).

(4) Commercial Code

The Commercial Code contains special provisions on marine insurance from Articles 815 to 841–2. These provide, *inter alia*, definition of marine insurance, indemnity principle, insurable value, period of cover, marine insurance policy, change of voyage or other alteration of risks, exclusions, partial loss, unavoidable sale of cargo, abandonment, and application to mutual insurance. Most of these provisions are considered discretionary. The Commercial Code was enacted in 1899 and has had no major revision since then. The government just launched a thorough revision of the Code in April 2014 to reflect the change in marine insurance business as well as its legal environment.

4. Jurisdiction

(1) Legislation[11]

Provisions on jurisdiction are contained in the Code of Civil Procedure of 1996. The Code states rules on jurisdiction in general, as well as jurisdiction according to the nature of claim. As to the marine insurance claim from the assured against an insurance company or P&I club, jurisdiction will be decided based on the following provisions of the Code of Civil Procedures:[12]

Article 3-2 (3) A court shall have jurisdiction over an action brought against a juridical person or any other association or foundation if its

---

[11] See Souichirou Kozuka, *'Maritime Procedures under the Japanese Law'*, 49 Report of Japanese Maritime Law Association, p. 1, 2005; Akiyoshi Ikeyama, *'Legal Issues on Jurisdiction and Governing law in Marine Cases in Japan'*, East Asia Maritime Law Forum, Waseda University, 2011, p. 80.

[12] The translation is derived from the Japanese Law Translation Database System, 2013, Ministry of Justice, Japan.

principal office or business office is located in Japan, or if it has no business office or other office or the location thereof is unknown but its representative or any other principal person in charge of its business has domicile in Japan.

Article 3-3 Actions listed in the following items may be filed with a court of Japan in the cases specified in the respective items:

(i) An action to claim performance of a contractual obligation or an action to make a claim relating to management without mandate conducted or unjust enrichment arising in connection with a contractual obligation, a claim for damages for non-performance of a contractual obligation or any other claim relating to a contractual obligation: Where the place of performance of the obligation determined by the contract is located in Japan, or where the place of performance of the obligation is supposed to be located in Japan in accordance with the law chosen under the contract.

(v) An action against a person who conducts business in Japan (including a foreign company (meaning a foreign company prescribed in Article 2, item (ii) of the Companies Act (Act No. 86 of 2005)) which carries out transactions continuously in Japan): Where the action relates to the business conducted by the person in Japan.

(2) Jurisdiction Clause

Parties to the contract are entitled to determine a court with jurisdiction by an agreement. However, this is only allowed for the court of first instance (The Code of Civil Procedure Article 11(1)). The agreement shall not become effective unless it is made with respect to an action based on certain legal relationships and is made in writing (Article 11(2)). The court, however, may reject the validity of the jurisdiction clause on the ground of *forum non conveniens* or for other reasons, depending on the circumstances of the individual case even where conditions stated in Article 11 are satisfied.

Japanese marine insurance policy written in Japanese stipulates the juris-

diction of the Japanese court and this will be accepted as a valid agreement where a contract is concluded in Japan. Cargo policy for overseas trade does not stipulate jurisdiction[13] and the contract may be regarded as having no agreement on jurisdiction. If the case is brought in a Japanese court, jurisdiction will be decided based on the rules laid down by the Code of Civil Procedures.

5. Governing Law

(1) Legislation

The legal source of the governing law is the Act on General Rules for Application of Laws (No. 78 of June 21, 2006). Article 7 states that the formation and effect of a juristic act is governed by the law of the place chosen by the parties at the time of the act. In the absence of choice of applicable law, the formation and effect of a juristic act is governed by the law of the place with which the act is most closely connected at the time of the act (Article 8(1)). 'A juristic act' here, means a contract.

(2) Contractual Agreement

Marine insurance policies written in Japanese, both hull and cargo, invariably contain a governing law clause which stipulates Japanese law as the applicable law of the contract. The Japanese court will apply Japanese law to these contracts.

As shown above, a policy written in English contains a clause stating that English law and practice are applicable as to the liability for and settle-

---

[13] Unlike the hull insurance practice, the overseas cargo insurance policy does not contain a jurisdiction clause. The reasons for the difference are thought to be as follows: (1) The Hull insurance policy is not transferable. The claimant is the party to the contract who has agreed the jurisdiction clause. (2) Marine cargo policy is transferable. In the case of CIF sales, the Japanese seller arranges insurance and assigns the policy to the overseas buyer. The overseas buyer might bring an action against the Japanese insurer at the court of the buyer's domicile. The court might allow jurisdiction over the buyer's claim even where the exclusive jurisdiction clause nominating a Japanese court had been agreed to by the seller and the insurer.

ment of claims. The exact wordings vary according to the class of insurance, i.e. hull or cargo, and among insurance companies. The intention of the insurer may be that the coverage of insurance is the same with those used in London, while the legal basis of the contract is governed by the law applicable to the contract, i.e. Japanese law if it is concluded in Japan. While this English governing law clause is designed to encourage smooth international transactions, it has sometimes become a cause of legal dispute over the applicable law(14).

Under this English governing law clause, the first and most significant legal issue is whether this clause intends the application of Japanese and English law to the matters stated in the clause separately, i.e. the governing law of the contract is divided into two different governing laws according to the field of the matter, the theory known as '*teishoku-hou-setsu*' (conflicting law theory), or its intention is that it only refers to English law as the term of the contract while the contract itself is governed by Japanese law, the theory known as '*jissitu-hou-setsu*' (substantive law theory). The majority of academic views are in support of the former theory and the courts have adopted this view in their judgments(15).

The second legal issue is the scope of legal matters covered by the phrase 'as to liability for and settlement of any and all claims'. The words 'liability' and 'settlement' are both very general and are not given specific legal meanings. Therefore, they can be interpreted differently by different people.

The meaning and scope of 'as to liability for and settlement of any and all claims' was considered in the decision of the Tokyo District Court in 1977(16). The court held that Japanese law applies to the matters relating to the validity of the contract and legality of the voyage and English law and

---

(14) For a clear summary of the status under Japanese law, see Seiichi Ochiai (co-ed.), *Kaijouhokenn-no-riron-to jitsumu* (Theory and Practice of Marine Insurance), Kobundo, 2011, p. 97 (in Japanese).

(15) Judgment of Tokyo District Court on 30 May 1977, *Hanreijihou* No. 880, p. 79; Judgment of Tokyo High Court on 9 February 2000, *Hanreijihou* No. 1749, p. 157.

(16) Tokyo District Court on 30 May 1977, *Hanreijihou* No. 880, p. 79.

usage apply to matters concerning the liability of the insurer and its payment if the insurer is liable for the claim. It was stated in the judgment, though *obiter*, that those matters affecting liability, including breach of duty of disclosure and minimising loss, should be regarded as matters 'as to liability', even though they may not be regarded as the direct issues of liability.

This legal point is especially important where Japanese law differs from English law significantly and in fact, it became a major issue in the *Monet* Case in 2002[17]. One picture of Claude Monet was carried by hand from Tokyo to a place in London by aircraft and was embezzled in London by the person handling this picture. The assured in Japan claimed insurance payment against the Japanese insurer under his cargo policy incorporating Institute Cargo Clauses (Aircraft by hand) with All Risks conditions. The policy contained the English governing law clause as shown above and it was argued which law, i.e. English law or Japanese law applies to the following issues: i) duty of disclosure and representation, ii) duty of mitigating loss and whether the insurer is allowed a set off, and iii) time bar and basis of interest rate.

The court held that (i) Japanese law applies to the issue on the duty of disclosure and representation on the ground that these are matters affecting the effectiveness of the contract and giving the insurer a right to repudiate the contract; (ii) English law applies to the duty of minimising loss and the reduction of insurance payment in case of its breach, on the ground that these are the matters covered by the words 'liability and settlement' of the governing law clause; and (iii) English law applies to the time bar and to the matter relating to interest rate as they are covered by the words 'liability and settlement' and that the judge applied the Japanese interest rate of 6% which was calculated based on the Japanese Civil Code governing this case, on the ground that the application of actual rate is treated as a matter of dis-

---

(17) Judgment of Tokyo District Court on 26 February 2002. For the case note, see Fumiko Masuda, Jurist Special Issue No. 210, p. 70.

cretion of judges under English law and practice.

The judge of the Tokyo District Court commented in the prior decision, though *obiter*, that non-disclosure was a matter in respect of liability. This time the court regarded it as a matter outside the scope of liability. This latter view is in line with the leading academic view that regards the duty of disclosure as a pre-contractual duty of the policyholder at the time of concluding a contract[18].

These decisions clearly show the difficulty of interpreting the governing law clause. In addition, we must anticipate the uncertainty of interpretation in different jurisdictions. The courts in other jurisdictions might interpret the same clause quite differently and in fact, the English court did so.

The marine insurance policy wordings identical to that of the English governing law clause used by Japanese insurers were examined in *Nima SARL v. The Deves Insurance Public Co., Ltd.* (*The Prestrioka*)[19] and Smith J. in the Commercial Court (first instance) held that the wording only stressed the application of English law and held that English law governed all the obligations under the policy. Smith J. thought that a narrower reading of the clause would produce a clash with Clause 19 of the Institute Cargo Clauses which specifies the application of English law and practice. In criticism of this decision, John Dunt comments that this interpretation is too wide because it is clear that the age and capacity of the party is not a matter of liability but he states that 'the intention is to incorporate most if not all of the rules falling within the scope of the Marine Insurance Act 1906 as these all ultimately bear upon liability for settlement of claims arising under the insurance'[20]. From this comment, it is presumed that English lawyers may find matters relating to duty of disclosure as covered by the word 'liability' because failure of the duty leads ultimately to the denial of the liability of the insurer for the claim. Obviously, this result is much wider than the above-mentioned judg-

---

[18] Tomonobu Yamashita, *Hoken-hou* (Insurance Law), 2005, p. 141 note No. 15 (in Japanese).

[19] [2003] 2 Lloyd's Rep. 327. Decision of Court of Appeal.

[20] John Dunt, *Marine Cargo Insurance*, 2009, p. 20.

ment of the Tokyo District Court.

It is without doubt that the insurer needs to state the wording of the clause showing their intention more precisely. However, it is also without doubt that such drafting is very difficult.

The third legal issue, though not apparent but was pointed out by Prof. Ochiai, is whether the mandatory provisions of the Insurance Act of 2008 apply to contracts containing the English governing law clause[21]. Provisions on insurable interest, time bar and priority lien of the right of the aggrieved third party under liability insurance are regarded as mandatory. These mandatory rules of the Insurance Act apply to marine insurance as well. Further studies are necessary to know whether mandatory rules of the Act apply to the insurance contract under English governing law clause.

6. Warranty

(1) Concept of Warranty and Similar Usage under Japanese Law and Practice

'Warranty' is a concept used in the common law countries and is a concept difficult to understand for civil law lawyers, as civil law does not have its equivalent concept. In addition, the fact that the word is used in insurance law differently from the usage under general contract law makes it more difficult for civil law lawyers to understand.

According to Dr Clarke[22], the common definition of warranty in insurance law is said to be that of Lord Goff, i.e. 'a warranty is any term of an insurance contract which, properly construed, is a condition precedent to the inception or continuation of cover'[23]. From this, we may understand that a warranty has two types of condition precedent: one, a condition which causes the cover not to start; and two, to cease during the duration of cover.

In marine insurance, a warranty is defined in section 33(1) of the Marine

---

[21] S. Ochiai, supra note (14), p. 98.

[22] Malcolm A. Clarke, *The Law of Insurance Contracts*, 5th ed., 2006, p. 603.

[23] *The Good Luck* [1992] 1 AC 233, at 263.

Insurance Act 1906 (MIA 1906), as a promissory warranty by which the assured undertakes that some particular thing shall or shall not be done, or that some condition shall be fulfilled, or whereby the assured affirms or negatives the existence of a particular state of facts. Section 33(2) provides that a warranty may be express or implied.

The peculiar feature of a warranty is the effect of its breach. Section 33(3) of the MIA 1906 requires the assured to comply exactly with a warranty, whether it is material to the risk or not. This effect gives insurance transactions a high efficiency but receives criticisms because of its harshness against the assured[24].

In Japan, while the law does not have an equivalent legal concept creating a condition precedent by a promissory term, we find similar rules or terms of marine insurance contract which are to be construed as a condition precedent to the inception or continuation of cover. For example, the Commercial Code states:[25]

> **Article 824(1)** Where there is a change of voyage prior to the attachment of insurer's liability, the insurance contract shall lose its effect from the time of such change.
>
> **Article 824(2)** Where there is a change of voyage after the attachment of insurer's liability, the insurer shall be discharged from liability for any accident which may occur after the time of such change, provided ... .
>
> **Article 825** Where the assured fails to commence or continue the voyage, changes the route or in any other way materially changes or increases the risk, the insurer shall be discharged from liability for any accident which may occur after the time of such change or increase of the risk; provided ... .
>
> **Article 827** In cargo insurance or anticipated profit insurance, when

---

[24] For a detailed criticism, see Baris Soyer, *Warranties in Marine Insurance*, 2001.

[25] This translation is based on the translation by the Non-life Insurance Institute of Japan, *The Insurance Act the Rules of Insurance Contracts in Japan*, 2011.

the carrier vessel is changed, an insurer is not liable for an accident that occurred after the change, except where the change is due to reasons not attributable to the policyholder or the assured.

In practice, these provisions of the Commercial Code are largely modified in insurance clauses. However, attention must be paid to the fact that the Commercial Code creates a legal concept which may be regarded as 'a condition precedent to the inception or continuation of cover' to restrict the scope of risks undertaken by the insurer in the case of risk change situation.

A condition precedent to the inception or continuation of cover is frequently used in Japanese marine insurance practice. For insurance contracts, several legal methods have been created to restrict the scope of coverage and risk borne by the insurer in Japan. One is the exclusion of perils, excluding certain perils from the cover. However, this will be effective only when the insurer can demonstrate clearly the causation between the excluded peril and the loss and it is on some occasions not easy for the insurers to prove. To restrict certain risks, a condition precedent is more effective as it does not require the proof of causation. Japanese hull insurance general conditions use phrases, a little different from condition precedent but giving similar legal effects, which enable the insurers to deny their liability to indemnify the assured for the loss after certain event has occurred. Examples of these phrases are as follows:[26]

The insurer does not cover:

- risks after the vessel has deviated from the trading limit or has navigated by an unusual route,
- risks after the vessel has entered an area of war or warlike disturbances or when she has been employed for any purpose connected with war or warlike disturbances,

---

[26] See the exceptions under the Hull Insurance General Conditions (in Japanese) of the Tokio Marine and Nichido Fire Insurance Co., Ltd.

- risks after there has been a change of the owner or the charter by demise of the vessel,
- risks after the structure of the vessel or the purpose for which she was employed has been substantially changed, and
- risks substantially changed or increased from those intended by the insurer to cover, if the person effecting the insurance or the assured is responsible for such increase.

Here, the clause provides that the insurer does not cover any loss occurring after a certain event[27]. Although the wording is different, its effect may be similar to that of a condition precedent to the continuation of cover, i.e. 'warranty' in English law. Generally, Japanese court may give effect on any term described as a warranty as the term of a contract if its effect is clearly stated in the contract. However, the Court may apply the *contra proferentem* rule when applying a term restricting the insurer's liability. Especially, where the accident occurred by an insured peril irrespective of the warranted event, there is a high possibility that the court restricts its application. Therefore, it is essential that the effect of its breach must be clearly stated in the contract.

(2) Interpretation of Warranty under Institute Clauses with English Governing Law Clause

Here the issue will be, again, the interpretation of the word 'liability' in the English law governing clause. If the Japanese court finds the relevant issue as a matter of 'liability', it will apply English law to it. Therefore, the question will be whether a relevant warranty is regarded as relating to liability.

Here we need to recall that English law has different kinds of warranty.

---

[27] For certain risks stated above, an insurer normally makes it a duty for the assured to inform the insurer of the event and the insurer may agree to cover the risks with additional premiums or with different conditions.

As seen by the definition of Lord Goff, a warranty is 'a condition precedent to the inception or continuation of cover'. It is clear that this relates to the liability of the insurer but this may also relate to the effectiveness of the contract in some cases.

Section 41 of MIA 1906, under the heading of 'Warranty of legality', states that 'there is an implied warranty that the adventure insured is a lawful one, and that, so far as the assured can control the matter, the adventure shall be carried out in a lawful manner'. The question is, therefore, whether this implied warranty may be regarded as a matter relating to liability.

In *Persian Rug* Case[28], the issue was whether an insurer of personal effects transported from Japan to the USA must pay insurance money against a theft claim of part of the rugs, where the import of rugs beyond a certain limited number was illegal under US law. As the issue was on the legality of the voyage, the courts treated the matter as a question of validity of the insured contract. The Tokyo District Court denied the insurer's liability on the ground that the voyage was illegal. However, the High Court reversed the decision and took a different view and held that the insurer was liable to pay for the loss on the ground that legality of the contract must be judged under Section 70 of the Japanese Civil Code and that the voyage in question was not against Japanese public policy even though it was against US law or regulations.

As shown by this decision, the Japanese court understood the issue of legality not as an implied warranty under the MIA 1906 but as a matter relating to the validity of the insurable interest or the validity of the contract itself and thus applied Japanese law to it.

7. Direct Action against Liability Insurer

While liability insurance is to protect the insured for his liability, its

---

[28] Judgment of Tokyo District Court of 13 May 1998, *Hanreijihou*, No. 1676, p. 129. Tokyo High Court of 9 February 2000, *Hanreijihou*, No. 1749, p. 157.

insurance money will be used for the compensation of the victim. If the insured goes bankrupt after the liable event occurs, its victim may only claim his damages against the insured as one of its creditors and may not be fully compensated. To protect the victim from the bankruptcy or similar situation of the assured, the Insurance Act of 2008 provides a priority lien over the insurance money payable for the assured from his liability insurer[29]. Under Article 22(1), an aggrieved party who has the right to demand compensation for damages against the assured has a priority lien over the right of the assured on the insurance claim. To secure this purpose, the Insurance Act makes it a rule to the effect that the assured can exercise his right of insurance claim to the extent of the amount he has paid damages to the victim, or to the extent the victim has agreed (Article 22(2)), and prohibits any assignment, charge or arrest of the right to claim insurance money under the liability insurance contract (Article 22(3)).

These provisions of Article 22 are considered mandatory. However, any law or any contractual agreement affording the victim a right to claim insurance money directly from the liability insurer is valid. Thus the right of direct claim against the insurer under the Law for the Compensation of Damages by Oil Spill 1975 is valid and enforceable against the P&I insurer.

The Insurance Act applies to all kinds of insurance contracts in Japan including the liability cover for various damages provided by the P&I insurance or *Kyosai*.

Insurers are entitled to raise any defence against the third party, which are permissible under his insurance contract against the assured. The priority lien is on the right of the payment to the assured, and the insurer is entitled to raise this permissible defence under his insurance contract[30].

---

[29] Liability insurance is defined under Article 17(2) of the Insurance Act as an insurance to indemnify the insured for his loss incurred by his liability for damages.

[30] The legal position of the pay to be paid rule under the Insurance Act is not clear. Under Japanese law, the event that triggers the liability insurance payment is considered the occurrence of the insured event. If so, the pay to be paid rule may be considered against the mandatory rule.

It is not clear, however, whether Article 22 applies to the liability cover of hull insurance or other insurance with English governing law clause. It may be presumed that the provision in Article 22 is in respect of 'liability', however, it is not clear whether a mandatory provision can be contracted out by nominating English applicable law in respect of the area stated by the clause. As discussed earlier, the matter needs a more close study.

8. Abandonment

Unlike English law, Japanese Insurance Act or the Commercial Code on marine insurance does not contain any definition of total loss or provide any concept of actual total loss or constructive total loss. However, the Commercial Code grants the assured of a marine insurance contract the right to abandon the subject matter of the insurance to the insurer and demand payment of the total insurance amount under certain specified circumstances.

The Commercial Code contains provisions on abandonment from Article 833 to 841. A right of abandonment is allowed for the assured where i) the vessel sinks, ii) the vessel is missing, iii) the vessel cannot be repaired, iv) the vessel or cargo is captured, or v) the vessel or cargo was confiscated by governmental procedure and has not been released for six months (Article 833). To claim abandonment, the assured must notify the insurer of his intention of the abandonment within three months (Article 836). When abandonment is made, the insurer acquires all the rights of the assured concerning the subject matter of insurance (Article 839). When the insurer has not approved abandonment, the assured cannot demand insurance payment unless the assured proves the grounds for abandonment (Article 841).

It will be understood from the above provisions that the abandonment is the right of the assured to claim total loss payment in return for the transfer of the subject matter of insurance. In such a situation, various liabilities for the environment might attach to the vessel or cargo in question. It is not fair for the insurer to owe a liability exceeding his liability for the insurance payment by the option given to the assured. Therefore, Japanese insurance

general conditions deny the application of these provisions. Instead, insurers treat the claim as total loss without following the procedures of abandonment in the situations stated under Article 833.

9. Subrogation over Remaining Property

In the event that the subject matter of insurance is destroyed in its entirety and the insurer paid insurance benefits in full, it shall, as a matter of course, acquire on behalf of an assured the title or other real rights retained by such assured in respect of such subject matter of insurance in accordance with the proportion of the amount of such insurance payment to the insurable value (agreed insurable value, if any). This rule is called '*zansonbutsu-dai*i' meaning subrogation over remaining property and is contained in Article 24 of the Insurance Act.

The rationale behind this rule is the prevention of unjust enrichment as well as the quick payment of insurance money without completing an exact assessment of loss by evaluating the damaged subject matter. This rule applies to the case of total loss only, including total loss in part. Transfer of the title or other rights occurs as a matter of course without any act or procedure and at the time of insurance payment.

This provision is unilateral mandatory not allowing any alteration to the detriment of the benefit of the assured. However, for marine insurance, this provision is discretional.

In practice, hull and cargo insurance clauses modify the law laid down by the Act and include the following rules:

> The property will not transfer to the insurer unless the insurer expresses his intention to acquire the property.
>
> Where the assured claims for a total loss, he must notify the insurer of any liability, lien, debt or other duty and must clear or remove these at the cost of the assured.

These clauses in the marine insurance policy are considered valid. However, it is not clear whether an insurer may waive his right of subrogation

over the remaining property where the assured gains by the insurer's waiver, such as where there remains a possibility that the lost cargo is discovered later and returned to the assured. Such a situation may bring a gain to the assured, thus going against the doctrine of prevention of unjust enrichment. However, the law is not clear on this.

10. Subrogation against Third Party

(1) Doctrine and its Application in Japan

Article 25 of Insurance Act 2008 provides the right of subrogation against third party as follows:[31]

> (1) In the event that an insurer has paid insurance benefits, it shall, as a matter of course, acquire on behalf of the assured the claims to be obtained by the assured as a result of damage due to insurable contingencies (as regards a non-life insurance contract under which damage that may arise on certain claims from default or otherwise is to be covered, such claims shall be included; hereinafter referred to as the 'assured's claims'), to the extent of lesser of:
>
> (a) the amount of insurance benefits paid by such insurer; or
>
> (b) the amount the assured's claims (if the amount mentioned in the preceding item is less than the amount of damage to be covered, the amount remaining after deducting from the amount of the assured's claims such deficiency).
>
> (2) If, in the case of the preceding paragraph, the amount mentioned in item 1 of the said paragraph is less than the amount of damage to be covered, an assured shall be entitled to receive repayment of the assured's claims except for the portion acquired by an insurer on behalf of the assured in accordance with the provisions of the said paragraph, in priority to the claims of the insurer thus acquired.

---

[31] This translation is based on the translation by Noboru Kobayashi et al., supra note (3) above.

The rationale of the rule is i) the prevention of unjust enrichment, ii) not reducing the liability of the wrongful third party and iii) quick payment of insurance money without waiting for the settlement between the assured and the liable third party.

This provision of the Act is semi-mandatory. It will be noted that the assured's right outweighs the insurer's right, the transfer occurs as a matter of course, and that there is no need for the insurer to show his intention. The insurer acquires the right up to the amount of his payment. Unlike under English law, the insurer is able to sue the third party in his own name. The assured loses his right to claim against the third party to the extent of the compensation paid by the insurer. This is so, even where the insurer does not exercise his subrogation right against third party as was confirmed by the Supreme Court Decision[32].

In practice, both hull and cargo insurance clauses impose certain duties on the assured but do not modify the insurance law on subrogation substantially. The insurer imposes a duty on the assured to secure his right against the third party and provide necessary assistance to the insurer in respect of the insurer's claim against the third party. Expenses incurred in complying with this obligation are payable by the insurer. Upon paying the insurance claim, the insurer normally asks the assured to submit a subrogation form in which the assured confirms the transfer of his right to the insurer as well as his duty to provide information and assistance to the insurer in pursuing recovery action.

Under English law, the title to sue remains with the assured, whereas under Japanese law the title transfers from the assured to the insurer upon payment. It is not rare that the responsible third party denies liability for the insurer's claim, arguing that the insurer has no title to sue under English law. Against this allegation, an insurer may protect himself by requesting the assured to assign his right against the responsible party to the insurer.

---

[32] Judgment of the Supreme Court dated 19 January 1989, *Hanreijihou* No. 1302, p. 144.

(2) Legal Issues

Subrogation creates various legal issues difficult to resolve, since the right is created by the insurance contract but the insurer takes over the right existing outside the insurance contract and thus it affects the liability of the third party. Here, some issues on marine insurance of interest to marine lawyers are introduced.

(a) Jurisdiction

First is the jurisdiction of subrogation. In marine insurance, parties involved, that is, insurer, assured and liable third party may exist in different jurisdictions. Jurisdiction and governing law is important as the law on subrogation differs among jurisdictions. As stated above, Japanese law differs significantly from English law as the former creates an automatic transfer of rights while the latter creates a right for the insurer to 'step into the shoes of the assured' only.

Unlike the Regulation (EC) No. 864/2007 on the law applicable to non-contractual obligations, (Rome II) Article 19[33] and Regulation (EC) No. 593/2008 on the law applicable to contractual obligations (Rome I) Article 15[34], the Japanese Act on General Rules for Application of Laws of 2006 (Act No. 78 of 21 June 2006) does not stipulate the jurisdiction of subrogation and the decision of the Japanese court varies according to cases. Among various academic theories the accepted theory is that the jurisdiction of the insurance

---

[33] **Article 19 Subrogation**

Where a person (the creditor) has a non-contractual claim upon another (the debtor), and a third person has a duty to satisfy the creditor, or has in fact satisfied the creditor in discharge of that duty, the law which governs the third person's duty to satisfy the creditor shall determine whether, and the extent to which, the third person is entitled to exercise against the debtor the rights which the creditor had against the debtor under the law governing their relationship.

[34] **Article 15 Legal subrogation**

Where a person (the creditor) has a contractual claim against another (the debtor) and a third person has a duty to satisfy the creditor, or has in fact satisfied the creditor in discharge of that duty, the law which governs the third person's duty to satisfy the creditor shall determine whether and to what extent the third person is entitled to exercise against the debtor the rights which the creditor had against the debtor under the law governing their relationship.

contract prevails, as this is the cause of the legal subrogation[35].

Even if this theory is supported, further questions may arise on its governing law under the English governing law clause. The governing law on subrogation is not clear, as it may be a matter of 'liability and settlement of claim' or may also be a matter arising after payment by the operation of law.

(b) Apportionment of Recovery Money

Under the Insurance Act, the right of the assured outweighs the right of the insurer. However, the leading theory is that this priority of the assured is only applicable to the apportionment of recoveries for the same kind of loss. Therefore, in the case of limitation of liability, recoveries will be apportioned on a *pro rata* basis among different types of losses. It is not clear, however, how the apportionment of recovery money will be in the case like English case of *Lord Napier*[36]. In that case, the House of Lords adopted the top down method in the liability of re-insurance of layers, not applying a *pro rata* basis among different interests.

A clear statement in the contract may dissolve this ambiguity. Institute Time Clause (Hulls) contains a clause as to the allocations of subrogation recoveries. Such provisions will be considered as valid under Japanese law.

11. Conclusion

This article tried to show the general structures of the Japanese marine insurance law as well as some legal issues on marine insurance contracts in Japan. As was seen, many of the difficulties stem from the difficulties of interpreting the English governing law clause introduced by Japanese insurers to promote international use of their policy. Although this approach has brought difficulties, we may rightly regard them as those of the harmonisation of laws among different jurisdictions. This approach may be appreciated as a practical solution in the global conflicting law situations.

---

[35] Fumiko Masuda, *Hoken-daii no Junkyo-hou (Jurisdiction on Insurance Subrogation)*, Jurist No. 202, p. 222 (in Japanese).

[36] *Lord Napier v. Hunter* [1993] AC 713; [1993] 1 All ER 385 (HL).

In April 2014, the Japanese government launched a full revision of the marine insurance law contained in the Commercial Code and we anticipate a new law in the near future. The author hopes that the new law will serve as a reliable, yet flexible, basis for the marine insurance business in Japan.