End of Conundrum or Beginning of Conundrums? - FIOST after Japan's Maritime Law Reform -

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I. Introduction

The present position of FIOST in Japan

There are two sources of law governing bills of lading[1] – the Commercial Code[2] and the International Carriage of Goods by Sea Act ("ICOGSA")[3]. The law which provides for the general rules of transportation and maritime commerce, including bills of lading, is the Commercial Code. ICOGSA is a special enactment on the areas of international carriage of goods by sea, and implement the Hague-Visby Rules into the Japanese jurisdiction[4]. ICOGSA furthermore incorporates a few provisions of the Commercial Code in relation to the laws which the Hague-Visby Rules do not cover, such as the shipper's right to redirect goods and the consignee's obligations against the carrier. This paper focuses primarily on the rules on bills of lading governed by ICOGSA.

Japan is no exception when it comes to tackling the debate familiar to shipping lawyers regarding the scope of the carrier's contractual duties provided for in Article III rule 2 of the Hague-Visby Rules: "… the carrier shall properly and carefully load, handle, stow carry, keep, care for, and discharge the goods carried." In Japan, this provision is implemented by Article 3, paragraph (1) of ICOGSA in the following terms:

> "The carrier shall be liable for the loss, damage or delayed arrival of the goods which is caused by his own or his servant's negligence for the receipt, loading,

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1 Souichiro Kozuka, 'The outline of the Japanese maritime law', Wave Length No.49 (2004) 12; Souichiro Kozuka, 'Japan's maritime law reform in an international and regional context', (2016) 30 A&NZ Mar LJ 125 at 129 <https://ssl.law.uq.edu.au/journals/index.php/maritimejournal/article/view/289> accessed 9 January 2017.

2 English translation, see <http://www.japaneselawtranslation.go.jp/law/detail/?id=2135&vm=04&re=01> accessed 9 January 2017.

3 English translation, see <http://www.jseinc.org/en/laws/japanese_cogsa.html> accessed 9 January 2017.

4 Whilst Japan has ratified the Hague Convention as amended by the Brussels Protocol 1968, there are however a few discrepancies between ICOGSA and the Hague Visby Rules, which are beyond the scope of this article.

stowage, carriage, custody, discharge and delivery of such goods."

Furthermore, Article 15, paragraph (1) of ICOGSA, implementing Article 3, rule 8 of the Convention, prohibits any special agreement in bills of lading which is contrary to Article 3 and which is not in favor of the B/L holders. These special agreements shall be considered null and void.

Therefore, as there used to be a debate in England before the House of Lords made a decision in the *Jordan II* [2004] UKHL 49, it is still unclear whether ICOGSA prohibits the FIOST clause, i.e. an agreement to limit the scope of the carrier's contractual duties. Whilst the majority has considered that it is valid[5], uncertainty remains in practice because there is no case law in Japan which touches upon this issue and is equivalent to *Pyrene v Schidia* [1954] 2 QB 402 or *Renton v Palmyra* [1957] AC 149. Furthermore, as no clear answer to this threshold question has been presented, discussions on more practical matters have not been well posed in Japan, unlike under English law. Such as: (i) what conditions a valid FIOST clause must meet;[6] (ii) in which situation the carrier shall still be liable for the cargo damage sustained during cargo handling;[7] or (iii) whether the carrier is exempted from unseaworthiness caused by bad stowage.[8]

Reform of Japanese maritime law

New ideas may be brought into this debate after the process of revision of the Commercial Code and ICOGSA are concluded.

The Commercial Code, which was enacted in 1899 and covers maritime law in general, including the carriage of goods by sea, has been intact for more than 100 years with only minimal amendments. It has been long thought to be obsolete and in need of an overhaul.[9] The proposed law to amend the rules on transportation and maritime commerce in the Commercial Code has been submitted to the National Diet. With regret, it is uncertain when the parliamentarians will both start and complete their deliberations, but the provisions of the proposed law are less likely to be modified in their considerations.

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[5] See also "Responses of the Maritime Law Association of Japan" in CMI Yearbook 1999, p.203 at [1.1.3].

[6] *The Jordan II* [2003] EWCA Civ 144; *The Sea Miror* [2015] EWHC 1747 (Comm)

[7] *The Eems Solar* [2013] 2 Lloyd's Rep. 487. See also *Court Line v Canadian Transport* [1940] AC 934; *The Panaghia Tinnou* [1986] 2 Lloyd's rep. 586; *The Imvros* [1999] 1 Lloyd's Rep. 848; *CSAV v ER Hamburg* [2006] 2 Lloyd's Rep. 66; London Arbitration 10/08 (2008) 749 LMLN; London Arbitration 12/08 (2008) 752 LMLN.

[8] *The Eems Solar*. See also *The Imvros*; *CSAV v ER Hamburg; The Socol 3* [2010] 2 Lloyd's Rep. 221.

[9] For the background and overview of the revision process, Tomotaka Fujita, 'Maritime law reform in Japan', CMI Yearbook 2014, 413; Hideyuki Matsui, 'Developments in the revision of the transportation law and maritime commerce law in Japan', Wave Length No.60 (2015) 1; Souichiro Kozuka, 'Japan's maritime law reform in an international and regional context', (2016) 30 A&NZ Mar LJ 125.

ICOGSA, which is in principle to implement the Hague-Visby Rules into Japanese law, is also scheduled to be revised on this occasion. Whereas there seems no imminent necessity to revise this legislation, the proposed new provisions on the contemporary rules of carriage of goods by sea, which are to be stipulated in the new Commercial Code but are not covered by the Hague-Visby Rules, will be reflected in ICOGSA[10]. A substantial number of the proposed new provisions are therefore planned to be incorporated into ICOGSA and, as a result, ICOGSA will become a more comprehensive law on international carriage of goods by sea.

FIOST after the law reform – The aims of this paper –

Will these law reforms assist in settling the conventional conundrum on the interpretation of the Article 3, paragraph 1 of the present ICOGSA, i.e. whether the scope of the carrier's contractual duties may be limited by agreement as discussed in the Article III, rule 3 of the Hague Conventions? This paper firstly looks at the relevant proposed provisions of the Commercial Code to be incorporated into ICOGSA and then discusses whether these proposals enhance the majority's position.

On the other hand, however, if its validity becomes more certain after the law reforms, Japanese shipping lawyers may then have to move on to new and even more complex conundrums, which are for example: (i) the conditions of validity; (ii) the carrier's cargo liability in the FIOST situation; and (iii) the carrier's liability for unseaworthiness caused by the stevedore's bad stowage. There have been no extensive discussions on these topics in Japan so far, but this paper will try to explore briefly in chapter III below.

[10] For more details of the proposed new rules, see Fumiko Masuda, 'Maritime Law Reform in Japan' (the slides presented at CMI New York Conference in 2016) <http://www.cmi2016newyork.org/session-18> accessed 9 January 2017; Kenji Sayama, 'The revision of the transport law and the maritime commerce law in the commercial code of Japan', Wave Length No.61 (2016) 12.

II. The new proposed provisions of ICOGSA

Proposed new provisions

The relevant provisions of the present and the proposed laws are as follows:

Laws currently in force	Proposed laws
ICOGSA, Article 20 (Application of the Commercial Code etc.) (1) The provisions of the Commercial Code except Articles 738, 739, 759 and 766 to 776 shall apply to the carriage of goods by ship under Article 1 of this Act.	**ICOGSA, Article 15 (Application of the Commercial Code)** The provisions of the Commercial Code in Part 2 Chapter 8 Section 2 and Part 3 Chapter 3 except Articles 575, 576, 584, 587, 739 paragraph 1 (including applied mutatis mutandis under Article 756, paragraph 1) and 2, 756 paragraph 2 and 769 shall apply to the carriage of goods by ship under Article 1 of this Act.
Commercial Code, Article 749 (1) Where a contract, the subject of which is carriage of individual goods is entered into, the shipper shall load the goods without delay in accordance with the captain's instructions. (2) If the shipper fails to load the goods, the captain may depart immediately. In this case, the shipper shall pay the full amount of the freight; provided, however, that any freight that the shipowner receives from other goods shall be deducted.	**Commercial Code, Article 737 (Loading of goods etc.)** (1) The carrier shall load and stow goods when the carrier receives goods from the shipper under a contract of carriage of individual goods (i.e. a contract, the subject of which is carriage of individual goods). (2) If the shipper fails to deliver the goods, the captain may depart immediately. In this case, the shipper shall pay the full amount of the freight; provided, however, that any freight that the carrier receives from other goods instead of the goods to be delivered by the shipper shall be deducted.
Commercial Code, Article 752 (4) Where a contract, the subject of which is carriage of individual goods is entered into, the consignee shall discharge the goods without delay in accordance with the captain's instructions.	(Deleted)

ICOGSA, Article 3 (Carrier's duty to exercise care over the goods) (1) The carrier shall be liable for the loss, damage or delayed arrival of the goods which is caused by his own or his servant's negligence for the receipt, loading, stowage, carriage, custody, discharge and delivery of such goods.	**ICOGSA, Article 3 (Carrier's duty to exercise care over the goods)** (1) (No amendment)
ICOGSA, Article 15 (Prohibition of special agreement) (1) Any special agreement which is contrary to the provisions of Articles 3 to 5, Article 8, Article 9 or Articles 12 to 14 and is not in favor of the shipper, receiver or holder of the bill of lading, shall be null and void.	**ICOGSA, Article 11 (Prohibition of special agreement)** (1) Any special agreement which is contrary to the provisions of Articles 3 to 5 or Article 7 to 10, or the provisions of Articles 585, 759 or 760 of the Commercial Codes, and is not in favor of the shipper, receiver or holder of the bill of lading, shall be null and void.

The focus here is on the impact of the proposed Article 737 of the Commercial Code, which is to be incorporated into ICOGSA by the proposed Article 15 of ICOGSA. This proposed Article is, according to the discussions in the Legislative Council of the Ministry of Justice and several materials submitted thereto, said to rule the division of functions, in that, to provide a default rule that the carrier shall load and stow the cargo as opposed to the current rule under Article 749. After this revision, both Article 3 paragraph (1) and this proposed article *appear to* touch upon the carrier's contractual duties to load and stow the cargo. As aimed as a default rule, this proposed Article 737 is not subject to the "null and void" principle under the proposed Article 11, paragraph 1 of ICOGSA, whereas Article 3 paragraph (1) is.

One may then observe that these two provisions have different functions, in that Article 737 non-mandatorily covers the scope of the carrie's contractual duties to load and stow and Article 3, paragraph (1) mandatorily imposes the due diligence in performing their duties so owned by Article 737 or agreement. If so, will the school of thought that Article 3, paragraph (1) mandatorily provides for the scope of the carrier's contractual duties survive in this new regime?

Prior to analysing the possible outcome of this reform in connection with FIOST, it seems necessary to study the lawmakers' intentions behind these amendments in the next sub-chapter.

The discussions over these amendments in the reform process

It has to be confirmed firstly that, in the present regime, Article 749 of the Commercial Code, being incorporated into ICOGSA by Article 20, paragraph (1) is not aimed at dealing with the division of the functions. Instead, as indicated by the words "without delay", it imposes the obligation on the shipper to "deliver" the cargo to the carrier so that the carrier can load and stow before the departure. This aim is clarified in its paragraph (2) which states that, when the shipper fails to comply with this obligation, the carrier is still entitled to receive the freight for this cargo. Accordingly, there have been no academics who argue that the FIOST clause is valid because of Article 749 and the debate regarding whether the carrier can transfer to the cargo interests its contractual duties to load, stow and discharge the cargo has been discussed only in Article 3, paragraph (1) of ICOGSA.

If it is considered that the aim of Article 749 is still reasonable, the reasons why this Article is scheduled to be replaced with the proposed Article 737 should be clarified. The lawmakers considered that Article 749, paragraph (1) ruled on the division of the functions and this could be interpreted to impose on the shipper a contractual duty to load the cargo. The lawmakers then assumed that this allocation of contractual duties was not in line with the prevailing policy that it was originally the carrier's duty. This is the reason of the amendment to Article 749, paragraph (1).

Furthermore, whilst this proposed Article 747, paragraph (1) is aimed to provide for the default rule, it was once thought that, in the reform process, it might be unnecessary to codify it and thus Article 737, paragraph (1) could be deleted. The draftsmen, however, have decided to retain this paragraph but with the above amendments because it interacts with paragraph (2), in that if paragraph (2) remains, the paragraph (1) must also remain. On the other hand, as to discharging in Article 752, there is no provision corresponding to Article 749, paragraph (2) so the draftsmen have assumed that it is not necessary to codify the directory rule that the carrier shall discharge the cargo. Therefore Article 752, paragraph (4) is scheduled to be deleted.[11]

Any impacts on FIOST?

The lawmakers' likely position

Is there any impact to the debate on validity of the FIOST clause? One interpretation

[11] The comments of Mr Uno (Ministry of Justice) in response to Professor Masuda's questions in the minutes of the 10th meeting of the Committee on Commercial Law (Transport and Maritime Law).

seems that this reform has no influence at all. Indeed, this FIOST issue was not examined in the Legislative Council of the Ministry of Justice. The likely response from the lawmakers seems therefore that, since this issue was not intended to be settled in this reform process, the two schools of thought still remain unchanged. Nevertheless, this paper boldly endeavours to interpret these new provisions.

Conservative views

If one wishes to protect the school of thought which denies the validity of the FIOST clause, the below two lines of interpretation may be proposed.

The first line admits the overlap of the function between these two provisions in the sense that both Article 737 of the new Commercial Code and Article 3, paragraph (1) of ICOGSA deal with the scope of the carrier's contractual duties, namely that the carrier shall undertake loading and stowage of the cargo. This line follows that, even though Article 737 is not subject to the null and void principle, Article 3, paragraph (1) still prohibits the FIOST agreement.

If this overlap is thought be odd, the second line may then be interpreted as such that Article 737 does not set out a rule on the division of functions. The scope of the service to be provided by the carrier is dealt with by Article 3, paragraph (1) only (as in the present regime), and therefore this reform has no impact on the FIOST debate. This line of thought, however, seems more odd because it deviates from the natural interpretation of the proposed Article 737, paragraph (1) as well as ignoring the reason behind the expected amendment to Article 749, paragraph (1).

New view?

The school of thought which acknowledges the validity of the FIOST clause continues to be strong in the new regime. The point this paper would like to present is that this school of thought might be even stronger after the amendment to ICOGSA. There seem to be two lines of thought under this new regime too.

The first view should assume that both Article 3, paragraph (1) of ICOGSA and the proposed Article 737, paragraph (1) do provide a rule that the carrier shall undertake cargo handling. In this sense, it recognises the imbricate of their purposes to the extent of loading and stowage. Furthermore, this assumes that these rules on the division of functions may be changed by agreement. Whilst this freedom of contract is expected to be codified in the

proposed Article 11, paragraph (1) of ICOGSA in relation to the proposed Article 737, paragraph (1), this view interprets Article 3, paragraph (1) in that it does not prohibit the amendment to this non-mandatory rule by agreement.

The other line should not assume the overlap of the purposes between the two relevant provisions, in that the division of functions is expected to be codified in the Commercial Code only and Article 3, paragraph (1) of ICOGSA deals with the standard of performance of the carrier's services. The extent of the carrier's service is non-mandatorily given in the Commercial Code, whereas the standard of its services to be performed under the Commercial Code or a separate agreement is mandatorily stipulated in ICOGSA. Furthermore, whilst the proposed Article 737, paragraph (1) touches upon loading and stowage only, the rest of cargo handling including discharge is also assumed to be a mere default rule because of the deletion of Article 752, paragraph (4) of the Commercial Code.

This latter view is perhaps more likely than not to become persuasive so that the school of thought which admits its validity seems to be strengthened. In the present regime, the rule of the division of functions is not clearly codified so that Article 3, paragraph (1) may have been interpreted to cover this point, which therefore becomes the source of the doubt of the validity of the FIOST clause in connection to Article 15, paragraph (1) of ICOGSA. However, in the new regime, the rule of the division of functions is expected to be covered by the proposed Article 737, paragraph (1) and therefore it seems no longer necessary to confer this role to Article 3, paragraph (1) of ICOGSA.

Conclusion

As mentioned earlier, the lawmakers have not intended to change the conventional interpretation of Article 3, paragraph (1) of ICOGSA and therefore uncertainties shall remain. Nevertheless, it seems more likely than not that the majority's view, i.e. Article 3, paragraph (1) does not prohibit the FIOST agreement will become more persuasive in the new regime.

III. Potential new issues in relation the FIOST clause

As mentioned at the beginning of this paper, there have been no substantial discussions in Japan on (i) the conditions of its validity, (ii) the carrier's cargo liability in the FIOST situation and (iii) the carrier's liability for unseaworthiness caused by the stevedore's bad stowage. If its validity is likely to be more certain, Japanese shipping lawyers appear to understand the necessity to start discussions on these issues. The below is a brief comment on these potential conundrums.

The conditions of validity of the FIOST clause

It has been suggested in England that clear words are required to transfer the carrier's contractual duties to load, stow and discharge the cargo to the cargo interest.[12] In the case of *The Jordan II*, the presiding Judge said: '[t]he natural meaning of the word "Free" is at no cost … It is not suggested that it has any wider customary meaning and appearing as it does in the freight clause I can see no reason why it should be given any wider meaning in this contract, particularly as cl. 17 says "Free of expense".'[13] This statement is understandable in the sense that exception to a general rule has to be clear and certain. The issue here should be whether the parties' intention to transfer the cargo handling responsibility is always and automatically declined if only the word "Free" is used. Is it permissible to refer to exchanges or documents between the shipowner/carrier and the charterer in order to ascertain their intention? Furthermore, even if their intention is so clarified in this process, may the carrier submit this against the B/L holder?

Situations where the carrier assumes cargo liability although FIOST is agreed

In a situation where the stevedore's bad stowage plan causes the cargo damage, is there any chance that the carrier owes liability to the B/L holder? It seems useful to establish two case scenarios.

One is where there is carrier's "significant intervention", i.e. the carrier intervenes in the stevedore's operation or discretion. Under English law, the carrier is likely to be liable for the cargo damage so caused by its intervention albeit the FIOST clause.[14] How should this kind of situation be resolved in Japan?

The other is where there is no carrier's "significant intervention". In this circumstance, the carrier is not obliged to handle the cargo because of the FIOST clause so that it does not assume liability in respect of the damage to cargo caused by the bad stowage. The B/L holder, nevertheless, may claim damages against the carrier alleging that it should have assisted the stevedores in order to prevent the cargo damage which would not have otherwise occurred. This kind of claim should be rejected because it is in conflict with the FIOST clause, but the difficulty lies in determining the legal basis upon which this

[12] The Jordan II [2003] 2 Lloyd's Rep. 87 at [9] and [14] per Tuckey L.J.
[13] See also *Subiaco (Singapore) Ptd. Ltd v Baker Hughes Singapore* [2010] SGHC 265.
[14] This "significant intervention" principle established by *Court Line v Canadian Transport* [1940] AC 934 has been applied to the situation where the consensual allocation of contractual duties should be revised. The recent B/L claim case is *the Eems Solar* [2013] 2 Lloyd's Rep. 487 (denied).

rejection should take place. This type of claim would be brought in tort and therefore it is not in principle subject to the FIOST clause. Furthermore, as the carrier relies upon the FIOST clause, Article IV bis, rule 1 of the Hague-Visby Rules[15] is unlikely to be invoked.

These two scenarios, which will eventually occur less infrequently, have not been discussed extensively in Japan. If the maritime law reform put an end to this validity issue, Japanese shipping lawyers would then face these legal conundrums.

Whether the carrier is exempted from unseaworthiness liability if it is caused by bad stowage.

Bad stowage can render the ship unseaworthy. In a situation where bad stowage of the cargo may be attributed to the stevedores employed by the shipper and where the master supplies sufficient information to them in order to prevent the stowage from being rendered unseaworthy, there is a debate whether the carrier is still liable for unseaworthiness. One may argue that, when the Hague-Visby Rules mandatorily apply, the carrier's obligation to maintain the ship's seaworthiness is so fundamental that it cannot be transferred to the cargo interests by the FIOST clause.[16] On the other hand, however, the opposite view seems also to be reasonable in the sense that, since the stevedores can undertake stowage to prevent unseaworthiness when sufficient information is provided by the ship, there is a reasonable *factual* ground that the cargo side should and could assume this liability, based upon the agreement on the division of functions.[17]

In turn, in Japan, the prevailing position is that the obligation to maintain seaworthiness is unique to the carrier and therefore it can neither be delegated nor transferred to somebody else. However, this issue does not seem to have been raised by the academics in this context. If the abovementioned opposite view cannot be considered wholly unreasonable, the conventional notion that this obligation was not transferable is susceptible to reexamination.

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[15] 'The defence and limits of liability provided for in these Rules shall apply in any action against the carrier in respect of loss or damage to goods covered by a contract of carriage whether the action be founded in contract or tort."

[16] *The Jordan II* [2004] UKHL 49 at [19] per Lord Steyn: '[I]t is obvious that the obligation to make the ship seaworthy under article III, r. 1, is a fundamental obligation which the owner cannot transfer to another. The Rules imposes an inescapable personal obligation … On the other hand, article III, r. 2, provides for functions some of which (although very important) are of a less fundamental order e.g. loading, stowage and discharge of the cargo.'

[17] *The Eems Solar* [2013] 2 Lloyd's Rep. 487 (obiter). See also *Compania Sud Americana v MS ER Hamburg* [2006] 2 Lloyd's Rep. 66.

IV. Conclusion

Loading, stowage and discharging cargo are, in practice, joint operations of the cargo interests and the shipowner.[18] It is also not uncommon that the stevedores are appointed by the cargo interests. Therefore, the allocation of responsibilities and risks involved in the cargo operations between the parties are not crystal clear. The FIOST clause seeks to clarify this allocation and in this sense it is a very important B/L clause. This clause is not however a panacea. It is still necessary to look at the carrier's own involvement or intervention carefully so as to ascertain the position on liability. This should be the real and practical issue concerning the FIOST clause. However, this issue has not yet been widely discussed in Japan because, it seems, the main and only issue is its validity under ICOGSA, where academics have not sought to depart from the mere interpretation of the words of ICOGSA and the Hague Rules. Accordingly, it has been widely thought that the carrier's liability for the malpractice of the stevedores is determined within the mere interpretation of the words of the ICOGSA. The practitioners appear to have been skeptical of this notion, and therefore they may have been reluctant to settle disputes relying upon this clause. If its validity is likely to become more persuasive in the revised ICOGSA, it is hoped that the new conundrums are more extensively discussed and practical guidance is presented to the shipping industry.

[18] *Pyrene v Scindia Navigation* [1954] 1 Lloyd's Rep. 321, 329 col.1: 'The carrier is practically bound to play some part in the loading and discharging.' See also Bernard Eder, et al, *Scrutton on Charterparties and Bills of Lading* (22nd edn, Sweet and Maxwell 2011) at 158 and Sir Guenter Treitel and F.M.B. Reynolds, *Carver on Bills of Lading* (3rd edn, Sweet & Maxwell 2012) at [9-123].