

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

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## **ABSTRACT**

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

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

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### **I. Introduction**

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

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

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

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

obligation in Civil Code was passed by the Diet.

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

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

### **III. New Extinctive Prescription for Collision Claims**

#### **A. Inconsistency between the Commercial Code and Collision Convention**

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

There was also another inconsistency between the Commercial Code and

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

<sup>2</sup> Article 798 of pre-revised Commercial Code

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

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

<sup>3</sup> Article 7 of Brussels Collision Convention 1910

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

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

### **B. Supreme Court Judgment**

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

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

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<sup>4</sup> Contrary to the extinctive prescription for GA claims which specified to be commenced from the time of the completed settlement of the account.

<sup>5</sup> Decision of Supreme Court of Japan, Vol.59 No.11 at 2558 (Nov. 21, 2005)

### **C. Revision of the Commercial Code**

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

## **IV. TEA under the Revised Civil Code**

### **A. Maritime Practice under the Pre-revised Civil Code**

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

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

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

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<sup>6</sup> See Article 789 of the revised Commercial Code

Claims for damages (limited to damage to properties) arising from ship's collision shall be extinguished by prescription if it is not exercised within two years from the time of tort.

<sup>7</sup> Yasuhiro Sato, *Assessment Practice of Marine Hull Insurance*, at 204-205(1994).

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

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

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

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

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

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

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

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period for such claim will commence from ...”

<sup>9</sup> See Article 151 of the revised Civil Code

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

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

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

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

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

<sup>10</sup> Civil Code (Law of Obligation) Study Group Report 69A, at 21.

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

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

## **V. Effect of Law Reform on Cargo Claims**

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

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

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

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

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

## VI. Conclusion

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

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

<sup>12</sup> Decision of Tokyo District Court, No.1400 at 104 (May 24, 1994)



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

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