

## Applicability of Mandatory Rules for Seafarer Protection\*

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*The major legal issues of this case were governing law questions regarding the liability of the shipowner/employer to its employee. It is true that in the absence of the parties' choice of law, the arbitral tribunal may apply the substantive laws or rules of law which it deems appropriate. However, it does not mean that the arbitral tribunal has arbitrary discretion in choosing the appropriate law as the governing law of the case; rather, the arbitrators should carefully examine the conflict of law rules of the forum and the requirement of the law of the country where the upcoming arbitral award will be enforced. They must bear in mind the role of the "connecting factors" in determination of the governing law. Therefore, the application of an alien law, which has minimal connecting factor with the case, may lead to a conclusion that is hardly understood by the parties. On the same token, the arbitrators must pay attention to applying the mandatory rules of a country, the laws of which not being the governing law of the issue. It is said that the application of the mandatory rules is a necessary evil to secure the enforcement of the award in the country, which has national interest in applying its own law to the issue. Further, arbitrators must pay attention to the consistent application of the law and respect the integrity of a legal system to reach a fair conclusion. The place of service of a seafarer for a vessel navigating international sea ought to be its home port country rather than the country of the ship registry, and the party autonomy in choice of the law in a seafarer employment should be respected.*

Key Words : Employment, Mandatory Rules, Seafarer Protection

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## I . Relevant Facts of the Case

Res Co. is a Delaware company and owner of a U.S. flagged fishing vessel, F/V A (hereinafter the “Vessel”). Res Co. delegated to Sis Co., a Korean corporation, a full authority to act for and on its behalf, and to manage crew manning and maintenance of the Vessel. In 2008, Res Co. and Sis. Co. entered into the ship’s maintenance, agreement and the crew manning agreement.

In March, 2010, Res Co. hired Mr. X, a Korean national, for a term of eighteen (18) months as the Chief Engineer on board the Vessel and entered into the Contract for Employment as Crew Member with him (hereinafter the “Employment Agreement”). Sis Co. signed the Employment Agreement with Mr. X as the Res Co’s representative. In May, 2010, the Vessel sailed from Guam for fishing and in June, 2010, the Vessel sank in the West Pacific Ocean and both Mr. X and the Captain died (hereinafter the “Marine Accident”).

In June, 2013, Claimants, the family members of the deceased Mr. X filed a complaint against Res Co. and Sis Co. for survival action for negligence for pre-death pain and suffering and other causes of action with the District Court of Guam (hereinafter “Guam Court”). In November, 2013, Sis Co. and Res Co. filed the motion to dismiss and compel arbitration and in August, 2015, the Guam Court ordered arbitration of the dispute between Claimants and Res Co., but denied Sis Co’s motion. In the litigation between Claimants and Sis Co., they negotiated for a settlement and entered into the Settlement Agreement in November 2018 (hereinafter the “Settlement Agreement”) in the amount of US \$ 1 million. In March, 2019, Claimants filed the Request for Arbitration against Res Co. with the Korean Commercial Arbitration Board (hereinafter the “KCAB”). Claimants claimed that due to Res Co.’s negligence in maintaining and/or operating and/or managing and/or crewing the Vessel, the Vessel was unseaworthy at the time of the Marine Accident and resulted in Mr. X’s death. Claimants claimed damages for breach of the Employment Agreement and tort caused by the death of Mr. X. The arbitration tribunal rendered its award after having a virtual hearing for the first time in the history of the KCAB.

## **II. Legal Issues to Be Addressed**

Among the various legal issues in relation to conflict of laws and substantive law of the case, this paper will discuss two major issues, i.e., (i) the governing law of the contract claim as well as the tort claim and (ii) the legal effect of the Settlement Agreement and its impact on Res Co's liability.

As to the governing law and dispute resolution of the Employment Agreement, Paragraph 9 of the Employment Agreement provides as follows:

### 9. Arbitration/Choice of Law.

It is specifically agreed that any and all disputes or claims of any nature arising out of, or relating to, this employment agreement or the employee's employment aboard this Vessel shall be subject to mandatory binding arbitration. Any such arbitration shall occur in, and be subject to the rules of arbitration of, the country of the crew member's nationality as established by his/her current passport. It is intended that this arbitration clause be construed broadly to incorporate any and all claims that can conceivably be arbitrated, including claims for death, personal injury, wages, discrimination, or harassment. Any claims subject to this clause will be governed by the substantive law of the country of the crew member's nationality.

## **III. Governing Law of Shipowner's Liability**

### 1. Conflict of Law Rules under the Korean Laws

#### (1) Relevant Provisions of Korean Conflict of Laws

Since the seat of this arbitration is Seoul, Korea, conflict of law rules of Korea shall be consulted in determining appropriate substantive laws or rules of law on the above issues. The relevant conflict of law rules can be found in the Korea Private

International Law Act (hereinafter the “KPIILA”)<sup>1)</sup> together with the legal theories of conflict of laws rule thereunder, the Korean Arbitration Act (hereinafter the “KAA”) and the KCAB International Arbitration Rules (hereinafter the “KCAB Rules”).

As to the principle of party autonomy and the basic principle in choice of law rules,<sup>2)</sup> Article 29 of the KAA provides as follows:

- (1) The arbitral tribunal shall decide the dispute in accordance with such rules chosen by the parties. Any designation of the law or legal system of a given state shall be construed, unless otherwise expressed, as referring to the substantive law of that state and not to its conflict of law rules.
- (2) Failing the designation referred to in paragraph (1), the arbitral tribunal shall apply the law of the state which it considers having the closest connection with the subject-matter of the dispute.

Also, Article 25(1) of the KPIILA declares the principle of party autonomy as follows<sup>3)</sup>:

A contract shall be governed by the law which the parties choose explicitly or implicitly: provided, that the implicit choice shall be limited to the case which the implicit choice can be reasonably recognized by the terms and conditions of the contract and all other circumstances.

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- 1) English text of the KPIILA is available at <http://www.law.go.kr/engLsSc.do?menuId=1&subMenuId=21&query=%EA%B5%AD%EC%A0%9C%EC%82%AC%EB%B2%95#>; As to introduction thereto, Kyung Han Sohn, New Private International Law Act of Korea, Yearbook of Private International Law, Vol. 3, Private International Law Association of Japan, Shinsinsha, 2001, 267 *et seq.*
  - 2) Myung-Yeop Kim, A Study on Legal Property and Effect of Arbitration Agreement, Journal of Arbitration Studies Vol.11(2001), 130~132; Kwang hyun Suk, International Commercial Arbitration Law Vol. 1, Bakyounsa, 2007 pp.116-117; YoungJoon Mok, Commercial Arbitration Law, Bakyounsa, 2000, p.93; Yong-Kil Kim, A Study on the Scope of Effect in Arbitration Agreements, Journal of Arbitration Studies v.23, no.2, pp. 14~15.
  - 3) Kyung-Han Sohn, Party Autonomy and Applicable Law in Arbitration, Korea Private International Law Journal Vol.17, No.1(2011), pp.421- 422; Kyung-Han Sohn, Arbitral Autonomy: The Concept and Scope, SungKyunKwan Law Review Vol.28 No.3(2012.09), pp. 5~6; Kyung-Han Sohn, Hyun-Joo Shim, A New Approach on the Arbitration Agreement, Journal of Arbitration Studies Vol.23, No.1(2013), pp.62~63.

As to the objective governing law, Article 26 (1) of the KPILA stipulates that:

In case the parties to a contract do not choose the governing law, the contract shall be governed by the law of the country which is most closely connected with the contract.

Further, Article 29(1) of the KCAB Rules refers as follows:

The parties shall be free to agree upon the substantive laws or rules of law to be applied by the Arbitral Tribunal to the merits of the dispute. In the absence of any such agreement, the Arbitral Tribunal shall apply the substantive laws or rules of law which it deems appropriate.

## (2) General Theory on Connecting Factors for Determination of Governing Law

In most jurisdictions, governing law, whether it is chosen by the parties or determined by the conflict of law rules, means a whole legal system of a country in terms of substantive law, not a particular statute or a particular case law. In other words, governing law is to select and indicate a legal system that governs legal relationships or a case pending before a tribunal. It is “connecting factors (in German, Anknüpfungspunkt)” which provide a connection between a legal or factual matter (for example a thing, a transaction, a person) and a particular legal system of a country.<sup>4)</sup> The KPILA provides for the connecting factors such as nationality, habitual residence, closest connection, and so on. In fact, connecting factor varies with circumstances, but in no event any factors other than those being prepared for in the KPILA play a role as connecting factor. There is an exception, however, that a particular law applies mandatorily to a specific legal relationship regardless of the connecting factors.<sup>5)</sup> In order to explain this exception, a theory called “special connection theory (in German, “Sonderanknüpfungslehre”)” of mandatory rules is introduced and broadly supported by the scholars in Korea.<sup>6)</sup> The theory says that in light that application of mandatory

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4) Kwanghyun Suk, *Explanation of the Private International Law Act*, Bakyoungsa, 2013, pp.32-37

5) For example, Articles 7, 25(4), 27(2) and 28(2) of the KPILA.

rules is an exception of the principle of private autonomy and choice of law rules, which always determines the governing law in consideration of the connecting factor, mandatory rules are strictly and restrictively applied to a particular matter.

## 2. Governing Law of the Breach of the Employment Agreement

As seen above, Article 9 of the Employment Agreement sets forth that “any claims subject to this clause will be governed by the substantive law of the country of the crew member’s nationality” and Mr. X’s had Korean nationality. In consideration of Article 29 of the KAA, Article 25(1) of the KPIILA and Article 29(1) of the KCAB Rules as mentioned above, it can be concluded that the governing law of any claims inclusive of Res Co.’s liability to Mr. X’s death arising out of the Employment Agreement is Korean law.

## 3. Governing Law of Tort Liability

### (1) General Provisions of KPIILA on Governing Law of Tort

Claimants also resort to a tort claim against Res Co. and insisted that their tort claims shall be subject to US law. Thus, the governing law of tort liabilities in respect to the Marine Accident of this case must be determined.

Article 32(1) and Article 32(3) of the KPIILA provide for the governing law of a tort as follows:

(1) A tort shall be governed by the law of the place where it occurred.

(3) In case the legal relations existing between the tortfeasor and the injured party are infringed by the tort, the applicable law of such legal relations shall govern irrespective of the provisions of paragraphs (1) and (2).

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6) Jongjin Yoon, *Modern Private International Law*, Hanol Pub. Co., 2003, pp.375-377; Changsun Shin, *Private International Law*, 5<sup>th</sup> Ed., Fides, 2006, pp. 266-267

From this provision, it is clear that the law of the place where the tort was committed (*lex loci delicti commissi*) shall be the governing law of the tort in question. However, a question arises what the term of “place of tort” means in the event that the place of a tortious act and the place where the tortious act results in damage or loss does not happen at the same place like this case. If Mr. X’s death was caused by the fault of Res Co. constituting tort, the tort can be interpreted to have taken place in the US territory based on the following factors; Guam was the home port of the Vessel; the Vessel is admitted to have departed from Guam in an unseaworthy condition; the location where Mr. X died is not far from Guam; Res Co. was incorporated in the United States; and the Vessel was registered with the United States and flew the US flag. Considering these factors, the initial answer for the governing law of the tort is US law pursuant to Article 32(1) of the KPILA.

### (2) Governing Law of Tort When Contractual Relationship Is Infringed

However, that there was a contractual relationship, i.e., the Employment Agreement, between Mr. X and Res Co., and that Res Co.’s failure to provide a seaworthy vessel to Mr. X also constitutes a breach of the shipowners’ duty of providing a safe vessel under the contract. This is where the legal relations existing between the tortfeasor and the victim are infringed by the alleged tort, and therefore that pursuant to Article 32(3) of the KPILA, Korean law by which the Employment Agreement is governed would be the governing law of the tort as well.

### (3) Denial of Recognition of Excessive Damages

It is worthwhile to mention that award of excessive damages under foreign law may be restricted by the KPILA. Article 32(4) thereof declares that “the right to claim for damages caused by the tort shall not be recognized when the character of such right is not clearly for appropriate compensation for the injured party or when the scope of such right is substantially beyond the necessary extent of appropriate compensation for the injured party.” This denial of the excessive damages is not allowed for the contractual claims but for tort claims only. The question is whether this denial is possible where the governing law of the tort claim is determined to be that of

contractual claims like this case through Article 32(3) of the KPILA. This may be a matter of characterization of cause of action, determination of which are available by two steps of characterization<sup>7)</sup> under the KIPLA and then characterization under the governing law as determined under Article 28(1) of the KPILA. It depends upon whether the claim under the US law through Article 28(1) thereof concerning employment agreements may be characterized as a tort claim or a contract claim. The first step characterization under the KIPLA is tort claim as discussed above. The second step characterization under the US law, which is determined as the governing law of the tort claim under the KPILA is also tort claim as requested by the Claimants. As the cause of action under the governing law is characterized as tort claim, the author interprets Article 32(3) of the KPILA is applicable to this case where tort claims are raised by the Claimants under the US law. However, should the Claimants resort to contractual claims under the US law, Article 32(3) of the KPILA might not be applied to this case.<sup>8)</sup>

#### 4. KPILA Provisions on Application of Mandatory Rules

Despite the choice of law clause of the Employment Agreement, Claimants asserted that certain mandatory rules of the United States must apply to this case, pursuant to Article 28(1) of the KPILA. Article 28(2) of the KPILA<sup>9)</sup> provides as to the governing law of employment agreements if there is no choice of law by the parties (hereinafter “objective governing law”). Article 28(1) of the KPILA<sup>10)</sup> provides for the application of

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7) It is a matter of so called two steps characterization or secondary characterization. For example, after characterization of an alimony claims for divorce as matter of legal effect of divorce and the governing law is determined to be a foreign law, then the question arises whether the alimony claim under the foreign law is a claim for divorce or a tort claim. Changsun Shin, *Private International Law*, 5<sup>th</sup> Ed, Fides, 2006. pp.85-86; Jongjin Yoon, *Contemporary Private International Law*, Hanol Pub.Co.,2002 p.90.

8) However, there could be a different scholarly opinion that Article 32(3) of the KPILA is applicable once the claim is characterized a tort claim under the KPILA regardless its characterization of the claim under the governing law as determined by the KPILA.

9) (2) In case the parties do not choose the applicable law, irrespective of the provisions of Article 26, the employment agreement concerned shall be governed by the law of the country where the employee habitually provides his/her service. In case the employee does not habitually provide his/her service within one country, the law of the country, where the business office of the employer who hires the employee is located, shall govern.

10) (1) In case of an employment agreement, even if the parties choose the applicable law, the



mandatory provisions concerning the protection of employees. The mandatory provisions of the above Paragraph refer to statutory provisions that cannot be varied and derogated from by agreement between the parties.

In this case, it is first necessary to determine whether there was a country in which Mr. X habitually provided his services, or, if Mr. X did not provide his services in any one country, whether there was a business place where Res Co. employed Mr. X. Although Mr. X worked as the Vessel's crew member, it is difficult to specify the country where Mr. X habitually provided his labor, as the Vessel had been fishing in and out of various countries, including the high seas, without operating in a particular country. There are two approaches in determining the place of habitual provision of service. One approach is that law of the country where the crew habitually provides his service is deemed to be the law of the country of ship registry, in case of seafarers of his vessel navigates internationally.<sup>11)</sup> The other approach is that there is no specific country where the crew habitually provides his service, in such case, and, therefore, the law of the country of the business place where the shipowner employed the crew must apply.<sup>12)</sup> According to the first approach, US law applies for protection of Mr. X, since the Vessel's registry was the United States. According to the second approach, US law also applies for protection of Mr. X since the business office where the Res Co. hired Mr. X was located in Guam, the United States. Therefore, the mandatory rules of the law of the United States apply anyhow in this case for the protection of Mr. X.

## 5. Conflict of Law Rules for Admiralty in the United States

As to the rules for choice-of law analysis for admiralty cases in relation to foreign seaman claiming damages under the Jones Act<sup>13)</sup>, the Lauritzen-Rhoditis criteria<sup>14)</sup> have

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protection, given to the employee under the mandatory provisions of the country of the applicable laws designated under paragraph (2), shall not be deprived.

11) Busan District Court Judgement 2012Gahap21822, June 12,2014.

12) In 2017, the Court of Justice of European Union in its Judgment in Joined Cases C-168/16 and C-169/16 Sandra Nogueira and Others v Crewlink Ltd and Miguel José Moreno Osacar v Ryanair rejected the country of the 'nationality' of aircraft but expressed that concept of 'home base' constitutes a significant indicium for the purposes of determining the 'place where the employee habitually carries out his work' unless there is a place of closer connection.

13) Article 27 of the Merchant Marine Act of 1920

been established by the U S Supreme Court. The factors that the courts consider include (i) the place of the wrongful act, (ii) the law of the flag, (iii) the allegiance or domicile of the injured seaman, (iv) the allegiance of the defendant shipowner, (v) the place where the contract of employment was made, (vi) the inaccessibility of a foreign forum, and (vii) the law of the forum and (viii) the shipowner's base of operations. The Lauritzen–Rhoditis criteria have been regarded as the proper criteria to be applied in admiralty cases in the US including seamen's personal injury cases.<sup>15)</sup>

## IV. Application of US Mandatory Rules

### 1. Possible Mandatory Rules of US Admiralty Law

It has been argued that the Death On the High Seas Act("DOHSA"), Jones Act, and general maritime law of the United States mandatorily apply to the claims for protection of Mr. X.

### 2. Mandatory Nature of the Death On the High Seas Act

It has been recognized that the DOHSA<sup>16)</sup> was originally intended to permit "recovery of damages against a shipowner by a spouse, child, or dependent family member of a seaman killed in international waters." The DOHSA provides as follows as to the cause of action<sup>17)</sup>:

When the death of an individual is caused by wrongful act, neglect, or default occurring on the high seas beyond 3 nautical miles from the shore of the United States, the personal representative of the decedent may bring a civil action in admiralty against the person or vessel responsible. The action shall be for the

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14) *Lauritzen v. Larsen*, 345 U.S. 571 (1953) and *Hellenic Lines, Ltd. v. Rhoditis*, 398 U.S. 306 (1970).  
See also *Neely v. Club Med Mgmt. Servs., Inc.*, 63 F.3d 166 (3d Cir. 1995).

15) Robert Force, *Admiralty and Maritime Law* 2nd Ed. Federal Judicial Center 2013, p. 24, *et seq.*

16) 46 U.S.C. §§ 30301–30308

17) 46 U.S. Code § 30302

exclusive benefit of the decedent's spouse, parent, child, or dependent relative.

It is clear that the above provision of the DOHSA is a mandatory provision and accordingly, any agreement of the parties which deprives the rights of the Claimants to bring a civil action in admiralty against Res Co. is null and void.

### 3. Mandatory Nature of the Jones Act

The Jones Act further provides as follows:

A seaman injured in the course of employment or, if the seaman dies from the injury, the personal representative of the seaman may elect to bring a civil action at law, with the right of trial by jury, against the employer. Laws of the United States regulating recovery for personal injury to, or death of, a railway employee apply to an action under this section.<sup>18)</sup>

The United States Supreme Court held that, [The Jones Act], which establishes a uniform federal law that state as well as federal courts must apply to the determination of employer liability to seaman, incorporates by reference, "all statutes of the United States modifying or extending the common law right or remedy in cases of personal injury to railway employees."<sup>19)</sup> The US Supreme Court went on to elaborate that the Jones Act adopts "the entire judicially developed doctrine of liability" under the Federal Employers' Liability Act (FELA).<sup>20)</sup> The FELA provides that, "(a)ny contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void."<sup>21)</sup>

It is also true that the vessel owner has a duty to provide its seafarers with a seaworthy vessel and such duty is an absolute duty under the Jones Act.<sup>22)</sup> It is

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18) 46 U.S.C. §30104

19) *Kernan v. American Dredging Co.*, 355 U.S. 426, 439, 78 S. Ct. 394 (1958).

20) 35 Stat. 65, as amended, 45 U.S.C. § 51 *et seq.*

21) 46 U.S.C. §55

22) *Mahnich v. Southern Steamship Co.*, 321 U.S. 96 (1944). It stated that[a] vessel and its owner are

reasonable that the above FELA provision as incorporated in the Jones Act is regarded a mandatory provision and accordingly, any attempt by Res Co. to exempt itself from the liability that it is legally obligated under US law to provide its employee, Mr. X, is void.

#### 4. Mandatory Nature of the General Maritime Law of the United States

General maritime law is a body of U.S. maritime law developed by courts rather than by statutes.<sup>23)</sup> General maritime law of the US is comprised of certain causes of action that are rooted in history, judicial doctrine and court precedent. US general maritime law provides common law remedies to a person who suffers an injury at sea, despite the fact that he/she is unable to file a claim under federal statutes. It is an established US case law that, "(u)nder the general maritime law a vessel owner has an absolute non-delegable duty to provide a seaworthy-vessel to crew members.<sup>24)</sup> This duty is irrespective of fault or the use of due care".<sup>25)</sup> A ship owner is bound by law to provide a seaworthy vessel to its crew member employee and this is "non-delegable" or in other words it is an absolute obligation.<sup>26)</sup> This is irrespective of whether or not an operator, manager, or any agreement is drafted to remove the duty. The duty as established by the general maritime law, as affirmed by United States courts, is understood to be mandatory.

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liable to indemnify a seaman for injury caused by unseaworthiness of the vessel or its appurtenant appliances and equipment. at 99; *Mitchell v. Trawler Racer, Inc.* (1960) 362 U.S. 539, 549 [80 S. Ct. 926, 932, 4 L.Ed.2d 941, 947-948].

23) It is said that general maritime law has been developed by the courts, from the outset, which have had to resolve disputes because Congress has never enacted a comprehensive maritime code. Robert Force, *Admiralty and Maritime Law* 2nd Ed, Federal Judicial Center 2013, p. 22, *et seq.*

24) *Moragne v. States Marine Lines, Inc.*, 90 S. Ct. 1772 (1970) held that, reversing the lower courts' decision that unseaworthiness was not a basis of liability under the Florida statute, wrongful death based on unseaworthiness is maintainable under the authority of "general maritime law" reasoning that maritime law has always been a separate body of jurisprudence, administered by different courts, with components of civil law and common law and to insure uniform application, maritime law should not be dependent upon either state law or common law.

25) *Billedeaux v. Tidex, Inc.*, 3 F.3d 437 (5th Cir,1993),1993 U.S. App. LEXIS 40755, at 4.

26) It is also true under FELA. *Payne v. Baltimore & Ohio R.R. Co.*, 309 F.2d 546, 549 (6th Cir,1962).

## 5. Extent to Which the US Laws Apply

There are two different views as to the issue of the scope of the applicable US laws.

### (1) The View Limiting Application of the Specific Provisions Which Are Mandatory

This view understands that “the mandatory provisions of the country of the applicable laws designated under paragraph (2)” as provided in Article 28(1) of the KPILA does not mean that the mandatory provisions entirely exclude and substitute the governing law agreed upon by the parties, but rather it intends to preclude only such a provision of the agreed governing law that is not consistent with the mandatory provisions of the applicable jurisdiction (in this case US law). It is understood that the governing law agreed upon by the parties still applies to the other relationships between the parties other than the area in which the mandatory provision for the protection of employees applies.

For example, the Korean Seafarers’ Act provides for minimum amount of compensation for seafarers at the time of an accident,<sup>27)</sup> which is clearly applied mandatorily. Also, it is understood that, under the Korean Seafarers’ Act, shipowners bear the duties for safety of crew members including the duty to provide a seaworthy vessel to its crew members. The provisions of the Korean Seafarers’ Act are mandatory provisions from which cannot be excluded nor derogated by the parties.

However, it does not seem that US law provides for any requirements for minimum damages to be paid to injured crew or his bereaved family by shipowners. There are no provisions to acknowledge that the US laws provide for guaranteed minimum compensation to seafarers or his bereaved family. Therefore, the US laws do not apply in determining the extent of the damages. Except for applying the US mandatory

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27) Article 99, Para.1 of the Act provides that, as compensation for the bereaved family, the ship-owner shall compensate the bereaved family for his death in the amount equivalent to average boarding wages for his service of 1,300 days without delay, when a seafarer dies during the performance of his duties. In addition, the ship-owner shall pay certain funeral expenses, compensations for the crew’s missing and loss of belongings (Arts. 100-102).

provisions on shipowners' duty to provide a seaworthy vessel to crew members including Mr. X, Korean law, the governing law agreed upon by the parties for the Employment Agreement, still applies to the issues of Res Co.'s liabilities, such as the duty to pay damages and the extent thereof.

The provision of the DOHSA 46 U.S. Code § 30302, 46 U.S.C. §55,<sup>28)</sup> which is cited in the Jones Act, and the absolute duty of shipowners to provide a seaworthy vessel to crew members under the general maritime law of the United States are mandatory provisions to be applied to this case.

In conclusion, for the two (2) causes of action, i.e., breach of contract and tort in this case, the governing law is Korean law in accordance with Article 28(2) and Article 32(1) and (3) of the KPILA, subject to US law applying as mandatory provisions in respect of the Res Co.'s duty or obligation to provide a seaworthy vessel.

#### (2) The View Extending Application of the US Law to Damages

Claimants are seeking damages from Res Co. on the grounds that Res Co. breached the Employment Agreement and that Res Co. also committed tort, by failing to provide a seaworthy vessel to the Res Co.'s employee, Mr. X, who died in the Marine Accident.

However, limits the scope of the application of such mandatory provisions only to the issue of what is such a duty or obligation under US law, and determines that Korean law rather than US law governs on how damages for the contractual breach or tort should be assessed. Once a governing law is determined in respect of a certain legal relationship such as based on contract or tort, this view takes the position that governing law should uniformly govern all aspects of that legal relationship including contract interpretation, performance and damages, unless there is a compelling reason

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28) "When the death of an individual is caused by wrongful act, neglect, or default occurring on the high seas beyond 3 nautical miles from the shore of the United States, the personal representative of the decedent may bring a civil action in admiralty against the person or vessel responsible. The action shall be for the exclusive benefit of the decedent's spouse, parent, child, or dependent relative."

not to apply that governing law in respect of a part of the legal relationship. Under this view, the scope of the application of the “mandatory provisions” in Article 28(1) of the KPILA should be interpreted in accordance with this principle. In this vein, if the mandatory provisions under US law are not complied with, the corresponding remedies including assessment of damages should also be governed by US law. Otherwise, it will be useless and ineffective to apply a higher standard to comply with under US law, if substantially less burdensome remedies for non-compliance of such requirement under another jurisdiction than the remedies under US law is are to be imposed.

This view regards the mandatory nature of the US law provisions<sup>29)</sup> to include not only the obligation to provide a seaworthy vessel but also the liability for not complying with the obligation. Another example for this position is the US Supreme Court’s holding on the Jones Act, which says “[The Jones Act], which establishes a uniform federal law that state as well as federal courts must apply to the determination of employer liability to seaman, incorporates by reference “all statutes of the United States modifying or extending the common law right or remedy in cases of personal injury to railway employees” and “[The Jones Act adopts] the entire judicially developed doctrine of liability” under the Federal Employers’ Liability Act (FELA).”

This view also refers to US case law which applied the Jones Act to foreign crew demonstrates the mandatory nature of the law. As mentioned above, there is a case where US Court applied the Jones Act to Greek crew in accordance with its conflict of laws rule.<sup>30)</sup>

This view further understands that the wording used in the above KPILA provision is not just “mandatory provisions” but the “protection granted to employees by the mandatory provisions” and such “protection” is broader than the mandatory provisions

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29) For example, the Jones Act provides in 46 U.S.C. §30104 “Laws of the United States regulating recovery for personal injury to, or death of, a railway employee apply to an action under this section.”

30) *Hellenic Lines Ltd. v. Rhoditis*, 90 S. Ct. 1731 (1970) confirming lower court’s judgments, 412 F.2d 919 (5th Cir. 1969) and 273 F. Supp. 248(S.D. Ala. 1967). John A. Scanelli, Applicability of the Jones Act to Foreign Seamen and Foreign Shipowners, *Hellenic Lines Ltd. v. Rhoditis*, 90 S. Ct. 1731 (1970), 12 Wm & Mary L. Rev(No.2)429 (1970).

themselves, and includes not only the requirement of the standard of seaworthiness but also the remedies (including damages) for non-compliance with that standard. Therefore, even in a case where the mandatory provisions are interpreted to be applicable only to the extent of the US law setting out the obligation to provide a seaworthy vessel (rather than the remedies for failure to comply with the obligation), because of this wording of the above KPILA provision, US law should govern not only the standard of seaworthiness but also the assessment of damages when seaworthiness requirement is not satisfied with.

### (3) Discussions on these Two Views

In consideration of the nature of mandatory rules as a special connecting factor in determination of governing law, a mandatory provision must apply restrictively to a particular matter or issue only as the KPILA provides. It means that a mandatory rule does not substitute the governing law chosen or determined for a foreign law inclusive of the mandatory rule. Along the line, Article 28 (1) of the KPILA limits the scope of application of the mandatory rules by providing that “the protection given to employees under the mandatory provisions shall not be deprived.” Any attempts to expand application of the US law to all aspects of legal relationship of a contract or tort including assessment of damages beyond its mandatory provisions are contrary to the principle of limited application of mandatory rules.

Furthermore, it must be examined whether the whole provisions of the Jones Act, the DOHA or the US general maritime law are mandatory provisions. For example, the Jones Act 46 U.S.C. §30104 providing that “Laws of the United States regulating recovery for personal injury to, or death of, a railway employee apply to an action under this section.” does not make the whole provisions of the Jones Act and other laws of the United States mandatory provisions, since it is not understood to prohibit the parties from varying and derogating their liabilities from those under the Jones Act by agreement between them.

It is, however, clear that the Jones Act or the DOHSA is not mandatory rules in its entirety. Neither the Jones Act or the DOHSA itself nor any case law thereunder



declares that the whole provisions or even any provisions regarding damages of the statutes mandatorily apply. Also the nature of the Jones Act, as a uniform federal law that state as well as federal courts must apply to the determination of employer liability to seaman, does not lead to the conclusion that the whole provisions of the Jones Act are mandatory provisions. It is true that the Jones Act intended to establish a uniform federal law and preempts state law including the common law on damages for crew members. However, it does not mean the Jones Act and payment of damages thereunder becomes mandatory provisions in its entirety. The reason why the Jones Act preempts the common law, is not because all the provisions of the federal statute are mandatory provisions but because they are subject to the principle of federal preemption under the US Constitution. The cases which apply the Jones Act to a non-US citizen crew<sup>31)</sup> does not necessarily mean that the Jones Act in its entirety mandatorily applies to foreign crews regardless of conflict of law rules.

Also, the phrase of “protection given to employees by the mandatory provisions” of Article 28 (1) of the KPILA may be applicable only in case where the following two conditions are met concurrently in its wording: (i) a substantive law at issue falls within a mandatory rule of the governing law which could have applied, should the parties not choose other country’s law as the governing law, i.e., objective governing law and, if that is the case, and (ii) the mandatory rule is designed for protection of employees. Even in such a circumstance, protection is meant to be specific as the mandatory rule of the objective governing law prepares for. The view that the concept of “protection” is broader than mandatory provisions themselves is erroneous since the concept of protection mentioned by this view embraces protection not only given by the mandatory rule but also given by other part of the objective governing law. In our view, the second view above in this respect is in contrast with the principle that any mandatory rule must apply strictly and narrowly and, therefore, in no event totally replace the governing law itself chosen by the parties with the objective governing law. Such protection is available only in case where the mandatory provisions provide for it concretely or the case law admits such protection is mandatory. The view that broader protection under the objective governing law is applicable in addition to its

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31) Such as *Hellenic Lines Ltd. v. Rhoditis*, 90 S. Ct. 1731 (1970)

mandatory provisions went far beyond the statutory wording of the Article 28 (1) of the KPILA.

Finally, even if the governing law for assessment of damages in this case is US law, certain amount of damages to be awarded under US law may not be admitted under Article 32(4) of the KPILA which is applicable to this case. In consideration of the fact that Claimants have received more than US\$ 1.5 million from the Res Co. and Sis Co. and additionally seek for substantial amount of damages under US law, the amount of damages to be awarded under US law could fall in the category of damages of clearly inappropriate compensation or substantially beyond the necessary extent of appropriate compensation under Korean law and therefore there is a possibility being not recognized.

As discussed above, under the Korean conflict of laws rules, the existence and extent of Res Co.'s liabilities for damages in tort as well as breach of contract is governed by and construed under Korean law, except for when the above-mentioned mandatory provisions of the US law apply.

## **V. Governing Law of Relationship between Joint and Several Debtors**

### **1. Governing Law of Discharge of Debt by Payment of Other Debtor**

As mentioned above, Sis Co. paid the Claimants US\$1million for settlement. It became an issue that legal effect or impact of the Sis. Co. settlement on Res Co.'s liability to the Claimants. The questions is whether Res Co.'s liability is discharged or reduced by the payment made by Sis. Co. In order to respond to the question, we first must determine which law governs the issue of whether and to what extent the Claimants' receipt of the payment would release Res Co. from its liabilities for the Marine Accident. While the governing law of the Sis. Co. Settlement Agreement was agreed by the parties to be US law, Korean law, as discussed above, is basically the

governing law of Res Co.'s liability. It would be a natural interpretation that the governing law of the obligation also governs the effect of discharge since discharge is one of the various ways of extinguishing obligations.<sup>32)</sup> Since it is a matter of the legal effect of payment made by Sis. Co. on Res Co.'s liabilities, insofar as the governing law of Res Co.'s liability to Claimants is Korean law, it is reasonable to interpret that the issues of discharge thereof are also subject to Korean law.

## 2. Governing Law of Relationship between Joint and Several Debtors

The KPILA does not have any explicit provision on the governing law of relationship between several debtors or multiple liability. We may refer Rome I/Rome Convention which was the basis for the amendment to the KPILA in 2000. Article 16 of Rome I provides for multiple liability as follows:

If a creditor has a claim against several debtors who are liable for the same claim, and one of the debtors has already satisfied the claim in whole or in part, the law governing the debtor's obligation towards the creditor also governs the debtor's right to claim recourse from the other debtors. The other debtors may rely on the defences they had against the creditor to the extent allowed by the law governing their obligations towards the creditor.

According to the above provision, the issue the Sis Co.'s right to claim recourse from Res Co. will be governed by the governing law of the Sis Co.'s liability, in this case, US law. However, Res Co. may rely on the defences it had against the Claimants to the extent allowed by the law governing its obligations towards the Claimants, i.e., Korean law.

As to the governing law of subrogation in general or of that by payment of several liabilities, the KPILA has no explicit provision thereon. Under the Rome I,<sup>33)</sup> the

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32) Ref Art. 12 of Rome I, which provides that "The law applicable to a contract --- shall govern in particular --- (d) the various ways of extinguishing obligations, prescription and limitation of actions," Michael McParland, *The Rome I Regulation on the Law Applicable to Contractual Obligations*, Oxford, 2015.

33) As to legal subrogation, Article 15 of Rome I provides that "[w]here 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

governing law of the Sis Co.'s right of subrogation could be the law governing its duty to pay damages to the Claimants, i.e., the US law. The provision on the governing law of subrogation in the Rome I can be only a limited reference in interpretation of the KPILA.

### 3. Relationship between Res Co. and Sis Co under US Law

Under the US law, liability for the property damage in a maritime collision or stranding to be allocated among the parties proportionately to the comparative degree of their fault, and to be allocated equally only when the parties are equally at fault or when it is not possible fairly to measure the comparative degree of their fault.<sup>34)</sup> Further, when Plaintiff settles with one of several joint tortfeasors, the non-settling defendants are entitled to a credit for that settlement. In the US, there is a divergence among respected scholars and judges about how the credit should be determined. There are three principal alternatives: (1) a "*pro tanto*" credit with a right of contribution against a settling defendant; (2) a "*pro tanto*" credit without a right of contribution against a settling defendant; and (3) a credit for the settling defendants' proportionate share of responsibility for the total obligation.

The US Supreme Court adopted the "proportionate share" approach to liability for matters governed by maritime law.<sup>35)</sup> McDermott case specifically rejected the "*pro tanto*" dollar for dollar credit approach. Under this approach, the money paid by a settling defendant extinguishes any claim that the injured party has against the released tortfeasor. The proportionate share rule applies to seaman's claim under the Jones Act and DOSHA.<sup>36)</sup> In this case, therefore, Res Co. is liable for the total amount of Claimants' damages reduced only by the percent liability, if any, that is deemed to

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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."

34) United States v. Reliable Transfer Co., Inc., 421 U.S. 397, 401-411 (1975)

35) *McDermott, Inc. v. AmClyde*, 511 U.S. 202 (1994)

36) *Great Lakes Dredge and Dock Co. v. Tanker Robert Watt Miller*, 92 F.3d 1102 (11th Cir. 1996); *Nunez v. B&B Dredging, Inc.*, 108 F. Supp. 2d 656 (E.D. La. 2000); *Slaven v. BP Am. Inc.*, 958 F. Supp. 1472 (C.D. Cal. 1997); *Geyer v. USX Corp.*, 896 F. Supp. 1440 (E.D. Mich. 1994); *Miller v. Int'l. Diving and Consulting Servs., Inc.*, 669 So. 2d 1246 (La. Ct. App. 5th 1996).

attribute to Sis Co. The Settlement Agreement with Sis Co. does not affect the non-settling party (Res Co.) and Res Co. is responsible for its proportion of fault under US law. Res Co. will not be allowed to claim for exemption or reduction if Res Co. is fully liable for the Marine Accident.

#### 4. Relationship between Res Co. and Sis Co. under Korean Law

Under Korean law, breach of a contract can be the basis of a contractual claim as well as a tort claim when the breach of a contract satisfies with the legal requirements for tort.<sup>37)</sup> The bereaved family members inherit all claims of the deceased including damages for the pain and suffering, and have the claims of damages for their own “pain and suffering” separately.<sup>38)</sup> Under Korean law, Sis. Co. and Res Co. are deemed to be the “joint tortfeasors” to Mr. X, and they are jointly and severally liable to pay damages to Claimants.<sup>39)</sup> Sis. Co.’s payment had Res Co. discharged from its liability to the extent of the amount paid, i.e., *pro tanto*.

#### 5. Comparative Analysis and Its Impact on Liability of Damages

It is assumed that the Tribunal determined Res Co. to be liable for US\$1.5 million and the liability is apportioned 50/50 between Res Co. and Sis Co. As noted above, Sis Co. paid Claimants US\$1million. Then, under the US law, Res Co. will be released by US\$500,000 only in proportion to its share and shall pay the remaining US\$1million. However, under the Korean law, Res Co. will be released by US\$1million, the total amount that Sis Co. paid and ought to pay the remaining US\$500,000. Then, Sis Co. will be entitled to collect US\$250,000 from Res Co. While there is no difference in sharing of liability between the joint tortfeasors under the US law and Korean law, however, it is different in the damages amount that the Claimants receive from the joint tortfeasors. It seems that the total amount of damages the Claimants receive under

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37) Refer to Supreme Court Judgment No. 2011 Da 60247, November 28, 2013.

38) *Id.*

39) Article 413 of the Korean Civil Code stipulates that “If each of the several obligors has the responsibility to perform the entire obligation, and the performance by one of the obligors discharges the other's obligation, the obligation shall be a joint and several obligation.”

US law is far more than the amount to be awarded under Korean law. We understand it comes from the US policy to encourage settlement of claims as early as possible without court judgment. However, it seems not fair for the lawyers from continental countries that the amount of damages varies according to the time of settlement or judgment. Although the Claimants may be awarded less amount under the *tanto* rule of Korea, the balance between the two legal systems in total compensation can be found at the Korean law which allows the Claimants to claim separate damages for their own pain and suffering in addition to inheritance of the damages claim of the deceased's pain and suffering.

## VI. Conclusions

The major legal issues of this case were governing law questions as to the liability of the ship-owner/employer to its employee. It is true that in the absence of the parties' choice of law, the arbitral tribunal may apply the substantive laws or rules of law which it deems appropriate.<sup>40)</sup> However, it does not mean the arbitral tribunal has arbitrary discretion in choosing appropriate law as the governing law of the case. Rather, the arbitrators should carefully examine the conflict of law rules of the forum and the requirement of the law of country where the upcoming arbitral award will be enforced. They are required to bear in mind the role of the "connecting factors" in determination of the governing law. Application of an alien law, which has minimal connecting factor with the case, may lead to a conclusion that is hardly understood by the parties. On the same token, the arbitrators must pay attention in applying mandatory rules of a country, law of which is not the governing law of the issue. It is said that application of the mandatory rules is a necessary evil to secure enforcement of the award in the country which has national interest in applying its own law to the issue.

The second issue for this case is the need of comparative legal analysis of difference legal systems. The author believes that a legal system of a country is a harmonized

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40) Article 29(1) of the KCAB Rules

combination of various elements to reach a fair resolution of a dispute. Therefore, we must be careful in applying only one element of the law of a specific country while applying law of a different country to other elements. This is because such inconsistent application of law may hurt the integrity of a legal system. To reach a fair conclusion, we should consult with the competing legal systems and compare them each other. Although the governing law of tort in this case is determined Korean law, the outcome under the competing legal system, i.e., the US law, should be reviewed to meet the parties' sense of justice.

The hearing of this case was conducted by virtual hearing without any technical or procedural problems. It is recommended to hold virtual hearings replacing actual hearings where the parties, their staff, legal counsels, witnesses are required to attend the hearings in person. Although COVID -19 expedited this transition from actual hearings to virtual hearings, we had better appreciate its merits for saving time, costs and for enhancing convenience of the parties, their counsels as well as arbitrators. [the End]

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