

Overview of Act to partially amend Commercial Code and International Carriage of Goods by Sea Act of Japan

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Outline of this Presentation

- I. Background led to the amendment
- II. Overview of the amended Act
 - 1 Structure of former law; Amended areas
 - 2 Overall structure of Commercial Code after amendment
 - 3 Main points of amendments – transport
 - 4 Main points of amendments – maritime commerce
 - 5 Main points of amendments - others
- III. Conclusion

I. Background led to the amendment

1 Before establishment of Sub-Committee at Legislative Council, MOJ

Legislation not based on demands by relevant industries but to modernize law at the initiative of Ministry of Justice (MOJ)

- ▶ Former law – Special Acts had been enacted from time to time but the original Commercial Code provisions written in *katakana* (literary style of written Japanese) remained intact since 1899
- ▶ 2011 – 2012 Commercial Law (Transport) Study Group
- ▶ 2012 – 2013 Investigation on Practice of Transport Transactions
- ▶ Aug 2012 – Nov 2013 Transport Law Research Group
- ▶ Feb 2014 Consultation No. 99 from MOJ to Legislative Council

It is hereby requested to draft outline of amendment of the Commercial Code, as it appears the Commercial Code provisions, mainly those related to transport and maritime commerce, need to be amended (i) to adapt social and economical change since the enactment of the original Code; (ii) to ensure reasonable adjustments of interests among merchants, carriers and other interested parties; and (iii) to follow up worldwide trends in maritime law. [numbering added]

- ※ Substantial amendment of Japan COGSA (based on Hague-Visby Rules) is not intended in principle; and accession to Rotterdam Rules is beyond the scope.
- ※ 1989 Salvage Convention would be partly incorporated in substance but ratification thereof is also beyond the scope.

I. Background led to the amendment

1 After establishment of Sub-Committee at Legislative Council, MOJ

- ▶ Feb 2014 Sub-Committee for Commercial Code (Transport and Maritime Commerce) was established in Legislative Council
- ▶ April 2014 – March 2015 1st to 11th Meetings
- ▶ March – May 2015 Interim Draft made public for comments
- ▶ June 2015 – Jan 2016 12th to 18th Meetings
 - ※ Carriage of Passenger Working Group Meetings were also held.
- ▶ Jan 2016 Sub-Committee adopted draft Outline
- ▶ Feb 2016 Legislative Council adopted final Outline
- ▶ Oct 2016 Bill to partially amend Commercial Code and International Carriage of Goods by Sea Act presented by the Cabinet to the 192th Diet (Cabinet Bill No.16); once scrapped and re-presented
- ▶ May 2018 Enacted/promulgated 1 April 2019 entry into force

II. Overview of the amended Act

1 Structure of former law; amended areas

▶ Transport

These are amended areas (partially including COGSA)

	Domestic Transport	International Transport
Land	Book II Com Trans C 7 Freight Forwarding C 8 Transportation Biz (Arts 559~592)	N/A
Sea	Book III Maritime Com C 3 Transportation Biz (Arts 737~787)	International COGSA ※ Domestic act for Hague-Visby Rules ※ Books II and III are applied <i>mutatis mutandis</i> for matters not covered by Hague-Visby Rules
Air	No Provision	Warsaw Conv, Hague Protocol, Montreal Protocol No.4, Montreal Conv ※ Almost all covered by Montreal Conv ※ Direct application

※ In addition, Civil Code, Insurance Act, etc. also applicable

II. Overview of the amended Act

1 Structure of former law; amended areas

▶ Maritime Commerce (except transport)

Commercial Code	Related Special Acts
Book III Mar Commerce 1 Ships and Shipowners 2 Ships' Captains 4 Average 5 Marine Salvage 6 Insurance 7 Ships' Creditors (Arts 684~736, Arts 788~851)	Act on Limitation of Shipowners' Liability ※ Domestic law for LLMC ※ 2015 Amendment under 1996 Protocol Act on Liability for Oil Pollution Damage ※ Domestic law for CLC and FC ※ Bunker pollution liability for general ships, compulsory insurance, etc. Art 35 of Ship Act ※ Applicable <i>mutatis mutandis</i> to sea-going ships for non-commercial purpose

※ In addition, Civil Code, Insurance Act, etc. also applicable

II. Overview of the amended Act

2 Overall structure of Commercial Code after amendment

Book II Commercial Transactions

Chapter 7 Freight Forwarding Business

Chapter 8 Transportation Business

Sections 1 General, 2 Carriage of Goods, 3 Carriage of Passengers

⇒ *General Rules for Carriage*

Book III Maritime Commerce

Chapter 1 Ships

Sections 1 General, 2 Shipowners, 3 Lease of Ships, 4 Time Charters

Chapter 2 Ships' Captain

Chapter 3 *Special Rules for Carriage of Goods by Sea*

Sections 1 Carriage in General Ships (Individual Goods), 2 Voyage Charters, 3 Bills of Lading (Bs/L), etc., 4 Sea Waybills (SWBs)

Chapters 4 Ships' Collisions, 5 Salvage, 6 General Average, 7 Marine Insurance, 8 Maritime Lien and Mortgage

International COGSA remained separate with partial amendments

II. Overview of the amended Act

3 Main points of amendments – transport

(1) General

- ▶ Party responsible for carriage on land, by sea or by air is comprehensively defined as “carrier”

Art. 569 (1) A carrier means a person in the business of undertaking carriage on land, by sea or by air.

- ▶ Voyage Charter: contract between “carrier” and “charterer”
Stipulated in Book III Maritime Commerce, Chapter 3 Special Rules for *Carriage of Goods by Sea*, Section 3 Voyage Charters = categorized as one of the contracts of carriage
- ▶ Time Charter: contract btwn “shipowner” and “time charterer”
Stipulated in Book III Maritime Commerce, Chapter 1 Ship, Section 4 Time Charters = categorized as one of the contracts for employment of a ship (some provisions for carriage of goods are also applicable *mutatis mutandis* when goods are carried under the relevant ship)

II. Overview of the amended Act

3 Main points of amendments – transport

(1) General

- ▶ Definitions of Carriage on land, by air and by Air (Art 569[2]~[4])
 - ▶ Carriage in smooth water areas: formerly sub to rules for carriage on land, now sub to those for carriage by sea
 - ▶ Carriage by barges etc. in ports are now sub to rules for carriage by sea

ex Art 569[1] A Carrier means a person in the business of carriage of goods or passengers on land, in lakes and rivers, or in ports and harbors

ex Act for enforcement of the Commercial Code Art 122: Areas of lakes and rivers, ports and harbors and short voyages on coastal routes shall be provided in Ministerial Order by MLIT.

ex Ministerial Order by No. 20 of 1899 Para.1: Areas of lakes and rivers, ports and harbors and short voyages on coastal routes shall be smooth water areas.

= carriage in ports was subject to rules for carriage on land

Art 569 [3] Carriage by Sea: carriage of goods or passengers by ship provided in Art 684 (including non-seagoing ship provided in Art 747).

- ※ Seagoing Ship: Seagoing ship for commercial purpose (with exception) (Art 684)
- ※ Non-Seagoing ship: Ship for commercial purpose navigated exclusively in lake and rivers, ports and harbors and other waters except the sea (ditto) (Art 747)

II. Overview of the amended Act

3 Main points of amendments – transport

(2) Notification obligation concerning dangerous goods

- ▶ Comprehensive definition of dangerous goods (Art 572)

Goods of inflammable, explosive or other dangerous nature

- ▶ Shipper's express obligation to notify relevant information (Art 572)



- ▶ Claim damages for violation of notification obligation

- ▶ If shipper's failure to notify is "due to a cause not attributable to shipper's fault", he/she is not liable. (Civil Code Art 415(1) Proviso as amended)
- ▶ Application to international carriage depends on the possibility of different construction (strict liability) under Int'l COGSA (COGSA Art 6(2))

Cf. Hague-Visby Rules' construction: fault based or strict liability has been an issue of debate

Cf. Rotterdam Rules: expressed as strict liability

II. Overview of the amended Act

3 Main points of amendments – transport (3) Exemption of expensive goods

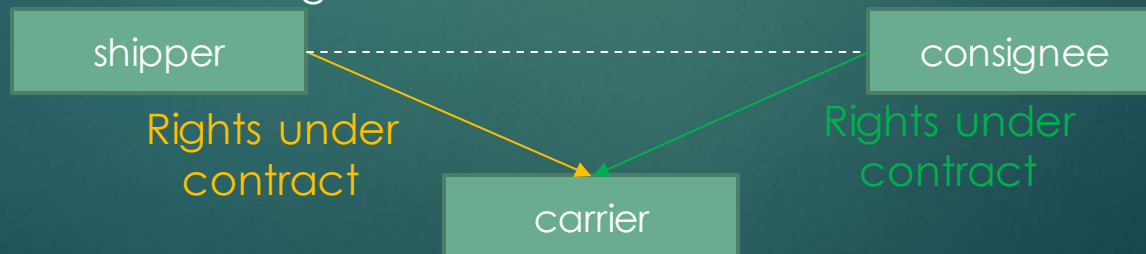
- ▶ Express provisions as to exception of exemption as to expensive goods (Art 577(2)/ex Art 578)
 - ▶ If the carrier had known at the time of contract
 - ▶ If loss or damage was caused intentionally by or with gross negligence of the carrier
- ▶ Remained applicable to int'l carriage of goods by sea

Art 20 of Int'l COGSA, providing for *mutatis mutandis* application of former Art 578 of Commercial Code to int'l carriage, was deleted: understood this is because the status of Int'l COGSA as special rules to Commercial Code applicable to int'l carriage is now made clear. (cf. Art 16(1) of Int'l COGSA providing for expanded application of contractual liability to tort liability makes express reference to relevant provisions of Commercial Code.)

II. Overview of the amended Act

3 Main points of amendments – transport (4) Rights of consignee

- ▶ In the carriage without B/L, cases where the consignee (not a party to contract) is entitled to rights under the contract instead of shipper (a party to contract) are expanded (Art 581/ex Art 583)
 - ▶ In case goods reach destination, or goods are totally lost
 - ▶ If SWB is issued, and if goods are totally lost in transit, the consignee (person merely designated as receiver under the contract by the shipper, party to the contract) is entitled to rights under the contract.
 - ▶ If B/L is issued, legitimate holder thereof is entitled to rights under the contract - unchanged

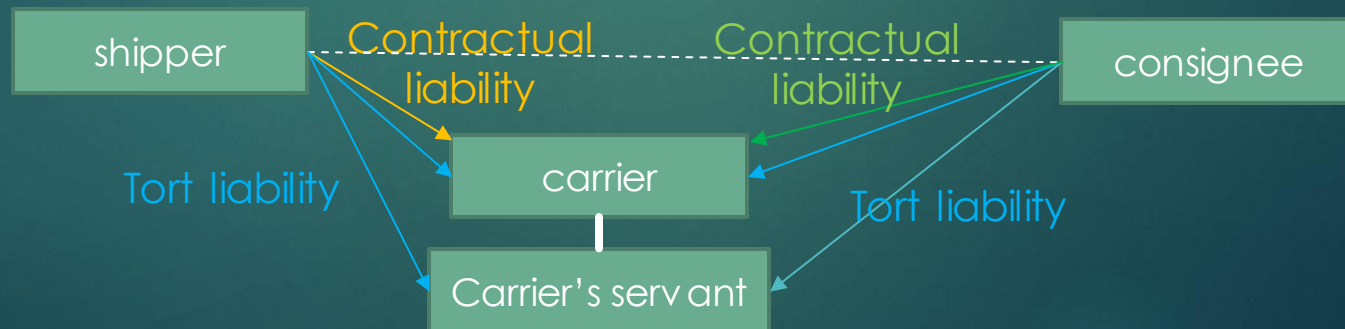


II. Overview of the amended Act

3 Main points of amendments – transport

(5) Relationship btwn contractual and tort liability

- ▶ Carrier's (i) contractual liability and (ii) tort liability to shipper and consignee --- Rules for (i) shall be applied to (ii) (Art 587/COGSA Art 16(1)(2))
 - ▶ Exception: Carrier's (tort) liability to consignee in case consignee had already refused carriage would be undertaken by carrier from shipper but carrier nonetheless did undertake carriage from shipper
 - ※ In practice it would be difficult to imagine this exception is applied to international carriage, since international carriage is utilized for international trade in which shipper is exporter and consignee is importer.
- ▶ Carrier's servant's tort liability is also sub to rules for carrier's contractual liability (Art 588/COGSA Art 16(3))
 - ▶ Exception if servant intentionally caused damage or were in gross negligence

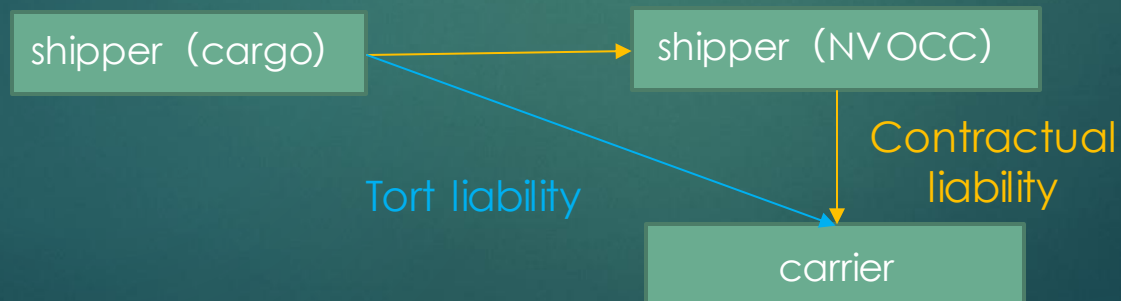


II. Overview of the amended Act

3 Main points of amendments – transport

(5) Relationship btwn contractual and tort liability

- ▶ Carrier's sub-contractor's tort liability is *not* covered.
- ▶ Contractual exemptions (as opposed to statutory ones) *not* generally extended to tort liability
 - ▶ Himalaya Clause is still required.
- ▶ Tort liability to parties other than shipper and consignee is *not* covered.
 - ▶ Tort liability to actual cargo interests where shipper is NVOCC
 - ▶ Circular Indemnity Clause is still required.



II. Overview of the amended Act

3 Main points of amendments – transport

(6) Combined transport

▶ Contract for combined transport (Art 578)

- ▶ In case two or more modes of carriage, from carriage on land, by sea or by air, are undertaken in one contract

Art 578 Carrier' liability to compensate for damage arising from loss of cargo etc. (omitted) in case two or more modes of carriage from carriage on land, by sea or by air are undertaken in one contract shall be subject to laws of Japan or international conventions to which Japan is a state party, which would be applied if the cause of such loss of cargo etc. occurred during the relevant mode of carriage.

- 2 The preceding paragraph shall apply *mutatis mutandis* where two or more types of carriage on land to which different sets of law would be applied are undertaken in one contract.

II. Overview of the amended Act

3 Main points of amendments – transport

(6) Combined transport

- ▶ If the period when **cause of** loss of cargo etc. occurred is known:
 - Subject to law or int'l convention (to which Japan is a state party) applicable if cause of loss of cargo etc. occurred in that period
 - ▶ Land = General (Book II Chap 8 Sect 1) + Carriage of goods (Sect 2)
(CMR would not apply even if occurred in Europe)
 - ▶ Domestic sea = Book III Chap 3 Int'l sea = COGSA
 - ▶ Domestic air = General + Carriage of goods Int'l air = Montreal Conv etc.
- ▶ If the period when **cause of** loss of cargo etc. occurred is unknown:
 - ▶ General (Book II Chap 8 Sect 1) + Carriage of goods (Sect 2) applicable
 - Not necessarily presumed that cause of loss of cargo etc. occurred during carriage by sea = COGSA not necessarily applicable
- ▶ Not always equal to liability regime of sub-contractors
- ▶ Different arrangements under contract terms are still possible (∵ above is default rules only) and required.

II. Overview of the amended Act

4 Main points of amendments – maritime commerce (1) Liability of carrier by sea

- ▶ Duty of seaworthiness in both voyage charter and carriage in general ship for domestic trade
 - ▶ Amended to fault (due diligence) based liability
 - ▶ Seaworthiness clarified, including manning etc. and cargoworthiness

Art 739 (Substantially the same as Arts 5, 15(1) of Int'l COGSA)

- (1) The carrier shall be liable to compensate for damage arising from loss of, d damage to or delayed arrival of the goods due to its failure in the following matters at the commencement of the voyage, provided, however, if it proves exercise of due diligence, it shall not be liable:
 - 1) To make the ship seaworthy;
 - 2) To properly man, equip, and supply the ship; and
 - 3) To make holds, refrigeration chamber and other parts of the ship in which goods are carried fit and safe for their reception, carriage and preservation.
- (2) Any agreement to exempt or reduce the carrier's liability to compensate for damage under the preceding paragraph shall be null and void.

II. Overview of the amended Act

4 Main points of amendments – maritime commerce (1) Liability of carrier by sea

- ▶ Prohibition of agreement for exemption in domestic carriage
 - ▶ Voyage Charters
Principle: agreement for exemption allowed in all 1)2)3) below
Exception: compulsory obligation in 3) unchanged vis-à-vis B/L holder
 - ▶ General Ships Agreement allowed in 1)2); not allowed in 3) below

Ex Art 739 (Provision to prohibit agreement for exemption; numbering added)

A shipowner, even if agreement to the contrary are made, shall not be exempt from the liability to compensate for damage arising from

- 1) its own negligence; ⇒repealed
- 2) intentional action or gross negligence of its mariners or other employees, or ⇒repealed
- 3) the Ship's not being seaworthy, ⇒Art 739(2), 756(2): compulsory nature maintained in carriage by general ship; and in voyage charters vis-à-vis B/L holder)

II. Overview of the amended Act

- 4 Main points of amendments – maritime commerce
 - (1) Liability of carrier by sea

Difference in liability regimes for int'l and domestic carriage still exists

【Carriage by General Ships】

- ▶ Int'l Carriage (Int'l COGSA)
 - ▶ Duty to care for goods (Art 3(1)) Compulsory (Art 15(1))
 - ▶ Exemption for navigational error and fire (Art 3(2))
 - ▶ Relaxation of burden of proof by proving facts for exemption (Art 4)
 - ▶ Duty for seaworthiness (Art 5) Compulsory (Art 15(1))
 - ▶ Package/weight limitation and its exception (Art 13, 13-2)
- ▶ Domestic Carriage (Commercial Code after amendment)
 - ▶ Duty to care for goods (Art 575) Default Rule
 - ▶ Duty for seaworthiness (Art 739) Compulsory
 - ▶ No package/weight limitation Agreement allowed to the extent not contrary to compulsory provision for seaworthiness

II. Overview of the amended Act

- 4 Main points of amendments – maritime commerce
 - (1) Liability of carrier by sea

Difference in liability regimes for int'l and domestic carriage still exists

【Voyage Charters】

- ▶ Int'l Carriage (Int'l COGSA) (Arts 15(1),16)
 - ▶ Duty to care for goods (Art 3(1)) Default + Compulsory vis-à-vis BL holder
 - ▶ Exemption for navigational error and fire (Art 3(2))
 - ▶ Relaxation of burden of proof by proving facts for exemption (Art 4)
 - ▶ Duty for seaworthiness (Art 5) Default + Compulsory vis-à-vis BL holder
 - ▶ Package/weight limitation and its exception (Arts 13, 13-2)
- ▶ Domestic Carriage (Commercial Code after amendment)
 - ▶ Duty to care for goods (Art 575) Default Rule (Arts 739, 756(2))
 - ▶ Duty for seaworthiness Default + Compulsory vis-à-vis BL holder
 - ▶ No package/weight limitation Agreement allowed to the extent not contrary to compulsory provision for seaworthiness

II. Overview of the amended Act

4 Main points of amendments – maritime commerce (2) Shipper's/Charterer's right to voluntarily cancel

- ▶ It is made clear that shipper/charterer shall compensate for all loss incurred by carrier if it exercise its right to voluntarily cancel contract
- ▶ To cancel before departure (Arts 743, 753, 755)
 - ▶ Payment of all freight (plus demurrage); or actual loss incurred by carrier (+ loading/discharging costs / consents from other shippers/charterers after commencement of loading)
 - ▶ Former law: half freight (2/3 freight if cancelled before departure of return voyage in case of round voyages)
- ▶ To cancel after departure (Arts 745, 754, 755)
 - ▶ Payment of or security for all freight (plus demurrage) + damage incurred from discharging / consents from other shippers/charterers
 - ▶ Former law: same as law after amendment
- ▶ If no shipment during laytime for shipment (Arts 753(3), 755)
 - ▶ The carrier is entitled to treat contract as cancelled by charterer
 - ▶ Former law: deemed cancelled

II. Overview of the amended Act

4 Main points of amendments – maritime commerce (3) Combined Transport Bills/Sea Waybills

▶ Combined Transport Bills (Art 769)

- ▶ Issued at the request of shipper if carriage on land and by sea is undertaken in one contract
- ▶ Rules for Bs/L are applied *mutatis mutandis* in principle

▶ Sea Waybills (SWBs) (Art 770)

- ▶ Issued at the request of shipper or charterer (instead of Bs/L)
- ▶ Since transfer by endorsement is not envisaged:
 - ▶ No special effect on descriptions on SWB like those on Bs/L or Combined Transport Bills (cf. Arts 760, 769(2)) = Proof contrary to descriptions allowed
 - ▶ e-SWBs (Issue by electronic method) allowed (Art 770(3))
- ▶ Container clause in the context of package limitation (Int'l COGSA Art 9(3)) is applicable to descriptions on SWBs

II. Overview of the amended Act

4 Main points of amendments – maritime commerce

(4) Time charters

- ▶ Categorized as contracts for employment of ships (Art 704)
 - ▶ Contract in which one party (shipowner) agrees to provide an equipped and manned ship with the other party for employment for a certain period of time, and the other party (time charterer) agrees to pay for hire in return
- ▶ Basic rights in addition to rights arising from above definition -
 - ▶ Charterer is entitled to instruct the master about decision of routes and other necessary matters related to employment of the ship, **except check before commencement of voyage and other matters related to safety in voyage.** (Art 705) (↔no express provision for safe port warranty)
 - ▶ Bunker, pilotage, tonnage and other ordinary costs for employment of the ship shall be borne by charterer (Art 706)
 - ▶ Applicable rules for carriage of goods: Notification of dangerous goods, disposal of unlawfully shipped goods, seaworthiness, etc (Art 707)
- ▶ No provision as to which party is liable for collision etc. under tort

II. Overview of the amended Act

4 Main points of amendments – maritime commerce (5) Ships' collisions (6) Salvage

- ▶ Ships' collisions – Special Rules of tort
 - ▶ Rules under 1910 Collision Convention partly incorporated
 - ▶ Time bar 2y from “time of tortious act” for property damage (Art 789)
 - Cf. Convention 2y from “the date of the casualty” regardless of personal or property damage
 - Cf. Former law 1y regardless of personal or property damage but no provision for time to commence (Art 798(1))
 - ▶ Split liability for property damage in both-to-blame collision – not introduced – joint and several liability as joint tort (Civil Code Art 719(1))
- ▶ Salvage
 - ▶ Rules for Special Compensation for protection of marine environment similar to those provided in 1989 Salvage Convention (Art 805) ; but ratification of Convention was beyond the scope
 - ▶ Default Rules LOF, JSE Form, etc. in practice
 - ▶ Time bar 2y after completion of work (Art 806) Former law 1y (Art 814)

II. Overview of the amended Act

4 Main points of amendments – maritime commerce (7) General Average (8) Marine Insurance

▶ General Average

- ▶ More detailed provisions than before, to partly incorporate concepts under York Antwerp Rules (YAR) 1994
- ▶ Default Rules YAR 1994 used in practice YAR 2016 in the future?

▶ Marine Insurance

- ▶ Standards for industry insurance
- ▶ Policyholder or insured is obliged to voluntarily disclose material matters concerning the likelihood of the occurrence (= risk) of any loss to be compensated for under the insurance (Art 820)

Cf. Principle under Insurance Act: obligation to disclose in response to inquiry (Insurance Act Art 4) ; compulsory rules in favor of policyholder or insured cf. default rules in marine insurance (Arts 7, 36[1])

- ▶ Default rules: Insurers' standard clauses used in practice

II. Overview of the amended Act

4 Main points of amendments – maritime commerce (9) Maritime Lien and Mortgage, etc.

Scope and priorities of maritime lien claims (Arts 842, 843)

- Rank 1 claim for damages resulting from loss of life or personal injury, which occurs in direct connection with the operation of a ship;
- ▶ Rank 1 whether or not linked with limitation claim under Act on Limitation of Shipowners' Liability
- Rank 2 salvage charges and general average to be borne by a ship
- Rank 3 tax imposed on a ship in connection with a voyage, pilotage charges and towage charges
- Rank 4 claim for costs arising from the necessity to continue a voyage
- Rank 5 claim held by ship's captain or other mariners arising from employment contracts
- ▶ Scope of this claim (whether linked to the ship in question) was a matter of big debate but express legislation was abandoned
- Rank 6 property damage claims under Art 2(1)[6] of Act on Limitation of Shipowners' Liability
- ▶ Maritime lien subordinate to mortgage was not introduced

II. Overview of the amended Act

4 Main points of amendments – maritime commerce (9) Maritime Lien and Mortgage, etc.

- ▶ Ex Art 704(2) about the effect of maritime lien on shipowners unchanged

(Rights/Obligations of a ships' lessees)

Art 703 A ship's lessee as provided in the preceding article shall have the same rights and obligations as the shipowner vis-à-vis third parties in the matters related to the employment of the ship.

- 2 In case as referred to in the preceding paragraph, any statutory lien arising from the employment of the ship is also valid as against the shipowner; provided, however, that this does not apply if the statutory lien holder knows such employment by the lessee is in violation of its contract with the shipowner.

- ▶ If a ship's lessee owes an obligation in the matter related to employment of the ship, then notwithstanding the obligor is the lessee, maritime lien attaches to the ship, being the property of the shipowner who is not the obligor. (= If the lessee does not discharge its obligations, then it is possible that the ship, being the property of the shipowner who is not the obligor, may be lost.)
- ▶ Big debate about whether this rule shall be applied to statutory lien under the Civil Code too (**statutory lien for preservation of movable goods under the Civil Code Art 320**) express legislation was abandoned
- ▶ This rule applies to employment by time charterers (**Art 707**)

II. Overview of the amended Act

5 Main points of amendments – Others

▶ Int'l COGSA Package Limitation (Art 9(1))

The carrier's liability in respect of the goods ~~per package or unit~~ shall be the higher of the following:

- 1) An amount equivalent to 666.67 unit of account multiplied by the number of packages or units of the goods lost, etc.
- 2) An amount equivalent to 2 units of account multiplied per kilo of gross weight of the goods ~~lost, damaged or delayed in delivery~~ in the preceding subparagraph.

▶ Other amendment of COGSA provisions not made

- ▶ Provisions related to Bs/L (ex Arts 6~9) are now provided in Commercial Code (Arts 757~760) and thus numbering adjusted
- ▶ Freight forwarders Provisions in former law unchanged
- ▶ Towage No provisions

III Conclusion

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- ▶ To adapt social and economical change since enactment of the original Code
 - ▶ Carriage by air, combined transport, SWB
 - ▶ Time Charters
- ▶ To ensure reasonable adjustments of interests among merchants, carriers and other interested parties
 - ▶ Relaxation of liability of domestic carrier by sea (yet unequal btwn int'l and domestic / Compulsory under Convention vs. Default rules)
 - ▶ Notification obligation about dangerous goods
- ▶ To follow up worldwide trends in maritime law
 - ▶ YAR1994, 1989 Salvage Convention
 - ▶ Participation in reunification of law by Rotterdam Rules is still in the agenda in the future
- ▶ Issues in interpretation remained/likely to emerge in the future
- ▶ Effect on practice are considered limited but remains to be seen