Effect and Scope of the Governing Clause in Marine Cargo Policy

Koichi Otani[1]

1. Introduction

1-1. Marine insurance practices of Japan resemble those of the United Kingdom, principally because of the crucial leadership role of that market in international insurance and reinsurance generally, and yet there are many differences. The non-life insurance industry has undergone the drastic market reform since 1996, when the new Insurance Business Law was implemented. Wholesale reform has been taking place as part of the governmental initiative for liberalization and deregulation of the insurance market since that time. And this has naturally affected marine insurance, and individual insurance companies have developed their own business strategies for this class.

By the way, in Japan, as in other countries, Hull insurance and Marine Cargo insurance are two classes of insurance categorized as "Marine Insurance". But cargo insurance in Japan consists of Marine Cargo insurance and Inland Transit insurance. Inland Transit insurance is classified separately from Marine insurance. But since Inland Transit insurance is underwritten by the cargo underwriting divisions of insurance companies, many statistics show Marine and Inland Transit insurance classes combined as if it were one of marine insurance classes. Air cargo is insured under Marine Cargo insurance when shipped internationally, and under Inland Transit insurance when shipped domestically.

On the other hand, Marine Cargo insurance is divided into "Coastwise Cargo" insurance and "Export and Import Cargo" insurance.

"Coastwise Cargo" insurance is the insurance to cover loss of or damage to cargoes carried between Japanese ports and places mainly by waterborne conveyances such as

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1 Professor of Marine Insurance Law

motor vessels or barges.

"Inland Transit" insurance and "Coastwise Cargo" insurance cover domestic goods from warehouse to warehouse against all risks, or alternatively against specified risks such as fire, explosion, sinking, stranding, collision or overturning of conveyances, according to agreements between insurers and assureds. Japanese policies and Japanese General Conditions are used for these two insurances.

And cargoes exported from Japan or imported into Japan are covered by "Export and Import Cargo" insurance. The shippers, the consignees and other interested parties to the goods transported from one country to another have to be thoroughly familiar with the marine insurance cover on goods. Therefore, export and import cargo insurance cover is required to be on a similar basis internationally, and in fact, no remarkable difference exists among the insurance terms available in various countries in this field.

So, in this field of insurance, insurers in the every part of the world stand in a competitive position to each other. So, the Japanese insurance companies use not insurance policy forms translated from original ones written in Japanese but the standard policy form in English. They currently employ two types of English marine cargo policy in this field.

One of them is a form based on the standard form established in 1949 by the Non-Life Insurance Rating Organization of Japan, which was then entrusted by the Marine & Fire Insurance Association of Japan Inc. with work in relation to the establishment of an insurance policy, and it is a traditional insurance policy almost copying verbatim the Companies Combined Policy (Cargo), which was created in 1939 as a unified form for insurance companies by the Institute of London Underwriters on the basis of the Lloyd's S.G. Policy contained in the First Schedule of Marine Insurance Act 1906. To this, the Institute Cargo Clauses (ICC) also established by the Institute of London Underwriters are additionally applied, without any alteration, as standard clauses. These insurance policy forms and clauses have been in use by insurance companies across the board after the approval of the Financial Services Agency (FSA).

The other type of form includes those prepared by individual Japanese insurance companies in line with the thoroughly new standard insurance policy form in English established by The Marine & Fire Insurance Association of Japan Inc., following the model of an insurance policy put in use ever since January 1, 1982, in England in place of the above older form used for many years. This new form was created in England in a manner to preempt the move in the United Nations Conference on Trade and Development (UNCTAD) to establish an international standard marine insurance policy

form and clauses. To the new Japanese insurance policy forms, the various Institute clauses newly established by the Institute of London Underwriters also apply additionally.

1-2. As stated above, the London market replaced the Lloyd's S.G. policy form and Companies Combined Policy by a new simplified form in 1982. At the same time, three kinds of the old Institute Cargo Clauses, *i.e.* I.C.C.(All Risks), I.C.C.(W.A.) and I. C.C.(F.P.A.),were thoroughly revised to I.C.C.(A), I.C.C.(B) and I.C.C.(C). Various other Institute Clauses concerning Marine Cargo insurance have been also revised successively.

However, Japanese insurers continue to issue policies in the old form in response to the requests from clients, unless a letter of credit requires the new policy form and new Institute cargo clauses to be issued on export cargoes.

But both new and old insurance policy forms have a clause which stipulates that "this insurance is understood and agreed to be subject to English law and usage as to liability for and settlement of any and all claims." This clause is called Governing Clause, and in the case of the traditional insurance policy, in particular, is found in the most important part of the contract representing general clauses, called the "bare body" on the face of the insurance policy.

Japanese non-life insurance companies employ insurance policy forms used in England, almost as they are, because it is necessary for them to encourage foreigners who are not familiar with the Japanese language, to use Japanese non-life insurance companies by reassuring them through the adoption of the insurance policy forms used in England whose information is well known in the world. However, even if non-life insurance companies in Japan employ insurance policy forms used in England without nearly any alteration, if, in the event of loss or damage, the liability of an insurance company was determined under Japanese law, prospective users of Japanese insurance companies who are not familiar with it, would hesitate again. For this reason, Japanese non-life insurance companies have come to expressly state in the above Governing Clause to the effect that the determination of liability for, and settlement of, any claims for insurance money shall not be subject to Japanese law but judged in accordance with English law and usage. In this manner Japanese insurance companies have gained credibility and customers.

But this clause often raises disputes about its effect and the scope of its application, because there will be a conflict between English law and Japanese law as to the validity of contract. We should understand that the contract is subject to English law and usage only as to liability for and settlement of claims. But the insurers' liability for claims will be based on the insurance contract which is enforceable in accordance with English law and

usage, and the insurance contract which is judged illegal by English law will not be enforced, even if it is valid in accordance with Japanese law. Many Japanese judges do not understand this point.

2. Facts of the case

Now, concerning the effect and scope of the application of this Governing Clause, we would like to pick up one case. This is the case "*Nicholas D. Connor v. Nippon Fire & Marine Insurance Co., Ltd.*" pronounced by the Tokyo High Court on February 9, 2000. In this case, the Plaintiff X is an American, who was borne in Japan, and was going to move to a new residence in California of the USA. He requested the Carrier Y^1 to transport a set of household goods, including furniture and clothes, owned by him, which were at his house in Tokyo to his new residence in California, and a contract of carriage was concluded between X and the Carrier Y^1. This contract was such as Y^1 would undertake all transportation, including carriage both by land and by sea, from X's house of Tokyo to his new residence and customs clearance in Japan and in the USA.

X gave instructions to Y^1 in respect of the goods, separating them into two groups, namely, those which would be immediately necessary at his new residence and those which he would like to be stored in a warehouse for some time, and requested Y^1 to pack them separately. Y^1 took out the goods from his house on the basis of the contract of carriage.

The Carrier Y^1 concluded an individual marine cargo insurance contract on behalf of X with the Non-Life Insurance Company Y^2 on the basis of a blanket open insurance contract already concluded between both parties.

As X received from the subcontractor of Y^1 a notice early in January of the next year, to the effect that all the goods safely arrived in California and cleared through customs, he conveyed his intention to Y^1 to receive the goods which would be immediately necessary at his new residence, and Y^1 agreed to it.

On February 5, the subcontractor of Y^1 carried the goods to X's new residence by truck, and when they opened the container and made an inspection under the witness of X, it was found that four carpets that should have been included in the goods were not in the container. The subcontractor of Y^1 advised the head office of Y^1, and they checked whether the four carpets were mixed with what should be stored in a warehouse for some time, but could not find.

Then, X demanded Y^2 to pay about 96 million yen as the insured amount of the carpets, but as Y^2 refused to pay, he brought an action against Y^2.

X's 25 carpets were all valuable Persian, and some of them were found to have been smuggled into Japan. In those days the Iranian Transactions Regulations were in effect in the USA and Iranian products were prohibited to import into the United States.

There were many issues in this case, but one of the issues is whether the Plaintiff X violated the Iranian Transactions Regulations and whether the above fact of violation affects the validity of the insurance contract of this case and then whether the Defendant Y^2 is liable for the loss.

3. Allegations of the Parties

The Defendant Y^2 alleged as follows:

(1) The presence of insurable interests is inevitable for a contract to become valid, and such insurable interests must be lawful. Insurance contracts concerning prohibited goods are void, regardless of the good will or malice of the party concerned. According to the Iranian Transactions Regulations the importation of Iranian products into the US is, in principle, prohibited and for the purpose of importation, it is required to obtain a special license from the Foreign Assets Control Board of the US Department of the Treasury. However, the carpets of this case were Iranian carpets, whose import into the US is, in principle, prohibited, and X did not obtain a special license when importing the carpets of this case into the US, for which reason X's act is apparently against the Iranian Transactions Regulations and the insurance contract of this case is void as it is without an insurable interest.

(2) Even if they assume that the insurance contract of this case is not void, it is required that the marine adventure insured is a lawful one and performed in a lawful manner under English law, which is the governing law concerning the insurer's liability for indemnity in the insurance contract of this case (Article 41 of MIA), and the carriage of cargo by sea covered by the insurance contract of this case cannot be performed in a lawful manner at all, it is *per se* an unlawful marine adventure and, thus, contravenes Article 41 of the same Act. The Defendant Y^2 as an insurer is not liable for indemnity on the basis of the above contract pursuant to Article 33 of the same Act from the date of the above contravention, *i.e.*, the date of the conclusion of the insurance of this case.

(3) It is impossible that the validity of the insurance contract of this case is immune from the contravention of the Iranian Transactions Regulations committed by the Plaintiff from such facts as: 1) the Iranian Transactions Regulations are criminal regulations containing penal provisions, including imprisonment, against violators; 2) it is impossible to obtain a special license for the import of the license upon their importation,

it would have been impossible to obtain it; 3) whether the Plaintiff was aware of the Iranian Transactions Regulations or not does not affect the illegality of the Act; 4) in view of that X has a hobby of collecting expensive carpets and is a US citizen engaged in the trade of various goods, including carpets, it is unthinkable that X did not know the same regulations; 5) the Carrier Y^1 was not notified by X of the inclusion of Iranian carpets in the goods of this case and there is no fact that X also took procedures for customs clearance by declaring the inclusion of Iranian products.

(4) Where the Iranian Transactions Regulations prescribe the prohibition of providing financial support for importation of Iranian products into the US or aid or other services, supporting by insurance the carriage of goods violating the same regulations amounts to a contravention of the same regulations. It follows that if the Defendant pays the insurance money to X on the basis of the insurance contract of this case, there is a possibility of Y^2 being criminally indicted in the US. X cannot claim against Y^2 the payment of the insurance money of this case, by which Y^2 may be criminally indicted.

(5) The prior disclosure on the basis of 19 USC Sec. 1592 and 19 CFR 162.74 is an arrangement in which, even if there is an act of violation, a violator confesses to the act of violation before a formal investigation is made or in a state where the violator is unaware of the commencement of a formal investigation and since US customs merely decided not to punish X as part of the operation of the above system and they did not judge that the importation of Iranian carpets into the US without obtaining a special permit had no problem at all, the illegality of X's act does not vanish by the disposal of the above US customs.

The Plaintiff X argued as follows:

(1) Even if the act of importing the carpets of this case is in contravention of the Iranian Transactions Regulations the above violation does not affect the validity of the insurance contract of this case or Defendant Y^2's liability for indemnity for the following reasons:

1) The provisions of kinds and disposal of prohibited goods are mere administrative regulations of the government which import such goods and does not affect the validity of a contract under private law. The Iranian Transactions Regulations, in particular, were established against the background of disputes between the nations of the US and Iran, and are clearly different in nature from such cases as the commodities imported are themselves problematic as in ordinary regulations concerning contraband. And in their

practical operation, strict restrictions are not considered to be in place.

2) Under the Iranian Transactions Regulations, the import of up to five Iranian carpets as personal effects at the material time when the insurance contract of this case was concluded and, furthermore, the importation, not for commercial purposes, of Iranian household goods which an individual who has lived in a foreign country has actually been using has come to be permitted by the general authorization dated May 9, 1995, issued by the Foreign Assets Control Board of the U.S. Department of the Treasury.

3) The carriage contract of this case also includes Defendant Y^1's obligation to perform customs clearance and Y^1, which is an expert in international transportation, must have been well versed in legal restrictions on US customs clearance procedures. However, not only X but also Y^1 was not aware of the presence of the Iranian Transactions Regulations at the material time of the conclusion of the carriage contract of this case and lacked the perception of the illegality of importation of the carpets of this case into the US.

4) Although X declared to Y^1 that a large number of carpets were included in the goods to be transported upon the conclusion of the carriage contract of this case and Y^1 expressly indicated the above point in the procedure of customs clearance, US customs did not take it up as a problem and gave permission of clearance and even if US customs had pointed out the lack of documents for clearance procedures, the submission of additional documents must have resulted in the grant of a special permit.

(2) When, though the arrangement of prior disclosure, X disclosed to US customs the fact that X imported the carpets of this case into the US and that he did not obtain a special license through his ignorance of the Iranian Transactions Regulations and asked a question as to whether the above act would give rise to legal problems, X received any punishment at all. This is an expression, as an official view of the US government, that they do not seek any responsibility from X and is a judgement final and binding.

4. Judgment by Tokyo District Court

The Tokyo District Court judged as follows:

(1) At the material time of this incident in question, the import of products originating from Iran into the US was, in principle, banned under the Iranian Transactions Regulations and that, although the import of up to five Iranian carpets was generally permitted, as to the import of carpets exceeding that quantity, even one of them could not be authorized without obtaining a special license from the US Treasury

Department's Office of Foreign Assets Control on the basis of the same regulations. Since the Plaintiff *X* does not argue the facts that each one of the 25 carpets enumerated in the inventory of carpets in this case are of Iranian make and that no special permit for the importation of the carpets into the US was obtained, *X*'s act to import the carpets as enumerated in the inventory of carpets of this case is regarded as an illegal act against US law, prohibited by the Iranian Transactions Regulations.

(2) On the basis of this judgement, an examination is made as to whether the insurance contract of this case which stipulates, in the carriage of such goods as prohibited from importation into the US, compensation for damage incurred to the relevant goods, is void or not as it lacks an insurable interest.

1) It is understood that the insurable interest is an economic interest which the Assured has in respect of whether a peril insured against occurs or not, concerning the insured object. However, the interest must not be such as the compensation for it is against laws or regulations, or public policy, and it is construed that, as to an interest based on a transaction of prohibited goods, even if it constitutes an economic interest, it cannot be recognized as an insurable interest.

2) According to the evidence, the spirit of the establishment of the Iranian Transactions Regulations is, against the background of the Iranian government's active support of terrorism, and hostile and illegal military action against merchant ships of the US and other non-belligerent nations, to prevent the importation into the US of goods related to Iran or other conduct from financially contributing to such terrorist actions or from promoting military action, and the measures provided in the regulations are considered to be measures to counter acts taken by the Iranian government; the above regulations contain provisions concerning the seizure of illegal goods and penal provisions, including imprisonment, against violators and there are, in the US, some cases where a sentence of gilt was delivered by reason of violation of the same regulations; the act by the Defendant Y^2 of paying insurance money to the Plaintiff *X* on the basis of this insurance contract after learning *X*'s violation of the same regulations is a violation of the Regulations and it is recognized that there is a possibility of Y^2 being criminally charged as it is considered to promote the transport of prohibited imports pursuant to the regulations.

3) According to the facts in 1) and 2) above, the insurance contract of this case was intended, in the carriage from Japan to the US of Iranian carpets whose import into the US was prohibited, to compensate for damages incurred with the relevant carpets, and the payment of insurance money on the basis of the insurance contract in this case is also

prohibited, and it is recognized that there is a risk of the insurer of being criminally charged if the payment is made. If the validity of such insurance contract is admitted, it will not only promote illegal acts, as a result, but also create illegal conduct in a positive manner as a need will arise for the insurer to pay the insurance money.

The insurance contract in this case, therefore, lacks an insurable interest and should be construed as void since it is *per se* against public policy. It should be understood at least that the payment of insurance money by which the insurer is feared to be criminally prosecuted cannot be claimed.

5. Judgment by Tokyo High Court

As mentioned above, the judgment was given against the Plaintiff X by the Tokyo District Court.

So X appealed to the Tokyo High Court and the Court pronounced the opposite judgment.

(1) Even if Y^2 is subjected to execution on the basis of a judgment ordering payment of insurance money to X in Japan, it is not necessarily clear what criminal punishment will be imposed on Y^2 in the US. At least in Japan, it is not against law at all to transport, from Japan to the US, carpets of Iranian origin collected and owned or stored for personal pleasure, as cargo for relocation (household goods), accompanying a person's move to live in the US; and since, even if it is in contravention of the Iranian Transactions Regulations and it is impossible for X to obtain a special import license, as specified in the same regulations, to take them into the US, the regulations are only temporary administrative restrictions and carpets are essentially different from ordinary contraband, such as drugs and weapons, which contain problems themselves (in effect, the regulations generally gave permission to import up to five carpets at the material time of this case and came to allow, in principle, people entering the US to import their owned Iranian carpets by the general licensing on May 9, 1995. The Plaintiff made a prior disclosure against the US Department of the Treasury, Office of Foreign Assets Control and received a reply to the effect that no punishment was planned against the import of the carpets of the case by X into the US, meaning that it was finally decided that no criminal punishment was to be imposed), it is questionable to thoroughly control the matter by making the contract null and void and, thus, the contract of transport cannot be held void since it is against public policy. It, therefore, follows that it is also difficult to think that the insurable interest of this insurance contract is against public policy. From what was described above, it cannot be said that the contract of transport and contract of

insurance in this case cannot be performed.

(2) Even if the act of importing the carpets of this case is in contravention of the Iranian Transactions Regulations, the Assured's violation does not affect the validity of a contract under private law or Y^2's liability of indemnity, because the Iranian Transactions Regulations are mere administrative regulations of the government and the case in question is clearly different in nature from cases where, as specified in provisions concerning ordinary contrabands, goods themselves present problems.

(3) The insurance contract is not included in the acts listed in the Iranian Transactions Regulations and even if they assume that there is a possibility of it being one of such acts, those disposed of as violations are restricted to those intentional or deemed to be intentional. Since X and Y^2 were unaware of these regulations at the point in time when the insurance contract of this case was concluded, there is no possibility of the insurance contract of this case itself being in contravention of these regulations. Besides, if Y^2 pays insurance money to X on the basis of the insurance contract of this case, there is no possibility of the same defendant being criminally indicted in the US.

6. Comments

6-1. It goes without saying that the Governing Clause means that the determination of liability for, and settlement of, any claims for insurance money shall be subject to English law and usage and that matters other than that are not subject to English law. It, therefore, follows that a problem may arise as to the determination of the effectiveness of an insurance contract itself, for instance, whether it is subject to the law where the contract is concluded, where the contract is executed, where the head office is located, where loss giving rise to an insurance claim occurs or where the justice court exists. However, if we assume that the parties to this case took for granted that the effectiveness of this insurance contract was subject to Japanese law, a question arises as to whether the insurance contract on the insurable interest the assured had in Iranian products to be transported to the United States of America was valid or not. From the theory of insurable interests, the insurable interest is required to be lawful and, for that reason, illegal interests cannot be insured. To force the transport of this case would naturally result in a breach of the law of the foreign country and, therefore, the interest in the cargo which is the object of the illegal carriage cannot be insured. Furthermore, it cannot be made an effective interest by any agreement or approval, which is a generally accepted idea at present.

Even if we substantially concede that the insurance contract was valid under

Japanese law, as shown in the opinion of the Tokyo High Court, in the event of loss, the insurer's liability, under the insurance contract, to the claim for insurance money must be naturally judged in accordance with the various provisions of the insurance policy, various clauses attached thereto, including institute cargo clauses and other additional clauses typed or hand written, and English law and usage (in compliance with the governing law clause, one provision among the general insurance clauses of the insurance contract of this case) which lie behind these clauses.

For that purpose, Section 41 of the English Marine Insurance Act 1906, which was enacted by compiling and systematizing past English judicial precedents of marine insurance behind the contract clauses mentioned now, specifies to the effect that "There is an implied warranty that the adventure insured is a lawful one, and that, so far as the assured can control the matter, the adventure shall be carried out in a lawful manner," thereby seeking the lawfulness of the marine adventure on which the insurance contract is based, as a precondition to consider the liability of the insurer in the event of loss. This is the so-called "implied warranty of legality" and it must be exactly complied with, as a precondition to judge the liability of the insurer. It, therefore, follows that if this requirement is not rigorously met, the insurer is discharged from liability as from the date of the breach of the warranty.

The warranty in English law means a promissory warranty and it is absolute in nature like this regardless of whether it be material to the risk or not, *i.e.,* whether the breach is a minor one or not; and the insurer is discharged from liability even if the warranty is complied with before the loss or, further, even if the damage is incurred by an accident completely unrelated to the breach of the warranty. This is apparent if you look at the famous case in 1870 "*Quebec Marine Insurance Co. v. Commercial Bank of*

Canada."[2] This is a sharp contrast to the possible grant in our country of, for instance, the claim for fire insurance money for a burnt house constructed in violation of the Construction Standards Act or for automobile insurance money for a vehicle in violation of the Road Traffic Law. Since the warranty in English law is extremely important and, as to the implied warranty, in particular, completely different from representations or conditions, the assured cannot be discharged from the responsibility for the outcome of the breach of it even if the breach be based on good faith or out of ignorance, or regardless whether it be material to the risk or not, it is beyond question that the seriousness of the breach does not matter, which is in contrast to the Tokyo High Court, which ruled, "Since the breach was not serious, the assured is excused." To make a repetition, this is an indispensable condition which must be strictly satisfied as a precondition to bind the insurer to shoulder liability under an insurance contract and, if this is not rigorously met, the insurer is discharged from liability as from the date of the breach of warranty (Section 33 of MIA 1906; Templeman, pp. 53 and 591; Susan Hodges, *Marine Insurance Act*, p. 98 and thereafter; etc.), *i.e.,* in this case retroactively upon conclusion of the contract.

The legality of a marine adventure specified in Section 41 of MIA 1906 is naturally determined on the basis of English law, and while a certain marine adventure may be legal in respect of the law of a certain country other than England but may be illegal in English law. For example, while a certain country and England are at war, a vessel loaded with a cargo owned by a person from the former country is engaged on a voyage frustrating a blockade enforced by England, this marine adventure is illegal under English law and, therefore, an insurance contract in which an English insurer undertakes to cover the risks

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2 The English Marine Insurance Act has, as well as the above mentioned implied warranty, provisions concerning an implied warranty of seaworthiness, with which this case is concerned. In this case, a vessel was insured for a voyage from Montreal to Halifax in Nova Scotia. The vessel had a latent defect in her boiler upon departure from Montreal. The defect manifested itself while the vessel was sailing down the St. Lawrence River, thereafter, the defect incapacitated her to navigate and became so serious that the vessel was forced to return to Montreal. After repairs, the vessel returned to the original voyage but she encountered stormy weather, completely irrelevant to the defect, and sank, resulting in a total loss. Since, in such circumstances, the vessel was unseaworthy upon the commencement of her voyage, and even if such defect was repaired, the vessel was held unseaworthy and the insurer was discharged from the liability to claims.

of arrest by the authorities of his own state, is illegal.

6-2. On the contrary, a certain marine adventure, which is legal in English law, may be illegal under the law of another country. Concerning this matter, as Plaintiff's attorney in this case has resorted to, Dr. Yoshisaku Katoh says that since under English Law an illegal action in a country other than England is not a matter even to take up, it is legal to conclude a contract to insure a vessel which intends to be engaged in smuggling in such a country or such intended cargo, and that, in this point, the situation is the same in our country.[3] That the situation is the same in our country would mean, we think, that even if an insurer in our country undertakes an insurance contract covering a vessel to be engaged in a marine adventure or cargo, in contravention of foreign law, such insurance contract is valid. It follows that, if cargo is detained by reason of a breach of a foreign law or if cargo is confiscated by foreign authorities since the assured has intended to smuggle into that country, it corresponds, according to Dr. Katoh's theory, to the loss resulting from capture, disposal by authorities or restraint of princes and the insurer may, depending on the situation, have to bear the liability.[4] Dr. Teruzoh Katsuragi also expresses that a breach of foreign laws and conventions is against the comity of nations, but that insurance contracts which protect vessels and cargoes related to marine adventures which violate the comity of nations are neither illegal nor invalid.[5] These statements apparently come from a certain case[6] in the past where Lord Mansfield ruled that in England "the insurance of a marine adventure clearly and publicly intended to deceive a foreign revenue law is not illegal even if fake documents have been made for a fraud," and not stopping there, "even if the trade covered by insurance is undertaken in contravention of an express condition of a treaty to which England and a foreign country are parties, such insurance is valid. At the time of the case, English judicial courts had a tendency, out of the idea that allowing the maximum freedom of trade was most important, to give a blind eye to or intentionally overlook illegality even if a contract was in breach of foreign laws or conventions.[7]

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3 Katoh, *New Theory of Marine Perils*, p.19.

4 Katoh, *ibid.*, pp. 502-503. Against this theory of Dr. Katoh, we refer to the view of Court of Appeal Judge Lord Denning in the case *Mackender v. Feidia A. G.* [1966] 2 Lloyd's Rep. 455.

5 Katsuragi, *Theory of Cargo Insurance Policy of 1963*, p. 178.

6 *Lever v. Fletcher* (1780) 1 Park, Ins. 507; *Planche v. Fletcher* (1779) 1 Dougl. 251.

7 Arnould, *On the Law of Marine Insurance and Average* (1981), s. 745.

Such a situation is the point in issue in this case. That is, it is the same situation in the point of whether, concerning loss in respect of the carriage of Persian carpets which is lawful under Japanese law in spite of its being in contravention of the laws of a foreign country, the insurer which undertook insurance covering the cargo on the basis of a marine insurance policy in English is liable or not.

Concerning this point, after the age of Lord Mansfield, along with changes in the concept of international faith and comity of nations, the court has come to show hesitance, resentment or resistance against enforcing such contracts and starting with the ruling in the case *Regazzoni v. Sethia* by the House of Lords,[8] in particular, people have come to believe that it has been clearly established that, probably unless a contravention is against the revenue law of a foreign country or other laws of a foreign country with unfair and discriminatory nature,[9] contracts which contravene domestic laws of foreign

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8 In this case, Polisseno Regazzoni, a resident in Switzerland, (buyer) and K. C. Sethia, an English company, (seller) concluded a purchase contract for the purpose of reselling in South Africa, 500,000 bags of jute of Indian origin to be transported from India to Italy. The export of jute from India to South Africa was banned by Indian law (the Sea Customs Act 1879 (as revised on December 1, 1950) in Articles 19 and 134 and an Order on July 17, 1946). The seller rejected the performance of the contract for reasons of the contract in breach of Indian law and the seller filed a law suit with an English judicial court seeking compensation for damages. The court ruled that the seller had the right to reject the performance of the contract (*cf.* [1958] A. C. 801). The actual judgement in this case was that the contract was unenforceable and it did not clearly indicate that the contract was illegal (one can say a contract is illegal only when it is illegal under the domestic law; and if a contract is illegal under the law of the place of solution and if the enforcement of a contract regulated by the law of a foreign country is contrary to the law of the forum *(lex fori)*, the contract is not said to be invalid but is more properly said to be unenforceable), but any contract which falls in the same category as the said case (while the above case was in relation to a purchase contract, this principle can be applied to marine insurance – *cf.* Lambeth, *Templeman on Marine Insurance*, 6th ed. (1986), p. 51 n. 4) is considered to be an unlawful one in the sense in Section 3 of MIA 1906 (Arnould, *ibid.*, s. 744 n. 11).

9 In the USA, even a contract which violates the revenue law of a foreign country is held – *cf.* Mullins, *Marine Insurance Digest* (1959), pp. 124-125.

countries or laws of the place of solution are held invalid.[10] [11] [12]

6-3. As stated above, though Plaintiff in first instance employed, in sessions of the appellate court, Katoh's theory and Katsuragi's theory mentioned above (High Court ruling Pages 12 and 13), the concept to hold neither unlawful nor invalid an insurance contract which violates the law of a foreign country only if it is legal under Japanese law, is now completely obsolete in England.

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10 Turner, *Insurance of Exports* (1966), p. 70.

11 In the case *Foster v. Driscoll* [1929] 1 K. B. 470, when the Prohibition was enforced in the United States of America, it was ruled that even if the export and import of alcoholic beverages was permitted in England, the marine adventure to smuggle whisky to the US was illegal. – *cf.* Treitel, *The Law of Contract*, 3rd ed. (1970), p. 377.

12 Arnould, *ibid.*, s. 744.