COUNTRY COMPARATIVE GUIDES 2023

The Legal 500 Country Comparative Guides

South Korea

SHIPPING

Contributor

Jipyong

Choon Won Lee

Partner, Head of Maritime & Aviation Team | cwlee@jipyong.com

Dahee Kim

Partner of Maritime & Aviation Team | dhkim@jipyong.com

This country-specific Q&A provides an overview of shipping laws and regulations applicable in South Korea.

For a full list of jurisdictional Q&As visit **legal500.com/guides**

SOUTH KOREA
SHIPPING

1. What system of port state control applies in your jurisdiction? What are their powers?

Korea is a party to the international conventions regarding safety of ship and crewmembers and protection of environment, including SOLAS, MARPOL, STCW, etc. Further, a number of domestic laws of Korea (including the Ship Safety Act, the Maritime Safety Act, the Marine Environment Management Act, and the Seafarers Act, etc.) stipulate provisions on port state control in accordance with the above international conventions. Generally, the port authority of Korea will investigate whether the foreign nationality/flag vessels that enter into Korean ports are in compliance with relevant standards under the international conventions, and if they find breach, will order the vessels to rectify the same. If the breach is deemed to be serious and may affect the safety or cause pollution, etc., the port authority may suspend and bar the vessel from departure until the breach is rectified.

2. Are there any applicable international conventions covering wreck removal or pollution? If not what laws apply?

As regards wreck removal, Korea is not a party to the Nairobi International Convention on the Removal of Wrecks 2007. Instead, there are a number of laws that are applied to wreck removal, namely: the Act on the Arrival, Departure, etc. of Ships; the Public Waters Management and Reclamation Act; the Maritime Safety Act; and the Marine Environment Management Act. Under these acts, shipowners can be ordered to remove shipwreck.

As regards pollution, in addition to MARPOL, Korea is a party to: (i) the International Convention on Civil Liability for Oil Pollution Damage 1969 and its 1976 and 1992 Protocols; (ii) the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1971 and its 1992 and 2003 Protocols; and (iii) the International Convention on Civil Liability for Bunker Oil Pollution Damage 2001. Further, the Compensation for Oil Pollution Damage Guarantee Act has been enacted as the domestic law and prescribes the liability of shipowners which contributed to oil pollution. The Compensation for Oil Pollution Damage Guarantee Act generally reflects the above conventions that have been ratified and come into force in Korea. The Marine Environment Management Act of Korea also has provisions relevant to the maritime pollution, under which the discharge of waste, oil, noxious liquid substance and other pollutants from vessels are restricted.

3. What is the limit on sulphur content of fuel oil used in your territorial waters? Is there a MARPOL Emission Control Area in force?

Under the Marine Environment Management Act of Korea and its subordinate rules, the limit on sulphur content of fuel oil in Korean waters are: (i) 0.1% in emission control areas; and (ii) 0.5% in other areas.

The Special Act on the Improvement of Air Quality in Port Areas of Korea and its subordinate rules stipulate such “emission control areas” where 0.1% limit is applied, which encompass most of major ports in Korea, including Busan, Ulsan, Incheon, Yeosu, etc.

4. Are there any applicable international conventions covering collision and salvage? If not what laws apply?

As regards collision, Korea is a party to the Convention on the International Regulations for Preventing Collisions at Sea 1972 (COLREG, 1972), although Korea is not a party to the International Convention for the Unification of Certain Rules of Law with respect to Collisions between Vessels 1910 (the “Brussels Collision Convention”). As for domestic laws, Part V (Maritime) Chapter Three (Maritime Perils) Section Two (Collision of Ships) of the Korean Commercial Act (“KCA”) stipulates

provisions on collision of vessels (Articles 876–881), which are understood to be influenced by and reflect the Brussels Collision Convention.

As regards salvage, Korea is not a party to the International Convention on Salvage 1989. As for domestic laws, Part V (Maritime) Chapter Three (Maritime Perils) Section Three (Salvage) of the KCA stipulates provisions on salvage (Articles 882–895), which are understood to be influenced by and reflect the major aspects of the International Convention on Salvage 1989.

5. Is your country party to the 1976 Convention on Limitation of Liability for Maritime Claims? If not, is there equivalent domestic legislation that applies? Who can rely on such limitation of liability provisions?

Korea is not a party to the Convention on Limitation of Liability for Maritime Claims ("LLMC") 1976 or its 1996 Protocol. However, there is equivalent domestic legislation that applies – Part V (Maritime) Chapter One (Maritime Enterprise) Section Four (Limits on Liability of Shipowners, etc.) of the KCA stipulates provisions on general/global limitation of liability of shipowners (Articles 769–776). The scope of the shipowners' global limitation generally matches the 1976 LLMC levels – only the global limitation level for damages with regard to a passenger's death and personal injury correspond to the 1996 Protocol level. In accordance with Article 776 of the KCA, the Act on the Procedure for Limiting the Liability of Shipowners, etc. has been enacted to prescribe the procedures for limitation of liability.

Article 774 of the KCA provides that the following parties as well as shipowners can rely on limitation of liability provisions in the KCA: (i) charterer, administrator of a ship, and operator of a ship; (ii) in case the shipowner or the person in (i) above is a corporation, general partner/partner with unlimited liability of such corporation; (iii) shipmaster, crewman, pilot and other employee or agent of such shipowner, charterer, administrator of a ship, and operator of a ship, who have caused claims by his/her act.

6. If cargo arrives delayed, lost or damaged, what can the receiver do to secure their claim? Is your country party to the 1952 Arrest Convention? If your country has ratified the 1999 Convention, will that be applied, or does that depend upon the 1999 Convention coming into force? If your country does not apply any Convention, (and/or if your country allows ships to be detained other than by formal arrest) what rules apply to permit the detention of a ship, and what limits are there on the right to arrest or detain (for example, must there be a "maritime claim", and, if so, how is that defined)? Is it possible to arrest in order to obtain security for a claim to be pursued in another jurisdiction or in arbitration?

At the outset, Korea is not a party to any Arrest Conventions, both 1952 and 1999.

This said, under Korean law, there are mainly three ways to arrest a ship: (i) pre-judgment attachment for the purpose of obtaining security for claim, (ii) judicial auction sale for exercise of security rights such as mortgage and maritime liens, and (iii) judicial auction sale for enforcement of judgment/arbitration award.

Firstly, pre-judgment attachment for the purpose of obtaining security for claim. A creditor who holds a monetary claim (not limited to "maritime claim") against a debtor may obtain security for the claim by attaching the debtor's assets (including a ship) before commencing the merit proceeding and obtaining the outcome (such as lawsuit or arbitration) for the claim (hence so-called "pre-judgment attachment"). In order to apply for the court's decision of pre-judgment attachment of a vessel, the applicant shall be required to show and prove that: (i) the applicant has a monetary claim against the debtor (not necessarily maritime claims or related with the vessel to-be-attached insofar as such claim is monetary one);(ii) the debtor is the registered owner of the vessel and therefore the ship is the debtor's property; and (iii) there is need for obtaining security for the claim before the merit proceeding is concluded, by presenting prima facie evidence.

It is possible to apply for pre-judgment attachment of a ship even if the claim to be secured shall be pursued in another jurisdiction or in arbitration. In this regard, it may be noted that once the court's decision for pre-judgment attachment is delivered, upon request from the debtor/respondent, the court may order the creditor/claimant to submit evidence that the merit proceeding (lawsuit or arbitration in the applicable jurisdiction) has been commenced within a certain time period. If the creditor/claimant fails to submit such evidence for commencement of the merit proceeding,

the pre-judgment attachment decision can be cancelled.

Secondly, judicial auction sale based on security rights such as mortgage and maritime liens. A creditor who holds the security right (meaning mortgage and maritime lien in case of ship) over the vessel for its claim may proceed to exercise such security right by commencing judicial auction sale proceeding against the vessel. In order to apply for the court's decision for commencement of judicial auction sale of the vessel based on the security right, the applicant be required to show and prove that the applicant has the security right (mortgage or maritime lien) enforceable against the vessel to be auctioned. Here, the issue of (i) whether the applicant's claim triggers/establishes the security right (i.e. mortgage and maritime lien) over the vessel, and (ii) the existence, extent, and priority of the security right (i.e., mortgage and maritime lien), shall be decided as per the flag law of the target vessel.

Thirdly, judicial auction sale for enforcement of judgment/arbitration award. A creditor who has confirmed its claim in the merit proceeding and obtained the court's judgment or arbitration award enforceable in Korea, may enforce the same against the debtor's assets. If the debtor owns a vessel, the creditor may enforce such judgment or arbitration award by commencing judicial auction sale proceeding against the vessel.

7. For an arrest, are there any special or notable procedural requirements, such as the provision of a PDF or original power of attorney to authorise you to act?

For all three types of ship arrest as discussed in Q5 above, we will be required to submit the PDF copy of the power of attorney (POA) to the court. The Korean court generally requires the POA to be signed and notarized, but if urgency is involved, the court may (or may not at its discretion) accept the signed copy on the condition that the notarized copy will be supplemented. We will also be required to submit the official corporate document (e.g. corporate registry certificate, etc.) of the creditor/claimant. Such corporate document can be replaced by the Corporate Nationality Certificate issued by the creditor/claimant, insofar as the certificate is signed and notarized.

8. What maritime liens / maritime privileges are recognised in your jurisdiction? Is recognition a matter for the law of the forum, the law of the place where the obligation was incurred, the law of the flag of the vessel, or another system of law?

Under Article 777 of the KCA, the following claims constitute maritime liens: (i) cost of litigation for common interests of creditors; (ii) taxes imposed on the ship concerning the voyage; (iii) pilotage dues and towing fees; (iv) maintenance charges and inspection charges of the ship and its appurtenances after final entry into a port; (v) claims arising out of an employment contract for crewman or employee of the ship; (vi) salvage charges due to rescue operations at sea; (vii) claims concerning distribution in general average; and (vii) claims for damages and loss incurred due to collision of the ship and other navigation accidents, loss of and damage to navigation facilities, port facilities and routes, and the life and body of a crewman or a passenger.

On the other hand, Article 60 of the Act On Private International Law of Korea provides that the maritime lien on a ship shall be governed by the law of the country of registry of the ship. Therefore, recognition of maritime lien shall be a matter for the law of the country of registry of the ship.

9. Is it a requirement that the owner or demise charterer of the vessel be liable in personam? Or can a vessel be arrested in respect of debts incurred by, say, a charterer who has bought but not paid for bunkers or other necessaries?

As discussed in Q7 above, the claims that trigger maritime lien under Korean law are limited to certain maritime claims closely connected with operation of the ship (it may be noted that a claim for bunker or other necessaires are not included). Therefore, general understanding is that insofar as the creditor hold claims stipulated in Article 777 of the KCA, such creditor will be entitled to exercise maritime lien against the vessel, even when the creditor does not have a direct contractual relationship with the shipowner or demise charterer. In this regard, there has been a recent case precedent (Korea Supreme Court Case No. 2017 Ma 1442 delivered on 24 July 2019), where the Korean court ruled that unpaid towing fees under the contract with the charterer of the vessel trigger maritime lien under Korean law.

10. Are sister ship or associated ship

arrests possible?

At the outset, it can be said ship(s) that are subject to arrest differ for each type of ship arrest under Korean law.

For the first and the third types of ship arrest, i.e. (i) pre-judgment attachment for the purpose of obtaining security for claim and (iii) judicial auction sale for enforcement of judgment/arbitration award, the creditor will be able to arrest ship(s) that are owned by the debtor.

This said, the Korean courts recognize the concept of "piercing of corporate veil" in Korea under limited circumstances, e.g. in case of "sham company" (i.e. even though a company exists externally in the form of a corporation, in nature it is merely an empty sham or facade and in substance such company is wholly subordinated to another main company) or in case of "abuse of corporate entity" (i.e. where a main company has set up another company merely to avoid its liabilities – the incorporation or use of the fresh company was aiming only to evade a legal or financial obligation or to perpetrate a fraud for the benefit of the main company).

In case the creditor succeeds in piercing the corporate veil and shows and proves to the court that the owner of the vessel is in substance the same company as the debtor, it is possible to arrest the vessel not owned by the debtor itself. However, it may be noted that recently, the Korean courts tend to take stricter stance in recognizing and granting "piercing the corporate veil". Further, the Korean courts will recognize and accept "piercing of corporate veil" only for the first type of ship arrest (if recognize and accept at all), i.e. (i) pre-judgment attachment for the purpose of obtaining security for claim. "Piercing of corporate veil" will not be possible for the third type of ship arrest, i.e. (iii) judicial auction sale for enforcement of judgment/arbitration award.

For the second type of ship arrest, i.e. judicial auction sale based on security rights such as mortgage and maritime liens, the creditor may be able to arrest the ship on which mortgage or maritime lien has been established, and such ship only.

11. Does the arresting party need to put up counter-security as the price of an arrest? In what circumstances will the arrestor be liable for damages if the arrest is set aside?

For the first type of ship arrest, i.e. (i) pre-judgment attachment for the purpose of obtaining security for claim, it is general practice that the court will require the creditor/claimant to post counter-security before delivering the decision. Such counter-security is required in order to be used for compensation of the debtor's damages and losses arising from possible inappropriate/wrongful pre-judgment attachment, because the pre-judgment attachment decision is usually delivered in an ex parte proceeding based on prima facie evidence and arguments submitted by the claimant only.

As for other two types of ship arrest, i.e. (ii) judicial auction sale for exercise of security rights such as mortgage and maritime liens and (iii) judicial auction sale for enforcement of judgment/arbitration award, deposit of counter-security is not required.

Under Korean law, the arrestor may be held liable for damages in tort when it is found that the arrest has been groundless and inappropriate/wrongful and is therefore set aside, and that the arrestor made such groundless application for ship arrest with intention or negligence.

12. How can an owner secure the release of the vessel? For example, is a Club LOU acceptable security for the claim?

The owner may release the vessel arrested in Korea by way of one of the following measures: (i) the simplest way would be to reach an amicable settlement with the arrestor and have the arrestor release the vessel by withdrawal of the arrest application; (ii) the owner may put up security with the court for the arrestor/claimant's claim and release the vessel; or (iii) in case requirements for the ship arrest have not been satisfied and accordingly the ship arrest is groundless and inappropriate/wrongful, the owner may file an appeal/objection to the ship arrest – when such appeal/objection is accepted, the court will cancel the pre-judgment attachment decision or judicial auction sale of the vessel, and the vessel will be released. Measures (ii) and (iii) can be taken jointly.

Generally, the Korean courts do not accept a Club LOU as acceptable security in releasing the vessel – only cash or if the court allows, surety bond issued by a specific Korean guarantee insurance company (Seoul Guarantee Insurance Company) may be acceptable.

13. Describe the procedure for the judicial sale of arrested ships. What is the priority ranking of claims?

For the first type of ship arrest, i.e. (i) pre-judgment attachment for the purpose of obtaining security for claim, the creditor/arrestor first needs to advance the merit proceeding (such as lawsuit or arbitration) for the claim and obtain a judgment/arbitration award enforceable against the vessel in Korea. Then, the ship arrest will be transferred to the third type, i.e. (iii) judicial auction sale for enforcement of judgment/arbitration award.

The procedure for the judicial sale of arrested ships for the second and third types of ship arrest, i.e. (ii) judicial auction sale based on security rights such as mortgage and maritime liens and (iii) judicial auction sale for enforcement of judgment/arbitration award, are similar. The Korean courts will appoint an appraiser to assess the value of the vessel, and put the vessel on bid for auction sale. Once the vessel is sold, proceeds will be distributed to the creditors.

Under Korean law, maritime liens will have priority over mortgage (Article 788 of KCA). For the claims that trigger maritime lien, the priority will be in the following order for the claims that have arisen from the same voyage (Article 782 Section 1).

(1) cost of litigation for common interests of creditors, taxes imposed on the ship concerning the voyage, pilotage dues and towing fees, maintenance charges and inspection charges of the ship and its appurtenances after final entry into a port

(2) claims arising out of an employment contract for crewman or employee of the ship

(3) salvage charges due to rescue operations at sea and claims concerning distribution in general average

(4) claims for damages and loss incurred due to collision of the ship and other navigation accidents, loss of and damage to navigation facilities, port facilities and routes, and the life and body of a crewman or a passenger

If the claims have arisen from different voyages, the claims arising from the later voyage shall have priority over the claims arising from the previous voyage. Provided, however, that claims arising out of an employment contract for crewman or employee of the ship shall be deemed to have the same priority with the claims arising from the last voyage. (Article 783)

14. Who is liable under a bill of lading? How is “the carrier” identified? Or is that not a relevant question?

In principle, the issuer of the bill of lading will be liable as per the wording of the bill of lading (Article 854 of KCA, “Where a bill of lading has been issued … it is presumed that a contract of carriage has been concluded and cargo has been received or loaded as stated in the bill of lading).

On the other hand, “the carrier”, or “the contracting carrier” to be specific, will be determined subject to the general principle for construction of contract considering all underlying circumstances, including the issuer of the bill of lading and to whom freight is to be paid, etc.

15. Is the proper law of the bill of lading relevant? If so, how is it determined?

Part V (Maritime) Chapter Two (Carriage and Charter) Section Six (Documents of carriage) of the KCA stipulate provisions on documents of carriage including the bill of lading and sea waybill (Articles 852-864). Under Korean law and practice, the bill of lading is generally understood to serve three functions: (i) evidence for contract of carriage; (ii) receipt for loading of the cargo on board the vessel; and (iii) document of title to the cargo, i.e. the right to claim delivery of the cargo.

16. Are jurisdiction clauses recognised and enforced?

The Korean courts have ruled that agreement for exclusive foreign jurisdiction may be effective and valid if: (i) the case does not belong to the exclusive jurisdiction of Korean courts under Korean law; (ii) the designated foreign court has jurisdiction over the case under the law of that foreign country; (iii) the case has reasonable relevance/connection with the foreign jurisdiction; and (iv) such agreement for exclusive foreign jurisdiction is not wholly unreasonable, unfair or against the public policy (Korea Supreme Court Case No. 2010 Da 28185 delivered on 26 August 2010, et al). Based on this principle, general practice is that Korean courts are likely to recognize and enforce jurisdiction clauses.

17. What is the attitude of your courts to the incorporation of a charterparty, specifically: is an arbitration clause in the charter given effect in the bill of lading context?

The Korean courts have ruled that in order for an arbitration clause in the charterparty to be given effect in the bill of lading context, (i) it should be stated in the bill of lading that the arbitration clause in the charter

shall be incorporated, and the charterparty should be specified by the statement in the bill of lading; or (ii) the holder of the bill of lading is aware, or could have been aware of the arbitration clause and the charter. Further, the arbitration clause in the charterparty should not be in conflict with other clauses in the bill of lading, and the arbitration clause in the charterparty should be broad enough to be applied to the bill of lading holder as well as to the disputes between the owner and the charter (Korea Supreme Court Case No. 2000 Da 70064 delivered on 10 January 2003, et al).

18. Is your country party to any of the international conventions concerning bills of lading (the Hague Rules, Hamburg Rules etc)? If so, which one, and how has it been adopted – by ratification, accession, or in some other manner? If not, how are such issues covered in your legal system?

Korea is not a party to the international conventions concerning bills of lading.

Instead, Part V (Maritime) Chapter Two (Carriage and Charter) Section One (Carriage of Goods) of the KCA stipulate provisions on contract of carriage of goods, which are generally understood to reflect contents of the Hague Rules and Hague-Visby Rules, including carrier's duty of care, package/weight limitation of liability and exemption of carrier's liability.

19. Is your country party to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? If not, what rules apply? What are the available grounds to resist enforcement?

Korea is a party to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

20. Please summarise the relevant time limits for commencing suit in your jurisdiction (e.g. claims in contract or in tort, personal injury and other passenger claims, cargo claims, salvage and collision claims, product liability claims).

Commercial claims: 5 years

Tort claims: 3 years from the date the claimant becomes aware of the tortfeasor and damages, or 10 years from the date of the tort action, whichever is earlier
Insurance claims: 3 years (claims for payment of insurance premium: 2 years)

Cargo claims under contract of carriage: 1 year

Claims under voyage charter: 2 years

Claims under time charter: 2 years from date of redelivery

Claims under bareboat/demise charter: 2 years from date of redelivery

General average claims: 1 year from completion of assessment/calculation

Salvage claims: 2 years

Collision claims: 2 years

Product liability claims: 3 years

21. Does your system of law recognize force majeure, or grant relief from undue hardship? If so, in what circumstances might the Covid-19 pandemic enable a party to claim protection or relief?

Under the Civil Act of Korea, when an obligor fails to perform his/her obligation, the obligee may claim damages against the obligor: Provided, That this shall not apply and the obligor shall not be liable to compensate damages if performance of the obligation has become impossible and where this is not due to the obligor's intention or negligence. (Article 390)

Further, when the performance of an obligation of one party to a bilateral contract becomes impossible by any cause for which neither of the parties are responsible, such party may not be entitled to claim counter-performance by the other party. (Article 537)

It is generally understood that in Korean civil law system, these two clauses may be relied upon to seek relief from force majeure situation or undue hardship for contractual relationships. Here, one of the key issues may be that whether the Covid-19 has rendered the performance of the party's obligation impossible without any fault of the party. This can be a difficult and complex issue, and the court will consider all underlying circumstances, including the nature of the contract, the parties' endeavours for performing the obligation, the specific situation of the Covid-19 at the material time, etc.

Contributors

Choon Won Lee
Partner, Head of Maritime & Aviation Team
cwlee@jipyong.com

Dahee Kim
Partner of Maritime & Aviation Team
dhkim@jipyong.com