An Analysis of the Controversial Exclusion Clauses under Korean Automobile Insurance Policy

*Semin Park**

Abstract

The interpretation of the Supreme Court that the exclusion clause of unlicensed driving cannot be applied to the case where there is consent of the approved insured only may leave room for criticism. It is submitted that the Supreme Court neglected the principle of the insurance law on the exclusion clause of unlicensed driving. The interpretation of it shall be interpreted more flexibly. Accordingly, as regards the case where the control or management of the insured was possible, it shall be interpreted it as including all situations with the cases under the control or management of the registered insured, approved insured and persons driving vehicles for them. In other words, if unlicensed driving was done under the express or implied consent of the registered insured, approved insured or drivers for them, the exclusion clause of unlicensed driving should be applied, depending on the detailed situation. The reason is that they all are in the position of insured under the automobile insurance policy, and persons in such positions would have the obligation not to permit driving by an unlicensed driver. According to the current provisions of Article 732-2 and Article 633 of Commercial Law, it has to be interpreted as an imperative provision that does not permit exclusion of the insurer's liability on grossly negligent accidents in personal accident insurance. However, there is a need of re-review of Article 633 that makes the relatively imperative provision for Article 732-2 of Commercial Law due to several problems including the possibility of unconstitutionality. Namely, unlike the current legal provision, the relatively imperative regulation should be made only in cases needed individually for each relevant article and shall review the ways to exclude Article 732-2 of Commercial Law from the subject of relative imperative provision.

* Associate Professor, College of Law, Chungbuk National University LL.B. (Korea Univ.), LLM. (L.S.E., Univ. of London, U.K.) Ph.D (Univ. of Bristol, U.K.).

This article has been reviewed by Seung Ho Choi, Associate, Linklaters, Hong Kong.

I. Introduction

In insurance contract law or an insurance policy, in the event of an occurrence of a certain cause arising in relation to an insured event, the insurer will not be liable for payment of the insured amount. This is referred to as the prerequisite for exclusion. In general, when a policyholder or insured party causes a loss, with intent, to another person, the insurer is not obligated for payment of the insured amount.[1] The rationale for the exclusion is that the intentional infliction of loss conflicts with the material requirement that the event must be an uncertain insured event. This is also related to the issue of 'insurance fraud' or 'moral hazard'. The requirement of 'intent' indicated here is the mental condition for undertaking a certain action(s), knowing that a specific result would occur because of his/her action. This does not necessarily mean the intent to obtain the insured amount.[2] However, the responsibility of loss compensation under the Guarantee of Automobile Accident Compensation Act or the Civil Act still remains, even for an intentional event.

Article 659 of the Korean Commercial Act defines that, if the insured events have occurred due to acts of the policyholder, the insured, or the beneficiary, which are 'intentional or grossly negligent', the insurer is not liable for payment of the insured amount. On the other hand, the 'Bodily Injury Liability I' of the Korean Automobile Insurance Policy excludes 'gross negligence' in relation to the conditions for exclusion. The reason for such exclusion of gross negligence is that it is different from an intentional act committed without fortuity, and when the loss caused by gross negligence is compensated, it is not contrary to the principle of the insurance contract. In other words, under the Bodily Injury Liability I, compulsory insurance with characteristics of social insurance, the insurer has compensation liability on loss caused by gross negligence of the insured, and accordingly, driving while unlicensed or intoxicated is not defined as a condition for exclusion.

Under such a situation, the exclusion clauses for unlicensed driving or driving while intoxicated, which cause particular problems are applicable to the cases of liability insurance, Bodily Injury Liability II and personal accident insurance of an automobile insurance contract.

---

1) Clause 1 of Article 3 of Automobile Insurance Policy

2) Supreme Court Decision: Mar. 9, 2001, 2000 Da 67020

II. Exclusion Clauses for Unlicensed Driving or Driving While Intoxicated in Bodily Injury Liability II

A. Exclusion Clauses for Unlicensed Driving

1. Policy Provision

Section 6 of Clause 1 of Article 11 of the Automobile Insurance Policy states that the insurer shall not be required to compensate for losses incurred from accidents occurring by the insured himself who was driving unlicensed or who allows a driver of an insured automobile to perform an unlicensed operation of an automobile with the express or implied consent of the insured.

2. Concept of Unlicensed Driving

Unlicensed driving is driving an automobile without a driver's license, which is required under the Traffic Road Act. The act of unlicensed driving is a criminal act and is subject to criminal sanction. The Supreme Court held that driving while one's driving privilege is suspended can also be treated as unlicensed driving.[3] Therefore, regardless of whether the driver has sufficient driving skills required for receiving a driver's license, the standard of the decision is whether the action is in violation of law.

Cancellation of a driver's license shall not be valid unless a legitimate notice of public announcement has been made under the Enforcement Decree of the Traffic Road Act. Therefore, an accident which occurs during the period where the person has not yet received the notice of revocation of the driver's license is not applicable to the unlicensed driving under the policy.[4] It is irrelevant whether the driver knew that he was driving without a license since the driver's license is suspended or revoked in accordance with the proper legal procedure. Accordingly, even if the driver does not know that he is driving without a license, the policy of exclusion of unlicensed driving may be applied.[5]

3) Supreme Court Decision; Mar. 9, 1993, 92 Da 38928; Supreme Court Decision; Oct. 10, 1997, 96 Da 19079

4) Supreme Court Decision; May 11, 1993, 92 Da 2530; Supreme Court Decision; Mar. 28, 1989, 88 Do 1738

5) Supreme Court Decision; Mar. 27, 1998, 97 Da 6308

The Supreme Court held that the validity of the driver's license becomes effective when the driver's license is issued by the Commissioner General of the Regional Police Agency and when the applicant is qualified to receive it. In such a case, whether the applicant is in a condition to receive the driver's license is determined on the basis of the date listed on the driver's license, unless there are other special circumstances.[6]

In addition, a driver who holds a 2nd class license but operates a vehicle that is designated to be driven with a 1st class license, such person is also guilty of unlicensed driving. If a foreigner without an international driver's license issued by his/her own country operates a vehicle after one year from the date of entry into the foreign country-even with an international driver's license-or operates a commercial vehicle, he/she is also guilty of unlicensed driving. In the meantime, there is a license to practice driving. When a person with a provisional license wishes to practice driving, he/she must be accompanied by a person who has had a driver's license for at least 2 years.[7] On the issue of whether driving in violation of such a license requirement is applicable to unlicensed driving, the provisional license has to be the right type of driver's license. And if a certain qualifying person is not practicing according to the Road Traffic Act, it is only a cause for the revocation of his/her license, but it shall not be deemed unlicensed driving.[8]

3. Characteristics of Exclusion Provision of Unlicensed Driving and Causation (Applicable to the Case of Driving While Intoxicated)

a) Characteristics of Exclusion Clauses of Unlicensed Driving

The conditions for the insurance exclusions are generally divided into those for the recognized policy and those under the pertinent laws. For exclusions under the policy, the conditions are further classified into Exceptions and Exclusions. The former exclusion is in relation to the cause of an insured event and the latter is completely excluded from the scope of the risk of the insured event. However, these two are not

6) Supreme Court Decision; Jan. 21, 1997, 96 Da 40127; Supreme Court Decision; June 28, 1996, 96 Nu 4992; Supreme Court Decision; June 13, 1995, 94 Da 1139

7) Article 26-2 of Enforcement Decree of the Traffic Road Act

8) Supreme Court Decision; Apr. 10, 2001, 2000 Do 5540

strictly distinguishable in actual practice.

Depending on the characteristics of the condition for exclusion of unlicensed driving with respect to the categories of Exclusion or Exception, the interpretation of the effectiveness of the condition of the exclusion for unlicensed driving differs greatly. If the condition of the exclusion for unlicensed driving is classified as Exclusion, the effectiveness of the condition for the exclusion for unlicensed driving is readily recognized, and it does not require the existence of causation between the unlicensed driving and losses. The Supreme Court appears to interpret the condition of the exclusion of unlicensed driving as a cause for excluding it from the coverage not on the basis that the cause of the accident is unlicensed driving, but on the basis of the significance of the violation of law by virtue of the driver's being unlicensed at the time of occurrence of the accident.[9] Accordingly, the attitude of the Supreme Court shows that the characteristic of the condition of the exclusion of unlicensed driving is an Exclusion.

On the other hand, if the foregoing is looked upon as an Exception, there are divided opinions as to the effectiveness of the exclusion of unlicensed driving. There are some bases for upholding the ineffectiveness of the exclusion of unlicensed driving; first, the insured event is not required to be in violation of law against loss for insurance purposes; second, automobile liability insurance is aimed at compensating the results of an act that is committed in violation of law; third, the policyholder who entered into a comprehensive automobile insurance contract may be excluded from criminal prosecution depending on the situation; and, lastly, it is unjust to provide immunity to the insurer simply on the sole basis of unlicensed driving, considering that unlicensed driving is not a criminal act but a simple administrative matter.[10]

Considering unlicensed driving, the act itself is an element that increases the possibility of the insured event. This undeniably brings a great change in the homogeneity of the risk among the participants in an insurance contract. Under such an objective, interpreting the characteristics of the exclusion for unlicensed driving as an Exclusion would be appropriate to the principles under the insurance contract.

---

9) Supreme Court Decision Mar. 9, 1993, 92 Da 38928

10) Su-Seok Maeng, *A study of the condition for the exceptions and exclusions in automobile insurance policies*, Ph.D Thesis, Dept of Law, Chungnam National University, Korea, 1996, pp. 79; Won-Kyu Rhyu, *Insurer's liability in unlicensed or driving while intoxicated*, in Contemporary issues in insurance law (Seung-Kyu Yang ed., 2000, Seoul) pp. 442

b) Issue of Causation

i. Courts' Decisions

For the requirement of causation between the unlicensed driving and the accident, a lower court held that the insurer's liability is excluded only in the case of the existence of causation between the unlicensed driving and the accident.[11] However, the Supreme Court overturned this decision and recognized the exclusion of the insurer's liability even in the case of lack of causation between the unlicensed driving and an insured accident.[12]

ii. Opposing Opinion on the Decision

In regards to this Supreme Court decision, it can be criticized on the basis that, first, it is not reasonable to exclude the insurer's liability even for an accident that absolutely has no causal link to the unlicensed driving. Secondly, even though the Court believes that it is difficult to prove causation between unlicensed driving and an accident, there may be criticism of the exclusion of the insurer's liability based only upon the fact that the action was one of unlicensed driving even when cases clearly show a lack of causation. Following this opinion, it points to Article 653[13] of the Commercial Law and its proviso in Article 655[14] for a way to resolve the problem of proving causation. In other words, unlicensed driving is a violation of the obligation of risk management, and the insurer who knew the violation of the risk management obligation with unlicensed driving shall cancel the insurance contract within the prescribed time to

11) Seoul High Court Decision 89 Na 19301

12) Supreme Court Decision; June 22, 1990, 89 Daka 32965

13) Article 653【Increases of Risks due to Intention or Gross Negligence of Policyholder, etc. and Termination of Contract】If, during the cover period, the possibility of the occurrence of insured events has been substantially altered or increased intentionally or by gross negligence of the policyholder, of the insured, or of the beneficiary, the insurer may request an increase in the premium or terminate the contract within one month after it becomes aware of the fact.

14) Article 655【 Termination of Contract and right to Demand Insured Amount 】

Even after the insured events have occurred, if the insurer has terminated the contract under the provisions of Articles 650-653, it is not liable for paying the insured amount the may demand the return of the insured amount which has been already paid: *Provided*, that this shall not apply when it was proved that the occurrence of the insured events was not affected by the non-disclosure or misrepresentation or by a substantial alteration or increase of the risks insured.

exclude its own liability to pay the insured amount. However, if the policyholder or insured proves that there is no causation whatsoever between the violation of the above obligation and the occurrence of the insurance event, he/she may receive the insured amount in accordance with the insurance contract.[15)]

iii. Analysis

However, such criticism of the Supreme Court decision is overly technical. Giving the unlicensed driver the chance to change his/her position, even upon violation of law, by requiring the existence of causation, would provoke more serious ethical problems in addition to the anti-social aspect that the act of unlicensed driving inherently possesses. The Korean automobile insurance policy defines the condition of exclusion of unlicensed driving to apply only to 'loss arising from unlicensed driving', but it does not mention 'loss caused by unlicensed driving'. Accordingly, this may be construed as to not require the existence of causation between unlicensed driving and an accident. The Road Traffic Act prohibits unlicensed driving and imposes criminal sanctions for the violation. People recognize that unlicensed driving is hazardous conduct constituting a crime. Under this situation, a policy not providing for compensation for accidents arising from such criminal conduct would not be construed as unreasonable. Accordingly, the exclusion of unlicensed driving shall not be interpreted as applicable to a limited case only for the causation between unlicensed driving and an insured event. Rather, if compensation is to be made even when there is no causation between the accident and unlicensed driving, a criminal act, then this is, to some extent, an act which encourages or instigates the criminal act.

4. Position of the Supreme Court

In the past, the Supreme Court held that unlicensed driving is applicable to the grave violation of pertinent laws, therefore accidents arising under such a violation of laws shall be excluded from insurance compensation, whoever the subject of the driving. On the other hand, the Supreme Court interpreted Article 659 of Commercial

15) Won-kyu Rhyu, previous article, pp. 436 and pp. 441-442; Supreme Court Decision; December 24, 1991, 90 Daka 23899, separate opinion

Law as defining the exclusion based on the cause of loss. Therefore, in the event of unlicensed driving, a circumstance at the time of having the losses (not the cause of the losses), the Supreme Court held that any attempt to limit this condition of the exclusion to the policyholder, insured or a driver hired by them, would be neglecting the purpose of the exclusion clause, and it deemed such limitation as unjust.[16)]

Thereafter, the Supreme Court stated its position by contending that the limited interpretation following the subject of unlicensed driving was still unjust. However, a crucial change was made by the Court. It held that the exclusion clause of unlicensed driving in relation to the scope of application would be an unfair interpretation, if it were applicable to cases of unlicensed driving without the control or management of the policyholder or insured. In other words, the Supreme Court's position was that of a need to change the interpretation that the exclusion clause of unlicensed driving was a provision applicable only to situations where the policyholder or insured may control or manage the circumstances. Consequently, the Court held that unlicensed driving that was conducted in a situation where the policyholder or insured might control or manage means that the unlicensed driving was conducted under the express or implied consent of the policyholder or insured.[17)] Here, the case indicated that the subject of approval (consent) is not the act of driving itself, but the 'act of unlicensed driving'.[18)] Therefore, even if the insured or policyholder approved the driving by the driver, without knowing that the driver did not have a license, the application of the exclusion policy would be impossible. This is the present position of the Court.

In this case, implied consent is interpreted as limiting the cases to have the inference of the intent of approval of the unlicensed driving to those that may be equivalent to express consent. In general, it is conceivable that there is an implied consent for persons who would have easy access to the applicable vehicle, such as family members, relatives or employees of the policyholder or insured. However, a determination of whether the unlicensed driving was performed under the implied consent of the insurance policyholder or insured should be based upon consideration of the overall situation, including the relationship of the policyholder or insured with the

16) Supreme Court Decision; June 26, 1990, 89 Daka 28287

17) Supreme Court Decision; April 23, 1999, 98 Da 61395; Supreme Court Decision; March 27, 1998, 97 Da 6308; Supreme Court Decision; September 12, 1997, 97 Da19298

18) Supreme Court Decision; November 23, 1993, 93 Da 41549

unlicensed driver, circumstances surrounding the operation and management of the vehicle during normal times of operation, the context leading to the unlicensed driving and the attitude of the policyholder or insured on the operation of the vehicle by the unlicensed driver as well as the purpose of operation and others.

The scope of application of the exclusion clause for such unlicensed driving has been narrowed in comparison to its scope of application in the past. However, the requirement of causation between the unlicensed driving and the accident concerned is still not required. The general tendency of the Supreme Court is to make a relatively strict interpretation of the implied consent of the policyholder or insured so that, in the event of unlicensed driving by a third party, the exclusion for unlicensed driving may be strictly applied to such case.

5. Supreme Court's Decision on Consent of Approved Insured [19] and Criticism

a) Facts

A, the owner of a cargo vehicle, registered the vehicle under the name of the company (B) and provided the vehicle for the company's business. A was responsible for the hiring of a driver, payment of the driver's salary, entering into the automobile insurance contract, vehicle maintenance and others. The company (B) entered into the contract with A to pay for the transportation expenses for the cargo it carried. A entered into the comprehensive automobile insurance contract with the insurer as a business vehicle for carrying cargo. The company (B) was registered as a primary insured. A allowed a person (C) who did not have the requisite driver's license to drive the cargo vehicle, and C was involved in an accident while driving the insured vehicle.

b) Courts' Decisions

The lower court based its decision on the fact that the unlicensed driver (C) was the company's driver, the cargo vehicle in the accident was in the ownership of the defendant company (B), and the unlicensed driver (C) was an approved insured under

19) Supreme Court Decision; May 30, 2000, 99 Da 66236

the insurance contract. The lower court found that the unlicensed driving in this case was performed by the insured himself. Therefore, the question of consent of the insured was not a crucial factor. Under this situation, the lower court recognized the application of the exclusion clause for unlicensed driving.[20]

However, the Supreme Court held that the exclusion clause for unlicensed driving was not applicable by interpreting the case as an accident occurring while driving unlicensed under the consent of the vehicle owner A, who was the approved insured. In other words, the Court was interpreting the case as one in which the unlicensed driving under the sole consent of the approved insured was not applicable to a case of possible control or management of the insured. This was because the approved insured would not have the authority to allow a third person to use and drive the vehicle, in principle. In addition, it is deemed unreasonable for the policyholder or the registered insured to lose the right to claim the insured amount only based on the fact of the consent by a person without such authority.[21]

c) Criticism

In regards to the case where control or management of the insured was possible, it shall be interpreted as including all situations of control or management of the registered insured, approved insured and persons driving vehicles on their behalf. In other words, if unlicensed driving was done under the express or implied consent of the registered insured, approved insured or drivers on their behalf, the exclusion clause for unlicensed driving should be applied, depending on the circumstances. The reason is that these circumstances are all entail positions where they are insured under the automobile insurance policy, and persons in such positions would have the obligation not to permit driving by an unlicensed driver.

In the above case, the driver who was involved in the accident while driving the cargo vehicle shall be deemed as the insured under the automobile insurance contract according to Section 5 of Article 12 of the Korean Automobile Insurance Policy, and the circumstances of this accident would be interpreted as falling within the case of

20) Busan High Court Decision; October 14, 1999, 98 Na 12591

21) Same objective: Supreme Court Decision; December 21, 1993, 91 Da 36420; Supreme Court Decision; May 24, 1994, 94 Da 11019

unlicensed driving by the insured himself. In other words, based on the fact that the unlicensed driver was the company's driver and that the cargo vehicle was the property of the defendant company, the person committing the unlicensed driving would be considered an approved insured, eligible for treatment as the insured under the insurance contract. Therefore, such case would fall under the case where the insured himself committing the unlicensed driving, and accordingly, the issue of whether the consent of the insured was given to the person other than the insured would be irrelevant.

The interpretation of the Supreme Court, that the exclusion clause for unlicensed driving cannot be applied to the case where there is only consent of the approved insured, since this would not fall under the case where the unlicensed driving could be controlled or managed by the registered insured, may leave room for criticism. It is asserted that the Court neglected the principle of insurance law on the exclusion clause for unlicensed driving. The Court's interpretation should be interpreted flexibly.

B. Exclusion Clause of Driving While Intoxicated

1. Policy Provision

Under Section 7 of Clause 1 of Article 11 of the Korean Automobile Insurance Policy, it states that "In the event of having an accident when the insured himself was driving while intoxicated or the driver of the insured vehicle was driving while intoxicated under the express or implied consent of the insured, 2 million won (around $1700-contribution money) from the insured amount is excluded. However, in the event that the insured has not paid the contribution money for accident resulting from driving while intoxicated because of economic and/or other reasons, the insurer may pay the damages including the contribution money to the victim first and claim the payment of the contribution money against the insured. In such a case the insured shall immediately pay for any accident resulting from driving while intoxicated to the insurer." This policy provision was newly amended in August of 2001.

2. Issue of Validity of Exclusion Clause

The exclusion clause for driving while intoxicated looks to the violation of lawby considering whether the cause of an accident was the act itself of driving while intoxicated, and it considers the fact that the law was violated in driving while intoxicated at the time of the accident as a cause of exclusion from the subject of compensation of the insured. This is the cause for excluding from the subject of compensation by the insurer. Therefore, its validity has been acknowledged, because defining the condition for exclusion with the circumstances at the time of the loss occurrence, regardless of the cause for such loss occurrence, would not fall under Article 659 of Commercial Law. Such a logical conclusion is consistent with the case previously described concerning unlicensed driving.

3. Definition of Driving While Intoxicated

Driving while intoxicated is considered as the consumption of alcohol in excess of the limit (0.05%) of blood alcohol density defined under Article 41 of the Traffic Road Act and Article 31 of Enforcement Decree of the Traffic Road Act. In the case of driving while intoxicated, as in the case of unlicensed driving, it is irrelevant whether the actual drinking of alcohol was an impediment to the driving. In the event the police's determination of the blood-alcohol density level is not relied upon, the determination of exclusion of the insurer shall be determined by comprehensive examination of the hospital record, record of examination for liver function, confirmation of the doctor or nurse, and others. According to a recent case, a respiratory measurement is an indirect measurement method for the blood-alcohol density level in that the machine has a margin of error, with the possibility of discrepancies depending on the physical condition of each person and the possibility of faulty operation or breakdown of the machine. Considering such risks, Clause 3 of Article 41 of the Road Traffic Act states that the measurement may be re-performed by blood sampling with the consent of the driver, should the driver disagree with the original measurement.

In the case of driving while intoxicated, the 'driving' refers to the use of a vehicle in accordance with its generally intended purpose for use on the road. And the Supreme Court has declared that even the act of moving a car in reverse for 1 meter, while the vehicle is parked in the alley of a residential area for parallel parking, would

be considered 'driving' as contemplated under the Road Traffic Act, even if such 'driving' is performed whilst parking or repositioning the car in a differentmanner.[22] Furthermore, an issue arose as to whether it was valid to refuse to have the sobriety test performed, since the test was apparently not strictly applicable to circumstances falling under the Road Traffic Act. The Court found that if a parking lot where a person was driving the vehicle was adjacent to a restaurant, and this was a place provided for people using the restaurant, where it was not possible for the general public or vehicles to have free access to such place, the parking space would not be deemed the 'road' for purposes of the Road Traffic Act.[23] The basis for this determination is that the intoxicated and unlicensed driving under the Road Traffic Act can only be established while the driver is on the 'road' as defined under the Road Traffic Act. Therefore, if a parking lot where a person drove the vehicle would not be accessible to other places and it was a place used as a parking lot for customers who gained access to the restaurant, then such a place would not under the Road Traffic Act.

4. Contribution Money to the Accidents of Driving While Intoxicated

This exclusion clause is different from other exclusion clauses in that it recognizes a requirement of the insured to pay an amount of 2 million won (around $1700) and the insurer to be liable for the balance amount. If a full exclusion is available, this may raise an issue regarding the proper protection of victims. Therefore, the exclusion system based on partial insurance was introduced. The customary practice of the insurance industry has been to make compensation with the exception of 2 million won deducted from the amount originally paid by the insurance company for accidents occurring while driving while intoxicated under the Bodily Injury Liability II. The excluded amount was left for the offender, and if the offender, the person driving while intoxicated, was incapable of making the payment, the insurance company would pay the victim first and be indemnified by the offender. Such customary practice was specified in writing with the revision of policy as of August 2001.

22) Supreme Court Decision; June 22, 1993, 93 Do 828

23) Supreme Court Decision; Jan. 19, 2001, 2000 Do 2763 and Supreme Court Decision; April 27, 2001, 2001 Do 817

5. Scope of Express or Implied Consent

The main parties to situations of for driving while intoxicated include the insured person and persons driving the vehicle of the insured under the express and implied consent of the insured. In relation to express and implied consent, the express or implied consent of policyholder or insured is required. As to provisions in policies regarding the subject of the express or implied consent of the insured, such consent must include the 'driving action' or and the 'driving while intoxicated'. Accordingly, when the driver who committed the act of driving while intoxicated under the express or implied consent of the insured to the intoxicated driving itself, the insurer is excluded from liability, and if the insured did not consent expressly or impliedly to the intoxicated driving but simply consented to the act of driving at the time of the consent, the insurer is held liable for compensation.

On this issue, an argument exists that, considering the social ill-effect of driving while intoxicated, the subject of express and implied consent should be interpreted to be limited to consent of the 'driving activity' in order for the insurer to be excluded from liability. However, this has provoked criticism that it would over-expand the application of the exclusion clause for driving while intoxicated. At the time of the occurrence of the insured event, the application of the exclusion clause would be fair only in cases when there was a possibility that the insured may reallocate its liability onto the insurer. When the insured only gives consent to the 'driving activity', the exclusion of insurer's liability for the unexpected driving while intoxicated would not be construed as reasonable.

III. Condition for Exclusion Clauses for Unlicensed or Driving While Intoxicated Personal Accident Insurance

A. Raising the Issue

Article 659 of Commercial Law states that the insurer does not have responsibility for payment of the insurance amount in the case where the insured event occurs due to the intentional or gross negligence of the policyholder. However, Articles 732-2[24] and

24) Article 732-2【Insurance Risks caused by Gross Negligence】

739[25] of the same Act state that the insurer shall have the responsibility for payment of the insurance amount even when the insured event occurs due to the gross negligence of the policyholder, insured or insurance beneficiary under life insurance and personal accident insurance. Moreover, Article 663[26] of the same Act states that the regulations related to the insurance under the Commercial Law may not be changed to disadvantageous the policyholder or insurance beneficiary without the special agreement of the parties. (Principle of prohibiting disadvantageous changes; relative imperative provision)

With such a regulation, under the interpretation of the Insurance Act, property insurance (compensation insurance) allows for exclusion of the insurer in the event of accidents caused intentionally or by gross negligence of the insured. However, in the case of life insurance or accident insurance, the insurer is excluded only in the event of an accident caused intentionally, while the insurer would be liable for an accident caused by gross negligence of the insured, which would include the case of ordinary negligence. Furthermore, in the event of property insurance (compensation insurance) such as Bodily Injury Liability II, the insurer is excluded under Article 659 of Commercial Law for an accident caused by gross negligence, and in the event of accidents related to unlicensed driving or driving while intoxicated, the law appears to recognize exclusion based upon gross negligence even without the intent that there be no difficulty of excluding the insurer. In addition, the life insurance does not even require that the accident occur during the unlicensed driving or driving while intoxicated as a condition for exclusion.

Therefore, the subject matter for the following discussion is the exclusion clause under the accident insurance policy. Article 732-2 of Commercial Law requires only an intentional accident as a condition for the exclusion, and this provision is relatively

---

In the case of an insurance contract covering death as an insured event, the insurer shall not be discharged from its liability, even though the insured event happens by reason of gross negligence of the policyholder, insured, or beneficiary.

25) Article 739【Applicable Provisions】

The provisions concerning life insurance except Article 732 shall apply mutatis mutandis to accident insurance

26) Article 663【Prohibitions of Entering Special Agreement which is Disadvantageous to Policyholder, etc.】

The provisions of this Part(Chapter 1 of Insurance Law) shall not be changed as being disadvantageous to the policyholder, the insured, or the beneficiary through an agreement by the parties: *Provided*, That this shall not apply in the case of reinsurance, marine insurance and other similar types of insurance.

imperative under Article 663 of Commercial Law. Therefore, there has been ongoing dispute over whether or not a policy provision recognizing the exclusion of the insurer would be valid in relation to Article 663 of Commercial Law and Article 732-2 of Commercial Law where the accident involving unlicensed driving or driving while intoxicated would be proof of intent of the insured, although the insured had the intent to engage in unlicensed driving or driving while intoxicated. This issue has led to the issue of unconstitutionality of Article 732-2 of Commercial Law. In addition, there is a question as to whether the Article 663 of Commercial Law's mentioning Article 732-2 of Commercial Law as a relative imperative provision is reasonable.

Insurance companies have exclusion clauses for accidents arising in the course of driving while intoxicated and unlicensed driving in relation to personal accident insurance provisions of automobile insurance policies. The Supreme Court has continuously rendered such policies as void in light of the provisions of the Commercial Law.[27] However, in spite of the series of cases rendered by the Court, insurance companies continue to maintain such exclusion provisions. On December 23, 1999, the Constitutional Court held that Article 732-2 of Commercial Law does not violate the Constitutional Law and denied the validity of exclusion clauses for unlicensed driving and driving while intoxicated under such accident insurance policies.[28] Such a decision upholding the constitutionality of the Commercial Law has at last brought about a change in such policy clauses. From April 2000, exclusions on unlicensed driving and driving while intoxicated are to be omitted from accident insurance provisions of automobile insurance policies. However, the Constitutional Court's decision raises many questions in, especially in consideration of the problem of moral hazard inherent in insurance contracts, the general principles for interpretation of accident insurance provisions and in light of a comparative look at similar foreign laws.

B. Basis of Decision of the Constitutional Court and the Supreme Court

First, the rationale for Article 732-2 of Commercial Law's not recognizing the exclusion of the insurer's liability for accidents arising not as a result of an intentional

27) Supreme Court Decision; April 26, 1996, 96 Da 4909; Supreme Court Decision; April 28, 1998, 98 Da 4330; Supreme Court Decision; February 12, 1999, 98 Da 26910

28) For the decisions of the Constitutional Court, 99 Hunga 3; 99 Hunba 50; 99 Hunba 52; 99 Hunba 62.

act is that the Court wants to protect the policyholder in light of the risk to life and body in the event of an accident. Therefore, gross negligence is excluded from the condition for the exclusion. Second, even if the insured event occurs due to gross negligence of the insured, the act itself is not considered interfere with the rise of an insured event or to bring about a moral hazard. Third, the legislative intent was to preserve the economic security of the surviving family members, the fairness of which is recognized by Article 732-2 of Commercial Law, and this is not deemed to interfere with the freedom to engage in business activities or in the freedom of contract. Fourth, in of comparison with the relative position of the insurer with many personnel, a physical organization and business sophistication, the policyholder is considered to be in a much more vulnerable position. As such, the parties to an insurance contract are not afforded the complete right to private autonomy, and it is generally recognized as the right of the government to partially intervene in the insurance business, in varying degrees. Fifth, although the difference between an accident caused by gross negligence and an accident caused by mere negligence is relative, the resulting impact may be greatly different. An actual differentiation between gross negligence and ordinary negligence is actually a very difficult task. If an exclusion is recognized even in the case of gross negligence, the insurer is surely likely to be exempt from its payment responsibility by applying its own favorable interpretation, which would provoke ceaseless disputes on the difference between gross negligence and mere negligence.

For the foregoing reasons, the interpretation for exclusion clauses in relation to unlicensed driving or driving while intoxicated in accident insurance provisions do not have to be similarly interpreted as in the case of liability insurance provisions. In addition, unlicensed driving and driving while intoxicated are intentional criminal acts, but unless there are special circumstances, the intent requirement is that of the act of unlicensed driving or driving while intoxicated and not the resulting death or injury itself. Therefore, this is not necessarily contrary to the morality or ethics of the person in the insurance contract even if damage compensation is to be made.

C. Criticism

An accident must occur as a pre-condition to triggering the insurance provisions, and the insured amount to be received in the event of an insured event is much greater than the premium that the policyholder pays under the insurance policy. Therefore, the

risk of moral hazard is ever present. Unlicensed driving and driving while intoxicated are typical moral hazards related to insurance provisions. The payment of the insured amount to persons engaged in such actions are self-destructive events which undermine the insurance system, and consequently, causes damage to good-faith policyholders.

Unlicensed driving and driving while intoxicated are not simply violations of traffic laws, but are criminal actions characterized by anti-social behavior. The recognition that unlicensed driving and driving while intoxicated are serious anti-social criminal acts has been recognized throughout society. It is a generally recognized fact in civilized societies that a license should be required to operate a vehicle and that driving while intoxicated should be a prohibited act. Society further recognizes that protection by way of insurance coverage for persons who have violated such established norms deviates from fundamental principles underlying the modern insurance system. Such insurance coverage may significantly encourage further acts of unlicensed driving and driving while intoxicated. The death rate from traffic accidents related to unlicensed driving would be twice that the death rate of ordinary traffic accidents, and according to the 1999 combined rate for accidents related to unlicensed driving and driving while intoxicated, the number of such accidents reached approximately 13% of all accidents occurred and approximately 20% of the number of death cases.[29] The Constitutional Court also pointed out the concern of preventing such illegal activities, which are contrary to social norms.

Following the current case of the Supreme Court and the decision of the Constitutional Court, the insurer's exclusion from liability is impossible for personal accident insurance related to unlicensed driving and driving while intoxicated. Therefore, insurance companies will undoubtedly reflect such restrictions into its calculation of insurance premiums.[30] In other words, the application of higher premiums unilaterally, even against innocent policyholders that exhibit little or no probability of engaging in unlicensed driving or driving while intoxicated may violate have a high probability of violating the equal protection clause under the Constitution. Insured drivers who are involved in accidents without fulfilling the fundamental

29) Data: 2000 Road Traffic Safety White Book, National Police Agency

30) After the revision of policy in April 2000, the net insurance premium rate of personal accident insurance was increased for 8.2%.

obligation of obtaining a driver's license or causing the accident to occur by driving while intoxicated-which have proportionately high accident rates-should not have the benefit of insurance policies. Such exclusion would be in accord with the interest of good faith and ethical standards characterizing the insurance system and in the interest of risk homogeneity within the insurance group. There is no reason to protect such insured drivers with insurance funds, which are reserved with proceeds contributed by other innocent policyholders.

If the position of the Constitutional Court or the Supreme Court, that the validity of an exclusion clause should be recognized only in the event of an intent to bring about the occurrence of injury or death, is to be defended, exclusion clauses other than unlicensed driving or driving while intoxicated that are defined under the personal accident insurance policy-for example, dangerous exercises including climbing, skydiving, scuba diving and others, surgeries including the birth and miscarriage of the insured-are inapplicable. This means that the existence of personal accident insurance may be jeopardized. Because it is very rare for the insured to take action applicable to the condition for the exclusion that is defined by personal accident insurance with the intent on the result, and even if such a case is present, proof of intent is extremely difficult.

From a comparative law perspective, countries with advanced insurance systems define driving while intoxicated under personal accident insurance policy as a condition qualifying the insurer for exclusion. In general, such countries do not require causation between the driving while intoxicated and the accident. For example, in personal accident cases in Japan, the accident involving the insured himself/herself is the condition for exclusion when the insured drives a vehicle without a license under the relevant law, or when the insured drives the insured vehicle under the situation where he/she is unable to drive normally because of the influence of alcohol, drugs, marijuana, anti-hypnotic drugs and others.[31] In addition, the insurer is excluded even without causation between drinking and others being injured.

In the case of the US, the exclusion clause of driving while intoxicated on personal accident insurance, such as group health insurance and others, is valid. The New York Comprehensive Motor Vehicle Insurance Reparations Act, as amended in 1995, is known to have a significant influence on the Insurance Act of each state, and the

31) Section 2 of Clause 1 of Article 3 of Chapter 2 of Comprehensive Insurance Policy on Personal Automobile

exclusion clause for driving while intoxicated is valid for personal accident insurance policies.[32] In the case of England, there is no automobile insurance standard policy but the exclusion clause for driving while intoxicated can be established by each insurer, with the court recognizing its effectiveness. The approach of these advanced countries have the tendency of strengthening control over unlicensed driving and driving while intoxicated. For example, some states in the US will convict a driver for first-degree murder, and it is a felony, which may bring a life prison sentence in the case of driving a vehicle while intoxicated accompanied by a car accident resulting in the death of persons. Japan also deems a 'dangerous driving manslaughter' if a death results from an accident while driving intoxicated. A 15-year's imprisonment may be imposed.

Compared to these countries, in Korea where the rate of traffic accidents is among the highest in the world, and with the serious ill-effects of unlicensed and driving while intoxicated[33], there have been recent calls for criminal and administrative regulations as well as insurance sanctions for such actions. The recent positions of the Constitutional Court and the Supreme Court, however, clearly pose significant problems.

As described earlier, the exclusion clause for driving while intoxicated and unlicensed driving in property insurance shall be interpreted effectively following the circumstantial exclusion theory, and it only limits the actual application of an exclusion clause by additionally proposing the standard of 'control and management possibility'. On the other hand, the standard shall differ in the event of personal accident insurance. It is interpreted as void based on the content control under Commercial Law and deletes the exclusion clause for unlicensed and driving while intoxicated in personal accident insurance provisions under automobile insurance policies. Such a dual interpretation sometimes produces unreasonable results in some instances. For example, in Bodily Injury Liability insurance, the victim who, without any responsibility, may be refused payment of insured money due to the application of an

32) §5103(b)(2). However, the standard automobile insurance policy of the US does not have the exclusion clause on driving while intoxicated.

33) The ratio of the number of accidents caused by the driving while intoxicated from the entire traffic accident increased from 2.9% in 1990 to 9.3% in 1997, more than 3 times. For the death from the foregoing accidents, it was 3.1% in 1990 that was increased to 8.7% in 1997 for nearly 3 times of increase. (Data: Statistics of Traffic Accident, 1998 Ed. pp. 94, National Police Agency)

exclusion clause, even in the case of an accident caused by gross negligence of the insured (wrongdoer). However, the insured responsible for the accident arising from gross negligence would receive an insured amount from the personal accident insurance, the insured being the beneficiary of the insurance contract. This is duly unreasonable.

D. Theory of Legislation (Amendment) and Conclusion

As to the current provisions of Article 732-2 and Article 633 of Commercial Law, such provisions should be interpreted imperative provisions that do not permit exclusion of the insurer's liability on the basis of accidents caused by grossly negligent conduct in personal accident insurance cases. However, due to several problems including its possible unconstitutionality as pointed out earlier, there appears to be a need for review of Article 633, which makes Article 732-2 of Commercial Law an imperative provision,. In particular, unlike the current legal provision, the imperative regulation should only be applied in individual cases , and the provision should be reviewed for ways to exclude Article 732-2 of Commercial Law as a imperative provision.[34] Under the present legal provisions, it is conceivable that the general provisions in the Insurance Act be made to exclude the insurer for cases of unlicensed driving and driving while intoxicated under personal accident insurance. Ultimately, as pointed out by the Constitutional Court, the protective function performed by the national authorities governing the insurance industry shall be lessened gradually. Therefore, in relation to the interpretation of exclusion clauses on unlicensed driving or driving while intoxicated in the context of personal accident insurance, the scope of private autonomy in regards to the insured event caused by gross negligence shall broaden.

34) Kyung-Whan Chang, *Analysis on the decisions of unconstitutionality of exclusion clauses for unlicensed and driving while intoxicated*, in Non-Life Insurance, February, 2000, pp. 15-24