THE BULLETIN OF

THE JAPAN SHIPPING EXCHANGE, INC.

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CONTENTS

VIIIth ICCA International Arbitration Congress - New York, May 6 - 9, 1986

The International Council for Commercial Arbitration (ICCA) will hold its VIIIth International Arbitration Congress in New York, in the Waldorf Astoria Hotel, from May 6 to May 9, 1986. The American Arbitration Association was invited to be the Host Organization. (140 West 51st Street, New York, N.Y. 10020; U.S.A.: Phone: (212) 484-4000; telex 12463).

The Congress will have two working groups: Comparative Practice, and The Impact of Public Policy, in each of which four Rapporteurs will highlight the various aspects of the subject. In addition, several commentators will further elaborate the picture by short presentations on the law and practice of the country, or group of countries, represented by them.

Comparative Practice - this working group will consider a number of specific practical questions based on a hypothetical case, which has been prepared by a common law lawyer, Howard M. Holtzmann, and a civil law lawyer, Giorgio Bernini. The presentation for this working group will be made by four Rapporteurs, one from a Socialist country (Serguei N. Lebedev - President, Maritime Arbitration Commission at the USSR Chamber of Commerce and Industry, Moscow); one from a civil law country (Sigvard Jarvin, - General Counsel, ICC Court of Arbitration, Paris); one with British common law experience (J. Martin H. Hunter - Solicitor, London) and one with American common law experience (Michael F. Hoellering - General Counsel, American Arbitration Association, New York).

The Impact of Public Policy - in this working group, the four Rapporteurs will each discuss a separate topic: Public Policy and the Arbitrability of Disputes (Karl - Heinz Boeckstiegel - President, Iran - U.S. Tribunal, The Hague; Professor at the University of Cologne); Public Policy and Arbitration Procedure (Stephen Schwebel - U.S. Judge, International Court of Justice, The Hague); Application by Arbitrators of National Public Policy Rules to the Substance of the Dispute (Yves Derains - lawyer, Paris); and the Arbitrator and the Truly International Public Policy (Pierre Lalive - Professor at the University of Geneva).

PREFACE

The 10th issue of the Bulletin of the Japan Shipping Exchange, Inc. was published last March after suspension for some time, and we were pleasantly surprised at the enthusiastic reception.

We have therefore decided to publish the Bulletin once or twice a year, and this is the 11th issue.

Because of 60-odd years' records in the arbitrations conducted by Tokyo Maritime Arbitration Commission of the Japan Shipping Exchange, there are many parties in the overseas maritime business circles who wish to learn the details of the activities. Because of the limited space, we are introducing only the outline of some of the awards granted in recent cases. Those who are interested in learning the systems of arbitration are asked to refer to the Guide Book published by us.

Tokyo Maritime Arbitration Commission will soon start a simplified arbitration system for easier and speedier settlement of disputes.

The Documentary Committee of the Exchange has completed revision of the Salvage Agreement which was first issued in December, 1980 to provide for exceptions for tanker salvage. The revision will be made available to public soon.

The detail of such matters will be reported in the 12th issue of the Bulletin which we hope to publish in September this year.

I-1. Drafting Arbitration Clauses designating Tokyo as Arbitration Site

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1. Introduction

It has been pointed out by an experienced practitioner that "although many advocates expressed their belief that international arbitration provided the best available means for resolving such disputes regarding an international contracts, they failed to warn potential users that the system is still in its infant stages. Accordingly, many litigators have been disappointed to find that the system did not operate efficiently enough to ensure their clients a fair hearing on the merits of a commercial dispute. As a result, reforms at the national and international level have been necessary to make the system a more efficient, workable device."[1)]

Since the necessary reforms have not yet been accomplished at this stage, it is submitted that draftmen of arbitration clauses for international contracts are responsible for considering well what points should be provided for in the arbitration clause in order to make the arbitration a more efficient and workable device.

On the other hand, a selection of the arbitration site will usually affect the way in which the arbitration agreement can be enforced, how the hearing will be conducted, how speedily the award can be enforced, and the means available to challenge the arbitration, arbitrators, the hearing, and the award.[2)]

This paper therefore is intended to provide for draftmen of arbitration clauses in international contracts some suggestion on what points should be considered so as to obtain fruitful results from the arbitration when Tokyo is designated as the arbitration site.[3)]

Since Japan has only one jurisdiction, the following discussion regarding arbitration in Tokyo is also applicable for arbitration in such other places as Osaka or Kobe.

2. Legal Framework of Arbitration in Tokyo

Japan is a party to the 1958 U.N. Convention on Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention), the 1923 Geneva Protocol on Arbitration Clauses, the 1927 Geneva Convention on the Execution of Foreign Arbitral Awards (the Geneva Convention), and 15 bilateral treaties with provisions on arbitration.[4)]

Article 98(2) of the Constitution of Japan provides inter alia that treaties concluded by Japan shall be faithfully observed. Article 73 of the Constitution requires that a treaty shall be ratified by the National Diet before or after being concluded by the Cabinet.

The prevailing opinion interprets these articles as giving a self-executory treaty on promulgation the validity of a domestic statute without the necessity of enacting any implementing legislation.[5)] The New York Convention and the other conventions or treaties therefore have no implementing legislation in Japan.

Chapter 8 (Articles 786 to 805) of the Code of Civil Procedure (C.C.P.; Law No.29, 1890) also provides for arbitration, but it is submitted that the New York Convention and the other conventions or treaties prevail over the C.C.P., if there is any inconsistency between a convention or treaty and the C.C.P., since an international convention or treaty is interpreted to prevail over domestic laws in Japan.[6)]

It should be noted that judicial decisions do not constitute precedents binding the rendering court nor indeed lower courts under Japanese legal system. This is even true of Supreme Court's decisions though they are strong persuasive authority.[7)]

It is also noted tat the New York Convention is playing a very important role

in the field of international commercial arbitration all over the world[8] and it is same in the case of Japan which has ratified the New York Convention in 1961.[9]

3. Necessity of Parties Designating Governing Law of Arbitration Clause

1) Recognition of Arbitration Agreement

Article II.1 of the New York Convention stipulates that each Contracting country shall recognize such arbitration agreements which meet the following requirements:

(a) that it be in writing;

(b) that under it the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not; and

(c) that it concern a subject matter capable of settlement by arbitration.

Article II.3 further provides that the court of a Contracting country, when seized of an action in respect of which the parties have made an agreement under the Convention, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

However the Convention is silent on the question of which law determines the defined legal relationship and the arbitrability of the subject matter within art.II.1, and the validity of the arbitration agreement under art.II.3.

Accordingly Japanese courts have to determine these questions by the interpretation of the Convention and the private international law of Japan, if they are arisen in relation to international commercial arbitration in Japan.

Regarding the requirements under art.II.1 there has been no court's decision, but the prevailing opinion of commentators is that they should be determined by the governing law of the arbitration agreement, since these requirements relate to the validity of the arbitration agreement. It however is submitted that

the requirements closely connect to the public policy of the forum and shall be determined by the lex fori. This interpretation will be in consistency with art.V.2(a) of the Convention.[10)]

Regarding the requirements under art.II.3 the Yokohama District Court's decision of May 30, 1980[11)] held that they were determined by the governing law of the arbitration agreement, which law was not explicitly designated but implied by the parties' designation of the main contract's governing law and of the place of arbitration. The prevailing opinion is in line with the Yokohama District Court and that the governing law of the arbitration agreement is the law explicitly designated by the parties as the governing law of the arbitration agreement or the law having the closest connection with the arbitration agreement when the parties do not designate the governing law.[12)]

It is quite usual that the parties to the arbitration agreement designate the governing law of the main contract and the place of arbitration but do not designate the governing law of the arbitration agreement. Under this situation both the court's decision and the prevailing opinion are not clear on the question which prevails in the determination of the governing law of the arbitration agreement, the governing law of the main contract or the place of arbitration. It also is submitted that the place where the arbitration agreement was concluded shall prevail over the governing law of the main contract in the determination of the governing law of the arbitration agreement since the place where the arbitration agreement was concluded is the closer connecting factor to the arbitration agreement than the governing law of the main contract.

Such being the case, if an arbitration clause in a contract provides arbitration in Tokyo but does not deisgnate its governing law, it remains to be uncertain the question which law Japanese courts will select as the governing law of the arbitration agreement, Japanese law (the law of the place of arbitration), the governing law of the contract or the law of the place where the arbitration agreement was concluded. This uncertainty will be eliminated by designating the governing law of the arbitration clause when it was drafted.

2) Availability of Court's Assistance to Arbitration

The C.C.P. stipulates the following courts' assistance to valid arbitration agreements:

(a) appointment of arbitrator by a court

When a party is a lapse in his appointment of an arbitrator or filling a vacancy of an arbitrator within 7 days from the other party's notice, the competent court shall, upon the application of one of the parties, appoint the arbitrator for the recalcitrant party (art.789(2) and 791 of the C.C.P.).

(b) Court's assistance to arbitrator

The competent court not only may order a witness or an expert to give testimony or expert opinion but also may perform any other act which is necessary for an arbitrator(s) to make his award but is not within the arbitrator's power, on the application of the parties and when the court finds such application proper (art.796 of the C.C.P.).

Although the C.C.P. is silent on the requirements for a court to give the above assistance to arbitration, the Tokyo District Court's decision of January 25, 1958[13] held that art.789(2) of the C.C.P. was applicable to an arbitration agreement included in a sales agreement between a Japanese corporation and an Australian corporation and providing that all disputes arising out of the agreement should be referred to two arbitrators appointed in Tokyo, one by each party respectively. The decision was based on the reason that the arbitration agreement was governed by Japanese law which was implied by the fact that the parties agreed to Tokyo as the place of the arbitrator's appointment and the sales agreement was made in Tokyo, although there was no express agreement on the govening law of the arbitration agreement itself nor on the place of arbitration.

It therefore is likely that Japanese courts will appoint arbitrator(s) for the recalcitrant party if the arbitration agreement is governed by Japanese law and Japan is designated as the place of the arbitrator's appointment or as the place of arbitration. However there still remains a question of whether Japanese

courts will give the above assistance to arbitration agreements governed by a foreign law even if the parties designate Tokyo as the place of arbitration.

3) Governing Law of Arbitration Procedure

There has been no Japanese court's decision on point, but the prevailing opinion of commentators is that the arbitration procedure is governed by the law designated expressly or impliedly by the parties or by the law most closedly connecting to the arbitration procedure if there is no parties' designation.[14] Under this prevailing opinion there might be possible that the arbitration procedure is governed by the foreign law which is the governing law of the arbitration agreement despite the fact that the arbitration is conducted in Japan.

This situation brings the following discrepant result:

(a) Since it is a duty of the arbitrator to make an award which has not any reason of vacation under the law of the place of arbitration, the arbitrator is obliged to follow the law of the place of arbitration if there is any inconsistency between the law of the place of arbitration and the governing law of the arbitration procedure. Then the enforcement of the award might be refused under article V.1 (d) of the Convention by the court of the country where the enforcement will be sought in the future.

(b) Even if the arbitrator makes the arbitration procedure meet the requirements of its governing law, the award might be vacated under the law of the place of arbitration.

It therefore is submitted that the arbitration procedure should be governed by the law of the place of arbitration and the C.C.P. should be applied for such arbitration based on the arbitration agreement which is not governed by Japanese law but designates the place of arbitration within Japan.

In this connection, taking into consideration the abovementioned uncertainty on the application of the C.C.P. it should be avoided to designate the law other than Japanese law as the governing law of the arbitration procedure or the arbitration agreement if the governing law of the arbitration procedure is not

designated, in case of the arbitration agreement providing arbitration in Tokyo.

4) Vacation of Award

Article V.1(e) of the New York Convention anticipates two cases of the vacation of awards. One is the vacation of award by a competent authority of the country where the award was made. The other is the vacation of award by competent authority of the country, under the law of which the award made.

Although article 801 of the C.C.P. stipulates the vacation of an award, the C.C.P. is silent on the question of whether this provision will apply both to a domestic award and to a foreign award. But the Osaka District showed in its decision of May 11, 1959[15] the view that the C.C.P. applied only to a domestic award which was made in Japan under the C.C.P.

On the other hand, the Tokyo District Court's decision of August 20, 1959[16] and the prevailing opinion of commentators are that an award is a domestic one if the governing law of the arbitration agreement is Japanese law, and the place where the award was made is not taken into consideration.

Such being the case, even if an award was made in Japan, it is not certain whether Japanese courts could vacate such award under the C.C.P. when the governing law of the arbitration agreement is a foreign law.

When the vacation of the award made in Japan is not available at a Japanese court, the party who claims the vacation should begin the action at a competent court of the other country which law governs the arbitration agreement. But it is another problem whether such country's court will accept and consider the vacation of the award.

It therefore is submitted that Japanese law should be selected as the governing law of such arbitration clause providing arbitration in Tokyo. The selection of Japanese law as the governing law of the arbitration clause will make it sure that Japanese courts will review the award made under the arbitration clause if any of the parties wishes it and could vacate the award if the court finds its vacation to be reasonable.

4. Necessary Supplementation to Japanese Arbitration Law

Even if the parties designate Japanese law as the governing law of the arbitration agreement or of the arbitration procedure in their arbitration clause stipulating arbitration in Tokyo, that is not enough to ensure an efficient operation of the arbitration. It is submitted that the following points are not certain under Japanese arbitration law:

1) when the arbitrators appointed by the parties fail to agree on their designation of third arbitrator, could the party or arbitrator request the court to designate the third arbitrator?
   There is no provision in the C.C.P. on this point and the courts' attitude is negative at this stage.[17)]
2) has an arbitrator his power to make the followings?
   an interim award or partial final award
   an order to safegurd the property which is the subject matter of the arbitration
   an arbitration in the absence of a party
   an order to consolidate the relevant arbitrations
   an order to allow a third party's intervention to the arbitration

It is submitted that necessary supplementation for the above points will be accomplished by referring the dispute to the arbitration under such arbitration rules of a reliable arbitration institute as the Japan Shipping Exchange, Inc. or by incorporating UNCITRAL Arbitration Rules into the arbitration clause or by stipulating the details of the abovementioned points in the arbitration clause.

5. Enforcement of Arbitral Awards made in Japan

Article I.1 of the New York Convention stipulates that the Convention shall apply to the recognition and enforcement of both arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought and arbitral awards not considered as domestic awards

in the State where the recognition and enforcement of such awards are sought.

Accordingly the Convention shall not apply to arbitral awards made in Japan when their recognition and enforcement is sought in Japan unless they are considered as foreign ones under Japanese law. However the definition of foreign arbitral awards is not certain under Japanese law as shown in relation to the vacation of arbitral awards made in Japan.

It therefore is submitted that there still remains a question which applies to the recognition and enforcement of arbitral awards made in Japan, the C.C.P. or the Convention.

It is interpreted that the requirements to enforce an arbitral award under the Convention are limited to those stipulated in articles IV and V of the Convention. This interpretation was supported by the Osaka District Court in its decision of April 22, 1983.[18)]

On the other hand, article 801 of the C.C.P. stipulates more requirements than those under articles IV and V of the Convention. Accordingly the enforcement of foreign arbitral awards in Japan under the Convention is easier than that of arbitral awards made in Japan under the C.C.P.

This point should be noted when the parties select Japan as the place of arbitration if the enforcement of the award is expected in Japan.

Regarding the enforcement of awards made in Japan in foreign countries one American case[19)] has been reported, but other information is not available at this stage. In this connection, it should be noted that Japanese courts have enforced one English arbitral award made in London under the Geneva Convention, two American arbitral awards made in New York under article IV of the Treaty of Friendship, Commerce and Navigation between Japan and U.S.A. and one American arbitral award made in New York under the New York Convention, but there has been no judicial decision which refused to enforce a foreign arbitral award in the past. This fact evidencing Japanese courts' favorable attitude to international commercial arbitration will assure that the enforcement of arbitral awards made in Japan will be not refused in foreign countries as long as they are the contracting state of the New York Convention or the

Geneva Convention.

6. Conclusion

As pointed out in the above discussion, there still remain some uncertainty for arbitration in Tokyo, but such uncertainty will be eliminated if they are carefully reviewed at the stage of drafting an arbitration clause providing arbitration in Tokyo.

Regarding arbitral awards made in Tokyo no problem is predicted for their enforcement in both domestic and international situations.

It therefore is submitted that generally speaking Tokyo is one of good arbitration sites for international commercial transactions.

FOOTNOTES

1) McClelland, "International Arbitration: A Practical Guide for the Effective Use of the System for Litigation of Transnational Commercial Disputes", 12 International Lawyer 83 (1978)
2) American Arbitration Association, Survey of International Arbitration Sites at 7 (1984)
3) Regarding general aspects of drafting arbitration clauses, see, Iwasaki, Effective Use of Model Arbitration Clauses in International Contracts in International Commercial Arbitration (Schmitthoff ed., 1980)
4) Pryles and Iwasaki, Dispute Resolution in Australia-Japan Transactios 119 (1983)
5) Pryles and Iwasaki, supra 4) at 120
6) Pryles & Iwasaki, supra 4) at 120
7) Pryles & Iwasaki, supra 4) at 5
8) van den Berg, The New York Convention of 1958 (1981); Sanders, Twenty Years' Review of New York Convention, 13 International Lawyer 269 (1979); Iwasaki, Application of New York Convention by Japanese Courts, Ehime Law Review No.16 at 47 (1983)
9) Regarding the remaining general aspects of Japanese arbitration law, Doi, JAPAN

(National Reports), 4 YEARBOOK Commercial Arbitration 115 (1979); Ohashi, Maritime Arbitration in Tokyo (1979); Koyama, Chuusai Hō (Arbitration Law) (Rev. ed. 1983)

10) Pryles & Iwasaki, supra 4) at 126

11) 8 YEARBOOK Commercial Arbitration 394 (1983); Not yet reported. Showa 50 Nen (wa) No.1552

12) Pryles & Iwasaki, supra 4) at 124

13) 9 Kakyū Minshū 111

14) Koyama, supra 9) at 154

15) 10 Kakyū Minshū 970

16) 10 Kakyū Minshū 1711

17) See, Court of Cassation's decision of May 6, 1940 in 19 Daishinin Minji Hanreishū Chū 785; Fukuoka High Court's decision of June 30, 1955 in 7 Kakyū Minshū 1736

18) Hanrei Taimuzu No.501 at 182

19) Fotochrome, Inc. v. Copal Co., Ltd., 517 F. 2d 512 (1975)

I-2. Legal Problems in case of Cargo Delivery without Surrender of B/L

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B/L's late arrival at the port of discharge is frequently experienced by people in international shipping and trade circle, and also loss or disappearance of B/L during transit by overseas mail is not uncommon. In these cases it is worldwide custom that the B/L is reissued or alternatively the cargo in question is delivered in exchange for a letter of indemnity signed by the cargo interests, in which a bank sometimes signs as a guarantor. However, these practices involve various legal problems concerning maritime law systems, custom and usage of import-export of cargo and other relevant matters in various countries where the B/L in question was issued, negotiated or destined. It therefore needs wide and deep knowledge and investigation to establish a proper, reasonable manual and procedure concerning cargo delivery in case of B/L's late arrival or loss. This is because it is said that the level or standard of shipping operation of a certain liner company corresponds to the contents of the above manual and procedure.

I would like to introduce and clarify as far as possible this issue from a practical legal point of view.

1. In Japan

1. Legality of cargo delivery without surrender of B/L

B/L is a document of title in which the right to claim cargo delivery is embodied. Thus a duty is imposed on the carrier to deliver the cargo if the B/L

is surrendered to him at the port of discharge. If after delivery of the cargo without B/L the carrier is requested to deliver the same cargo by the person holding the B/L in hand, the carrier must compensate to such person the damages incurred by the carrier's being unable to deliver the cargo. It is, however, uneconomical and impractical for both the carrier and cargoowner if the carrier rejects the cargo delivery without B/L only for avoidance or fear of possible risks as abovementioned. Therefore a practical alternative is to deliver the cargo without B/L by securing letter of indemnity from the cargo-owner or by surrender of reissued B/L, reissuance of B/L being rather limitedly made, comparing with delivery in exchange for a letter of indemnity.

In old days, our courts judged the delivery of cargo in exchange for a letter of indemnity to be illegal by reason of being against public policy but nowadays such delivery is recognized to be a lawful and effective custom to meet the requirements arising from daily shipping business. With respect to this aspect we have an interesting precedent which is "Takada Shokai Case" (so-called B/L case) held by Supreme Court in 1930. Importing company, Takada Shokai took over their cargo in Japan from Toyo Steamship Co. in exchange for a letter of indemnity jointly signed by Mitsubishi Bank as guarantor, the B/L in question being still en route to Japan by sea mail. Soon thereafter, a great earthquake (The Kanto Earthquake) occurred and a catastrophic disorder of the economic market followed. Eventually Takada Shokai became insolvent and could not honor the bill of exchange as well as B/L. The bank who kept the B/L claimed the cargo from the shipping company who then, compensated the damages to the bank. Then the shipping company brought a suit for reimbursement from the guarantor, Mitsubishi Bank. Admitting the claim of the shipping company the Supreme Court held that judging from the actual situation surrounding commercial trade by modern shipping service, this practice (delivery without B/L) was not against public policy, but was lawful — therefore the guarantee by the bank was also effective and lawful.

By this Supreme Court judgement, the legality or lawfulness of cargo delivery without B/L was finally recognized. However we must point out that there

still exist minor authorities who maintain such delivery to be illegal on the ground of the statutory provision that "In cases where a bill of lading has been made, no delivery of the goods can be demanded except upon delivery of such bill of lading" (Article 584 of the Commercial Code). In the meantime it is generally admitted that delivery without B/L does not constitute embezzlement nor misfeasance in office under the Criminal Code.

2. The right afforded to bona fide holder of B/L

The person who purchased B/L in good faith is entitled to demand delivery of the cargo from the carrier. If the cargo has been delivered to another person, the holder of B/L is entitled to claim compensation of damages by reason of the carrier's breach of obligation to deliver the cargo to him. This right for compensation of damages will arise even if the person purchased the B/L with knowledge that the cargo had been delivered to the third party. Some court judgements and authorities also allow that the holder of the B/L may claim compensation for damages from the person who took over the cargo without B/L, by reason of tort.

Whether the holder of the B/L can claim against the carrier "in tort" as well as by reason of breach of contract is a question in dispute under court judgements and authorities. The general view is that the courts will only admit tortious liability if what was done deviated greatly from what the parties intended to realize by the contract. As far as the delivery of cargo in exchange for a letter of indemnity is concerned, this custom is recognized by the courts to be lawful and effective in meeting the requirements of commerce and therefore it is unlikely that the courts would judge such delivery to constitute tort, although there is no precedent dealing with this issue.

In the meantime, we have some court judgements which have confirmed a liability for tort in other aspects of breach of contract of carriage. For example, in 1925 the Supreme Court held that the carrier was liable for tort in case where a valuable cargo was lost during the carriage and that the carrier could not, as a defence, rely upon Article 578 of the Commercial Code (which exempts the

carrier from any liability unless the shipper gives prior notice of the value of the valuable cargo), because this Article should only apply to contractual liability. In another Supreme Court case in 1963, the carrier was held liable for tort because he delivered to a third party without the shipper's approval or instructions, cargo which was kept by the carrier for shipment.

The existence of these precedents indicates that the possibility of tortious liability in a case of cargo delivery without B/L cannot definitely be ruled out. This possibility closely relates to the problem concerning the time limitation of the carrier's liability and the period of deposit in carrier's hand of letter of indemnity.

3. Carrier's right toward consignee

(1) Right to demand return of the cargo.

The carrier is entitled to have the cargo returned to him unless the B/L is presented on later date by the consignee who took over the cargo without B/L, provided that the cargo is kept under control of the consignee instead of having been transferred to bona fide third party. Needless to say, the consignee cannot invoke Article 708 of the Civil Code for the purpose of declining to return the cargo, this Article providing that a person who has effected an act of performance for any illegal cause cannot demand the return of the subject material of such act of performance. It is understood that this right for the return of the cargo shall lapse by prescription if not exercised within one year.

(2) Right to demand compensation for damages

If the carrier has made compensation to the holder of B/L, the carrier is entitled to request reimbursement to the consignee, because the carrier's loss was caused by the consignee's breach of contractual obligation to surrender the B/L to the carrier. The right of reimbursement will arise even in a case where the carrier did not secure the consignee's letter of indemnity at the time of delivery without B/L. In this sense, such letters of indemnity do not create the right for reimbursement, but only confirm it in writing, for the

purpose of clarification as well as of obtaining the joint signature of a bank as guarantor.

4. Liability of guarantor

A major problem with respect to guarantee is monetary limit of guarantee. That is, where a certain amount is referred to in the guarantee contract, is guarantor's liability limited to such amount?

According to court cases and authorities, it can be said that the guarantee is unlimited even if a certain amount is referred to, and that such an amount only functions as a basis for assessing the guarantee fee, unless the guarantee agreement expressly indicates that the guarantor is not liable in excess of such amount.

5. Time limitation of the right of B/L holder – Period of keeping letter of indemnity.

(1) The right to demand the delivery of the cargo against B/L shall elapse by 5 years commercial prescriptin (Article 522 of the Commercial Code). On the other hand, the right to demand compensation for damages in connection with the cargo shall cease by one year time limitation according to Article 14 of the International Carriage of Goods by Sea Act (Hague Rules Legislation of Japan).

Although some doubts are shown on whether this Article 14 may apply to the damage (of such kind as discussed herein) caused to the holder of B/L, major authorities are of affirmative opinion on the ground that the situation where the cargo is unable to be returned from bona fide third party is the same as loss of the cargo from the standpoint of B/L holder.

In almost all cases it is impossible to recover the cargo because the cargo has been transferred to a third party and to this extent the right to demand the actual delivery of the cargo is so unrealistic that prescription of 5 years does not effectively operate. In other words, the only remaining remedy for the holder of B/L is the right to demand compensation which is subject to

one year time limitation.

(2) When one year time limitation shall start

Views on this matter vary; namely, a) the day when the demand of delivery of the cargo was made, b) the day when the delivery should have been made, or c) the day when delivery was made without B/L, etc.

But it can be said b) is major. According to a), the right to demand the delivery is subject to 5 years prescription and thus if at the end of 5 years demand of delivery is made, one year time limitation shall start thereafter. This means the carrier's liability would continue to exist for 6 years.

(3) Bad faith of the carrier

Article 14 of the International Carriage of Goods by Sea Act provides as follows;

> "The liabilities of the carrier with respect to the goods shall terminate if no legal action is made within one year from the date of delivery of the goods (if the goods were totally lost the date when they should have been delivered). *Provided, however, that this shall not apply when the carrier is in bad faith".* (Emphasis added)

It is generally said that "bad faith" should be construed limitedly or strictly as far as possible (It should be noted that Hague Rules have no proviso of such kind). Therefore, only where the carrier has wilfully or intentionally caused or concealed the damage to the cargo, can bad faith be effectively contended, while this is not the case, if the carrier has mere knowledge of occurrence of the damage. Accordingly, in case of the usual custom of delivery without B/L, the carrier knows only that it is possible that a B/L holder other than consignee may appear at a later stage, and thus this does not lead to bad faith.

(4) When liability for tort elapses.

If tortious liability is admitted in case of the delivery of cargo without B/L, such liability is subject to prescription of 3 years from the time when

B/L holder became aware of damage or of 20 years from the time of the cargo delivery, whichever is earlier (Article 724 of the Civil Code).

(5) The period of keeping letter of indemnity

The letter of indemnity should be kept by the carrier until the carrier's liability for cargo delivery without B/L ceases. In order to protect the carrier's interests to maximum extent, the letter of indemnity might best be kept for 20 years (see the preceding para.). But such a long period will press harshness upon the cargoowner and is anyway impractical. Therefore, it is desirable to set up some reasonable and mutually satisfactory period. This matter will be again taken up later in this article. In the meantime, we must point out that the Visby Rules (to amend the Hague Rules) provide inter alia to the effect that:

a) one year time limitation shall apply to the carrier's liability for cargo delivery without B/L, and,

b) one year time limitation shall apply to liability for tort as well as contractual liability.

Therefore as far as the contracting States of this Rules are concerned, the matter has become very simple, while Japan does not still ratify the same.

6. Public summons and decision of nullification concerning lost B/L

Articles 777–785 of the Code of Civil Procedure stipulate the procedures to nullify the B/L which was lost or stolen.

On the other hand, Article 518 of the Commercial Code provides that an applicant of public summons is entitled to have the carrier deposit the cargo or to demand the delivery of the cargo by giving security money. But this right under Article 518 is scarcely utilized because it takes much time and expenses.

Once according to the Code of Civil Procedure the decision of nullification is obtained, the B/L becomes null and void and its holder can no longer exercise the right to demand delivery. In other words the carrier can release letter of

indemnity against such a decision.

(1) Procedure for the decision of nullification

In the name of the last holder of B/L, application of public summons is made in the summary court having jurisdiction over the place of discharge (the place where obligation under B/L is performed), together with a copy of B/L in question and materials showing the fact of loss or theft of B/L such as police certificate or applicant's own statement.

In 10—20 days after application the court makes investigation of the case and about one month thereafter public summons are published on the Official Gazette. Court fees of about ¥60,000 shall be initially paid. By the date which the court decides, and which is not earlier than 6 months after the date of the above publishment on the Gazette, the holder of B/L is required to appear and give notice to that effect. In case of no such B/L holder the public summons becomes definite and then the applicant can obtain the decision of nullification. Usually it takes about 8 months for finalization.

(2) Other comments of this procedure

The applicable court is a summary court having jurisdiction over the place which is shown on the document in question as the place where the obligation under contract shall be performed (Article 779). In case of B/L it is understood that such place is the port of discharge.

Consequently Japanese courts have no power in respect of Bs/L for cargo exported from Japan. On the other hand they do have jurisdiction over all cases concerning Bs/L for cargo imported to Japan, regardless of the place of loss, foreign or Japan. We have Supreme Court decision of 1931 where Japanese jurisdiction was denied for the lost debenture in which place of payment was shown to be London or New York.

However, the Summary Courts of Tokyo and Osaka are in a position to accept an application for public summons and decision for nullification even with respect to the B/L for the cargo destined to the countries other than

Japan, if it is proved that such outward B/L was lost in Japan. Although this is somewhat questionable from the viewpoint of strict construction of Article 779 of the Code of Civil Procedure, the attitude of these courts should be welcome and is useful for de facto nullification of B/L.

It should be noted, however, that the carrier will stand in a difficult position if the lost B/L is surrendered by bona fide holder at the port of discharge in a foreign country because the decision of nullification by a Japanese court may not efficiently operate as defence in the claim lodged in another country.

2. In countries other than Japan

(1) Time limitation of liability of the carrier

One year limitation applies in many countries (U.S.A., West Germany, France, U.K., Canada, Australia, Hong Kong, India, Kenya, Burma, Urguay, Brazil, etc.)

In the State of California or West Germany 3 years limit may apply to the action founded in tort.

In Venezuela B/L for the cargo imported in it must be straight B/L (namely consignee's name must be designated in stead of "to order"). In this connection the carrier's liability terminates at the time of delivery to the customs.

As for liability for reissuance of B/L, there may be possibility of 30 years (W. Germany) or 6 years (U.K.) limitation.

(2) Decision of nullification

Only West Germany has a system similar to the decision of nullification in Japan.

In Brazil there is very simple system in which B/L becomes nullified if notice is published in a newspaper during 3 consecutive days and no answer is made during 2 days immediately thereafter.

In Hong Kong a notice in a newspaper is customarily utilized. However its legal effect may be doubtful.

3. Recommendable manual/procedure for shipping company

Taking into consideration aforementioned various problems concerning cargo delivery without B/L, we would study what are reasonable procedures to be taken by shipping company.

1. In general

(1) To check whether consignee is duly entitled to take delivery.

When the person who demands the delivery of the cargo without B/L or reissuance of B/L is not familiar with the shipping company or his economical situation or reliability is not satisfactory, it must be checked through sales contract, invoice etc. as well as inquiry to L/C opening bank and/or agents at relative ports whether such person is duly entitled to take delivery.

(2) To secure letter of indemnity with bank's guarantee.

Letter of indemnity should satisfy the following conditions.

(i) The signor is to be the person duly authorized. In case of a corporation a representative director is requested to sign, but if such corporation is a famous and big trading firm, signature of general manager of a certain department or branch will suffice.

(ii) Joint guarantee by bank is inevitable.
Bank should be reliable one and the best is the bank touching L/C in question.

(iii) Period of bank's guarantee should be unlimited.

(iv) Amount of bank's guarantee should be unlimited, if possible.
If some amount is strongly requested to be shown, it is desirable to make remarks to the effect that such amount is only for the purpose of assessing the guarantee fee. In the last case where amount of bank's guarantee cannot help being described, the amount should not be less than 150 percent of CIF value of the cargo in question.

(v) Instead of bank's guarantee, a cash deposit or pledge on the deposit

is acceptable. In case of the latter, acknowledgement should be made by the bank of such deposit. The amount is also to be over 150 percent of CIF value.

2. With respect to loss or late arrival of B/L destined to Japan

(1) In exchange for a letter of indemnity, the cargo delivery is admitted.

(2) Thereafter the consignee must be requested to take necessary procedures for the decision of nullification. When and if the consignee submits a true copy of such decision, bank's guarantee can be lifted but the consignee's single letter of indemnity should be still kept. The period of keeping letter of indemnity is to be 10 years or around.

(3) In case of late arrival of B/L, continuous requests should be made to the consignee to submit B/L as soon as possible. If the B/L is eventually found to be lost, the procedure for decision of nullification must be followed.

3. With respect to loss or late arrival of B/L destined to other countries from Japan.

(1) In exchange for a letter of indemnity, the cargo can be delivered or B/L can be reissued. However reissuance of B/L should be limited to cases of imminent necessity.

(2) In case of reissuance of B/L for one lost set of B/L out of say 3 sets of B/L, the other two sets must be beforehand returned.

(3) Reissued B/L shall be numbered by reference to the number of old B/L and the remark of reissuance is to be noted in the B/L. Also a notice of the fact of reissuance must be sent to the office or agents at the port of discharge.

(4) Procedures for decision of nullification are not required.

(5) After one year and three months after delivery, bank's guarantee can be

lifted upon request. But before doing so it must be checked that no claim concerning such B/L was lodged with any branches or agents. After lifting bank's guarantee, the consignee's single letter of indemnity must continue to be kept. If the consignee's financial situation or reliability is poor, lifting of bank's guarantee must be refrained.

(6) The period of keeping letter of indemnity is to be 10 years or around.

(My hearty appreciation is hereby expressed to a valuable advice given by Mr. N. Carden, Executive of Thos. R. Miller & Son)

II-1. Arbitral Award in a Dispute Arising from a Purchase Contract for a Motor Vessel "SUMOTO MARU"

The Claimant: Purchaser (The Philippines)

The Respondent: Seller (Japan)

- the coating of the bottom with anti-corrosive paint done by the Respondent without Claimant's approval.
- the unwarranted and unauthorized acts of bad faith.
- cancellation of the contract.
- demand for the refund of the deposit.

Regarding the disputes between the parties as above mentioned arising from a purchase agreement for a motor vessel "SUMOTO MARU" dated September 26, 1979, the arbitrators appointed in accordance with the Rules of Maritime Arbitration of the Japan Shipping Exchange, Inc. hereby render the following arbitral award having closely studied the case.

Award

1. The Respondent shall pay to the Claimant the sum of US$10,000 and the interest thereon at the rate of 6% per annum for the period from October 1, 1979 to the date upon which the payment is completed.
1. The rest of the claims made by both parties shall be dismissed.
1. The cost of this arbitraion shall be ¥600,000, and the same being split between the Claimant and the Respondent each party shall pay ¥300,000.
1. Tokyo District Court shall have the Jurisdiction over this arbitral award.

I. Statements made by the Parties

1. The Claimant
   (1) The Respondent shall pay the Claimant the sum of US$20,000, and the interest thereon to be computed at the prevailing bank rate.
   (2) The cost of this arbitration shall be paid by the Respondent.
2. The Respondent
   (1) The claims made by the Claimant shall be dismissed.
   (2) The cost of this arbitration shall be paid by the Claimant.

II. Pleadings of the parties

1. Pleadings of the Claimant

(1) Regarding a M.V. "SUMOTO MARU" owned and controlled by the Respondent (hereinafter referred to as "the Vessel") and based on the Survey Report by Nippon Kaiji Kentei Kyokai for the Vessel (Exhibit A-B) and the inspection report of the Vessel while she was afloat by M. Ponce, the consultant engineer for the Claimant (hereinafter referred to as Ponce), the Memorandum of Agreement dated September 26, 1979 regarding the purchase and remodelling of the Vessel was entered into between the parties, using the Nipponsale Form made by the Documentary Committee of the Japan Shipping Exchange, Inc. (Exhibit A-C. Hereinafter referred to as the Agreement)

The articles and special provisions of the Agreement and the Addendam thereto related to the dispute are as follows.

2. The Purchase Price of the vessel shall be US$200,000.00 and US$ 300,000.00 for remodelling of the vessel as per Addendum of this Memorandum of Agreement.
3. As a security for the correct fulfillment of this Agreement, the Buyers shall pay a deposit of 10 per cent of the Purchase Money . . . within two weeks from the date of this Agreement . . .
4. The Buyers shall pay the balance of the Purchase Money as follows:

Addendum to 4. of MOA (38)

. . . of which US$180,000.00 shall be paid to the Sellers when the vessel is put on drydock and approved by the Representative of the Buyers and US$300,000.00 shall be paid when the vessel is delivered to the Buyers by the Sellers upon the completion of remodelling and export procedures are completed.

6. The Sellers shall deliver to the Buyers the vessel upon completion of remodelling free from outstanding recommendations and average damages affecting her present class in safe berth in Nagasaki Port, Japan not before November 15, 1979, but not later than December 15, 1979.

In the event of the Sellers failing to deliver the vessel within the period specified as above, the Buyers shall have the option of maintaining or cancelling this Agreement, but any delay not exceeding thirty (30) days caused by force majeure and/or caused by repairs in order to pass the inspection under clause 7 of this Agreement to be accepted by the Buyers.

14. Should the Buyers fail to fulfil this Agreement, the Sellers have the right to cancel this Agreement, in which case the deposit shall be forfeited to the Sellers. If deposit does not cover the Sellers' loss caused by the non-fulfillment of this Agreement, they shall be entitled to claim further compensation for any loss and for any expenses.

If default should be made by the Sellers in the delivery of the vessel with everything belonging to her in the manner and within the time herein specified, the deposit shall at once be returned to the Buyers, and the Sellers shall, in addition, make due compensation for loss caused by the non-fulfillment of this Agreement, but such compensation shall only be payable by the Sellers if such default on the Sellers' part is from other caused than those referred to in clause 6 and/or clause 9 of this Agreement.

15. Any dispute arising from this Agreement shall be submitted to arbitration held in Tokyo by the Japan Shipping Exchange, Inc. in accordance with the provisions of the Maritime Arbitration Rules of the Japan Shipping

Exchange, Inc. and the award given by the arbitrators shall be final and binding on both parties.

Addendum to the Sales Agreement

3. The vessel at the onset of the remodelling shall be subjected to J.G. inspection as to the condition of the underwater portion of the vessel. The Owner shall be given notice at least three (3) days prior to drydocking and inspection to enable the Owner to send its representative to witness the inspection. It is understood that inspection shall include the customary painting schedule of the vessel.

(2) The Claimant paid to the Respondent the sum of US$20,000.00 on October 1, 1979 as a deposit pursuant to Article 3 of the Agreement (Exhibit A-D) and made the representative of the Claimant, M. Carpo, (hereinafter referred to as Carpo) come to Japan in order to inspect the Vessel in accordance with Article 4 of this Agreement upon consultation with the Respondent. When Carpo and Ponce visited the dock of Shimabara Dock Kyogyo Kumiai at Shimabara City, Nagasaki Prefecture on October 10 of the same year, the Vessel had already been drydocked and its bottom painted with anti-corrosive paint.

(3) As stated above, the coating of the bottom with anti-corrosive paint, which had been done by the Respondent without the Claimant's approval, constitutes the unwarranted and unauthorized acts of bad faith by the Respondent which deprived the Claimant of an opportunity to fully inspect the condition of the Vessel. The Claimant therefore decided not to proceed with the purchase of the Vessel and so advised the Respondent in their letter of October 17 (Exhibit A-F) citing the deteriorated condition of the Vessel found as a result of the inspection, and demanded the refund of the deposit.

(4) The inspection and the approval by the Claimant are made the prerequisite for the Agreement by the special provisions thereof, and the coating of the Vessel without the Claimant's consent prior to the inspection constitutes a

violation of the basic condition of the Agreement.

2. Statement of Counterclaims made by Respondent

(1) Carpo and Ponce conducted their inspection on October 10, 1979 at Shimabara Dock Kyogyo Kumiai of Shimabara City, Nagasaki Prefecture in order to inspect the bottom of the Vessel in accordance with the Agreement. Although one coat of anti-corrosive paint was given to the underwater part of the Vessel on October 10, there was no difficulty in inspecting the conditions of the propeller, the rudder, the bottom and other underwater parts of the Vessel (Exhibits B-B and B-C).

(2) At the time of the said inspection, the Claimant lodged no claim about the conditions of the Vessel, let alone their intention to cancel the Agreement. The two representatives of the Claimant went on to discuss with E. Hayashi, the representative of the Respondent, on 11th at the main office of the Respondent concerning the price and the expense of remodelling the Vessel. Such a discussion could have been held only if the Claimant had approved the conditions of the Vessel. Furthermore, Ponce stayed on in Nagasaki following this meeting, having meetings concerning the details of the remodelling, and executed a Guarantee Undertaking for the remodelling work on October 12 (Exhibit B-A). The Agreement, therefore, was concluded and effective. Although the Claimant alleged that the coating of paint was willfully done by the Respondent and cited the same as the reason for cancellation of the Agreement, the Respondent refused refunding of the deposit under Article 14 of the Agreement because the Claimant's cancellation of the Agreement was unilateral, their allegations being utterly groundless (Exhibit B-D).

(3) If the Claimant had made a claim against the painting, inspections other than the visual inspection could have been arranged. Besides, any damages on the Vessel, if found, were to be repaired by the Respondent in their own responsibility.

3. Evidences

The Claimant submitted Exhibits A-A to A-G, and the Respondent Exhibits B-A to B-D as the evidences respectively.

Reasons

1. There is no dispute between the parties on the conclusion of the Agreement on September 26, 1979 regarding the Vessel which was owned and controlled by the Respondent.

Although the Agreement used the Form of NIPPONSALE with Addendam providing various special agreements, the Agreement in fact may be interpreted as mainly concerning remodelling, as is evident from its purpose being remodelling the Vessel into a private yacht and delivery thereof to the Claimant, and from the fact that the remodelling expenses greatly exceeded the price of the Vessel itself. It is deemed, therefore, to have a character which is remarkably different from the ordinary sale and purchase of a vessel presupposed by the above mentioned Form. Of the special provisions, the one on which the Claimant base their demand, that is, the clause appearing from the line 38 of Article 4 of the Agreement,

"... of which US$180,000.00 shall be paid to the Sellers when the vessel is put on drydock and approved by the Representative of the Buyers..."

(hereinafter referred to as the special provision of Article 4) is found to have been inserted by the Claimant and not particularly excepted to by the Respondent.

2. In perusing the development of the dispute in this case, the Vessel had already been dry-docked and the bottom thereof had been given one coat of anti-corrosive paint when the Claimant went to Shimabara, Nagasaki Prefecture on October 10, 1979 for the inspection of the Vessel in accordance with the above mentioned special provision of Article 4.

Having returned home on October 17 of the same year the Claimant informed

the Respondent in writing of their decision not to proceed with the purchase of the Vessel and demanded the refund of the deposit, claiming that

"We find said vessel much too deteriorated and failing to come up to the condition represented by you."

According to the Application for Arbitration, the Statement of Claims submitted by the Claimant and their Testimony made at the Hearing, the inspection of the Vessel and approval thereof by the Claimant prior to the remodelling was the prerequisite for the purchase of the Vessel, wherefore the above special provision was inserted for that purpose; the Respondent's unauthorized painting of the Vessel prior to such an inspection lead them to conclude that they were deprived of a full inspection of the Vessel, and it clearly constituted a breach of faith on the part of the Respondent; and thus the cancellation of the Agreement and refunding of the deposit ought to be made under the special provision of Article 4.

The Respondent responded to the above quoted notice of the Claimant dated October 17 by a letter dated October 26 stating that

"be informed that your abrupt and unilateral decision to cancel the purchase of the Vessel has resulted in immense losses to my client in terms of expenses incurred, even much more than the amount you deposited with them. Moreover, although we recognize your right to cancel the Agreement, we feel such a decision is not based on reasons and/or grounds for a valid cancellation of the Agreement in order that a refund of your deposit be deemed proper. We, therefore, will take your deposit money as a forfeiture as per Article 14 of the Agreement."

The Respondent cite their grounds for such a response in their Statements submitted in writing and made at the Hearing that the behavior of the Claimant at the site of inspection of the Vessel was conclusively deemed as their approval of the special provision of Article 4, and that giving a coat of paint to the Vessel in no way prevented the inspection thereof, and therefore the Claimant's objection that this deprived them of their opportunity for a full inspection was not a valid reason for cancellation of the Agreement. In their Statement submitted after

the Hearing, they stated that damages, if any, were to be repaired by the Respondent and the Claimant could not cancel the Agreement for this reason.

3. Pleadings and disputes of the parties as above stated are now considered.

(1) Effect of the special provision in Article 4 concerning the approval by the Claimant:

(i) The special provision in question is stated in very simple words which makes it difficult to readily render interpretation based on the wording. However, the Respondent did not particularly dispute the statement made by the Claimant that the inspection and approval of the Vessel by the Claimant was the prerequisite for the Agreement; and also from the facts that the Respondent stated in their first Statement that the Agreement came into force validly in absence of any claims lodged by the Claimant after the inspection and further that no arrangement was made for a class surveyor at the time of the Claimant's inspecting the Vessel, it is judged that the both parties' understanding was that the approval by the Claimant themselves of the condition of the Vessel would affect the validity itself of the Agreement, although the special provision in question was inserted into the Article 4 which provides for the payment of the price of the Vessel.

(ii) However, the special provision does not define the contractual effect or the rights and obligations of the parties when the Claimant did not give their approval, and here the understandings of the parties diverge.

Although the Claimant assert that the Agreement may be cancelled when they do not give their approval (including the instances where they were made unable to do so), the Claimant do not seem to have fully proven this point when the Claimant's Statement and Testimony are reviewed.

The understanding and pleading of the Respondent on this points, on the other hand, clearly contain contradiction. In their initial Statement, the Respondent consistently arguing the propriety of the reason for the cancellation said that the Claimant's cancellation lacked valid grounds and was therefore unreasonable. This is substantially the same as the response written by the Respondent on October 26 quoted in II above. However, the Respondent was

heard to state in the Hearing that they understood that under the Agreement the repair was to be made to the satisfaction of the Claimant in case their approval was not obtained, and yet that the Agreement would lapse in the absence of the Claimant's approval. They came to state in their Statement submitted after the Hearing that damages, if any, would be repaired and the Agreement could not be cancelled.

In the ordinary sale/purchase of vessels, the inspection of the bottom is conducted in order to ascertain whether the vessel in question unconditionally meets the standards of the Ship Classification Society designated by the Agreement. Any party who has had experiences in sale/purchase of vessels would know instantly that when the ship does not meet such classification standards, the prevailing practice is for the sellers to repair the ship until a clean certificate of the surveyor belonging to the Classification Society is obtained, and this is also what is stipulated in the NIPPONSALE Form. Thus, the pleading of the Respondent that in the case where the approval as defined in the special provision is not obtained, it suffices so long as the Respondent make the repair to the satisfaction of the Claimant without leading to cancellation of the Agreement is acceptable as a principle. On the other hand, when the fact is taken into consideration that the Respondent who are engaged in the trade of exporting vessels and who have expertise knowledge of the forms and practices in the trade did make in the first place those Statements and Testimony which are contrary to such practices, the arbitrators cannot but judge that it is not proper to immediately conclude that the interpretation by the principle based on the practice, form and wordings is automatically applicable simply because the special provision in the Agreement does not stipulate otherwise.

(2) In this case the Respondent refuse refunding the deposit on the strength of Article 14. However, it would be the duty of the Respondent to do so if the Respondent were to insist that the special provision in Article 4 stipulates that the damages, if any, are to be repaired by the Respondent in their own responsibility. The arbitrators fail to understand the reason for the Respondent's failure to proceed toward arrangement for the repair when they were informed

by the Claimant of the deteriorated conditions of the Vessel and cancellation of the Agreement. From the point of equity, therefore, also unacceptable is their assertion to refuse the refund of the deposit under Article 14 while neglecting their own duties.

4. The Demand of the Claimant is refund of the deposit, while that of the Respondent is the dismissal of the Claimant's demand. Considering the situation as above stated and the judgement as above rendered, it is considered most reasonable to review the present case from the point of equity as to the reasonableness/unreasonableness of the facts and to pass the judgement on the demands made by both parties.

5. Study of Facts

(1) Coating of Anti-Corrosive Paint on the Bottom

The Respondent state that an oral agreement of the Claimant was obtained and assert that Ponce was also aware of this, but it is recognized that the painting was performed without knowledge of the Claimant from Ponce's testimony that it was not until he saw the Vessel that he learned of the fact that the painting had been done.

The Respondent conclude that the inspection of the bottom is in no way deterred by the painting. However, since it is a common knowledge that the inspection of the bottom is to view the existing condition, and painting prior to the inspection cannot be considered as an accepted custom in the ordinary sale and purchase of vessels, the Respondent's conclusion cannot be accepted affirmatively. Even if it were to be so accepted in this case (although we have no means of ascertaining it), giving the coat of paint without prior authorization is still absurd since Paragraph 3 of the Addendum to this Agreement states "inspection shall include the ordinary painting schedule", and the Respondent may well be called as having violated the Agreement.

It is readily supposed that the Claimant, buying a vessel for private use for the first time, should think that a full inspection of the Vessel was hampered by the painting in question, but it is not reasonable to assert that this was a conclusion not to be changed in any way. For instance, an appointment of a surveyor could

have been arranged, and his advice could have been taken into consideration. It is also reasonably supposed that the Claimant should come to harbour a keen sense of distrust in the Respondent because of the unauthorized painting by them who were to perform a remodelling work of an enormous scale on behalf of the Claimant. And yet, this is not a proof enough to decide that it was an unmistakable deed of betrayal on the part of the Respondent as asserted by the Claimant, and the arbitrators are obliged to say that it was unreasonable of the Claimant to jump at cancellation of the Agreement.

(2) Circumstantial Evidences of Whether Approval was Given or Not.

The Respondent state that the approval of the Claimant based on the special provision of Article 4 was given in fact pointing out that the Claimant did not make any claims after their inspection of the Vessel, that consultations were held on the price and remodelling job of the Vessel on the day following the inspection, and that a Guarantee Undertaking with Ponce was concluded. From the result of the Hearing, the allegation from the points 1 and 2 above is deemed to remain within the scope of subjective impressions formed by the Respondent. Perusing the Guarantee Undertaking, Ponce is found to have signed the guarantee by the Respondent merely as a witness, and therefore the Undertaking cannot be deemed as a valid contract executed upon an agreement reached by the parties. Although the Respondent consider Ponce an agent acting for the Claimant, the Claimant refuse to acknowledge the fact, and there are no other evidences to prove this point. And since the Respondent acknowledge having paid an honorarium to Ponce, he cannot be recognized as having acted as an agent for the Claimant. Therefore, it is not possible to acknowldege from the circumstantial eviences cited by the Respondent that there existed the fact of an approval.

6. Having carefully studied the Statement and Testimony given at the Hearing in the light of the facts recognized in the foregoing Reasons 2, 3, 4 and 5 and the judgement made, it is hereby judged reasonable that half the amount of the deposit, viz. US$10,000, and the interest thereon calculated at 6% per annum for the period from October 1, 1979 to the time the payment is completed

should be paid to the Claimant by the Respondent.

7. Having reviewed the overall results as above mentioned, it is deemed reasonable that the cost of this Arbitration shall be paid equally by the parties.

Given on May 15, 1981

II-2-1 Interlocutory Award (as to Arbitral Body and Place) in a Dispute Arising from Voyage Charter Party for M.S. "SUN RIVER"

Claimant : Owner (Panama)
Respondent : Charterer (Korea)

Regarding the dispute between the parties as above mentioned arising from Voyage Charter Party dated July 23, 1980 for M.S. "SUN RIVER", the arbitrators appointed in accordance with the Rules of Maritime Arbitration of The Japan Shipping Exchange, Inc. hereby render the following award as to the arbitral body and the place, prior to hearing the merits of the case:

Main Text

Respondent's plea regarding the present arbitral body and the place for the dispute in question is groundless and, therefore, cannot be admitted.

Reasons

With regard to its claim for demurrage relating to the M.S. "SUN RIVER" Voyage Charter Party dated July 23, 1980 (hereinafter referred to as the "Charter Party"), Claimant filed an application for arbitration with The Japan Shipping Exchange, Inc. (hereinafter referred to as the "Exchange") in accordance with Clause 43 of the Charter Party which reads:

> "Any dispute arising under this Charter Party to be referred to "The Korean Commercial Arbitration Association, Seoul, Korea" and "The Japan Shipping Exchange, Inc., Japan" and the award of which to be final and binding upon both parties."

The application was accepted by the Exchange on July 22, 1981, and a copy

of a complete set of Claimant's application documents was immediately served upon Respondent. Respondent sent to the Exchange in response a letter dated August 12, 1981, the last paragraph of which reads as follows:

> "For your reference following is full text of item 43 of Charter Party specifing arbitration clause, (QUOTE No. 43 (the same as quoted above) UNQUOTE."

Further, in its letter to the Exchange dated October 7, 1981 and also in its letter of no date which was received by the Exchange on November 27, 1981, Respondent requested postponement of the date set for filing its counterclaim or suspension of arbitration proceedings because of a delay in obtaining relative documents such as laydays statement, from consignees. The second paragraph of Respondent's telex dated February 24, 1982 reads:

> "2.ACDG TO ITEM NO. 43 OF SAID CHARTER PARTY AND DISPUTE ARISING UNDER THIS CHARTER PARTY TO BE REFERRED TO THE KOREAN COMMERCIAL ARBITRATION ASSOCIATION SEOUL KOREA AND THE JAPAN SHIPPING EXCHANGE, INC JAPAN. TFORE PLACE OF ARBITRATION TO BE AGREED UPON BETWEEN CLAIMANT AND RESPONDENT PRIOR TO PROCEEDING WITH ARBITRATION. WE UNDERSTAND THAT ACDG TO THE KOREAN–JAPANESE ARBITRATION AGREEMENT DATED OCT 23/26, 1973 IF PLACE OF ARBITRATION NOT REACH AGREEMENT BTN APPLICANT N RESPONDENT WITHIN 28 DAYS AFTER THE DATE APPLICATION FOR ARBITRATION RCVD FM EITHER PARTY BY EITHER ASSOCIATION, PLACE OF ARBITRATION TO BE THE PLACE OF RESPONDENT. TFORE UNLESS ABV CLARIFIED, UNABLE TO AGREE TO OWNERS ROST/ INTENTION TO PROCEED ARBITRATION."

Respondent thus made a plea that the place of arbitration for this dispute should be Seoul. In its letter to the Exchange dated March 2, 1982 following the above telex, Respondent states that:

> "You are meantime reminded that Clause 43 of the Charter Party stipu-

lates "to be referred to the Korean Arbitration Association and your Exchange." In other words, we may elect to go to Korean arbitration in the event such necessity is inevitable."

Against the above plea of Respondent, Claimant argues in writing dated March 1, 1982 substantially as follows:

(1) According to the provisions of Article 26 (Forum in Consequence of Defense) of the Code of Civil Procedure of Japan, an objection with regard to a jurisdiction should be filed in the initial stage of arbitration proceedings.

(2) Respondent argues that pursuant to Clause 43 of the Charter Party, the place of arbitration should be agreed upon between the parties before arbitration is initiated. However, a need for arbitration arises only when there is a dispute between the parties, and in such a stage they cannot possibly be expected to reach a gentleman's agreement. For this reason, an arbitration clause is agreed upon in advance so as to enable either party to initiate arbitration in case a dispute should arise.

(3) Claimant has no knowledge of the Korean–Japanese Arbitration Agreement. Respondent asserts that arbitration should be held in the place of its domicile. However, since Claimant is a Panamanian corporation and Respondent a Korean corporation, it would be most equitable and fair to have the dispute arbitrated in Japan, a third nation. Furthermore, because Claimant is a Panamanian corporation, a reference to the Korean–Japanese Arbitration Agreement is irrelevant.

(4) The arbitration clause in question expressly states that "the award is final and binding upon both parties." In considering the above phrase, "Seoul *and* Japan", in relation to this arbitration clause, if one interprets it to mean that a dispute is arbitrable in both places, then there would be two arbitration awards both binding the parties, which is obviously unreasonable, and it is most unlikely that the parties have agreed in advance upon such irrational arbitration clause. Ordinarily, arbitration is initiated by one of the parties and the other party may file a counterclaim within

the limits of the same arbitration procedures as followed by the party initiating arbitration. Therefore, what was really agreed upon by the parties in the present case is "Seoul *or* Japan", and the arbitration clause in question was duly formed with the understanding that a party against whom arbitration is initiated shall proceed to undertake defense irrespective of whether such arbitration is applied for in Seoul or in Japan. This is a logical consequence of the parties' agreement regarding "binding clause."

Attorney for Claimant submitted other arguments as well against Respondent's contention, and thus there is a great gap between the two parties' allegations.

In view of the fact that the arbitrtation clause 43 is inserted typewritten in the Charter Party and is not part of its printed form, the arbitrators deemed it necessary to hear directly from the parties their intention at the time this charter party was prepared and to examine their statements together with their respective arguments referred to above so as to determine which of the places should be taken as the place of arbitration. Accordingly, the arbitrators decided to hold the hearing for both parties on July 7, 1982 only on this point. Notice of the hearing was sent to both parties on June 10 of the same year. Claimant submitted his affidavit dated June 16, 1982 and on the date of hearing, Attorney for Claimant, appeared before the arbitrators. Respondent, in its letter of June 24, 1982, stated:

> "We wish to reiterate our position not to avail of your service in this case, where we feel like being driven about by the Owner .... As we said in our previous letter, we feel like being driven in a losing game. As aforementioned we would not meet with this arbitration, having no one to represent us in your good office."

and did not appear on the date of hearing.

Now, the arbitrators proceed to examine the meaning of the word "and" as used in the "The Korean Commercial Arbitration Association, Seoul, Korea" and "The Japan Shipping Exchange, Inc., Japan" in Clause 43 of the Charter

Party.

It is evident that the said arbitration clause was inserted with the intention of excluding submission of any dispute to a court either in Japan or Korea. With regard to the circumstances which led to the making of the arbitration clause, Claimant states in its affidavit that, when the parties negotiated the Charter Party, Claimant desired to have a dispute arbitrated in Japan while Respondent desired to have it arbitrated in Seoul, and so the parties eventually made a compromise and agreed that an application for arbitration might be filed either in Seoul or in Tokyo. The wording of Clause 43 may have been an inevitable consequence of the circumstances in which it was drawn up. From the foregoing, one should say that the word "and" signifies the parties' agreement that their dispute be arbitrable either in Seoul or in Tokyo.

However, once the parties have failed to settle a dispute through their negotiation and are obliged to refer the dispute to arbitration for settlement, it may be practically impossible for them to agree as to which of the two places should be the place of arbitration no matter how much they discuss and try to agree upon the question according to the above interpretation of the word "and". Yet, interpreting the word "and" as meaning that a dispute is arbitrable in both places (two arbitrations of one dispute) would, needless to say, result in an obvious inconsistency with the last part of Clause 43 reading " . . . . . the award of which to be final and binding upon both parties."

Therefore, the word "and" must be held to mean that the parties agreed to have arbitration conducted in "Seoul or Tokyo", and it is the most reasonable interpretation of Clause 43 that if arbitration procedure is initiated by either party in one of the places, then the other party must file its plea and/or counterclaim in that place.

Next, the arbitrators examine whether or not Seoul, the place of domicile of Respondent, can be made the proper place of arbitration upon the theory that the domicile of defendant should be considered a place of jurisdiction as asserted by Respondent. The interpretation of the wording of Clause 43 is as explained above, and in order to have the clause construed as adopting the

forum of domicile of defendant, the clause must contain the express provision to that effect and so Respondent's contention does not hold. Also, Respondent referred to the Korean–Japanese Arbitration Agreement to support its position. However, the Arbitration Agreement was entered into in October, 1973 between the Korean Commercial Arbitration Association and The Japan Commercial Arbitration Association and it does not bind all of the commercial arbitrations between Japan and Korea. Arbitrations governed by the Arbitration Agreement are limited to those of disputes relating to agreements which incorporate the arbitration clause set forth in Article 1 of the Arbitration Agreement. Clause 43 of the Charter Party is completely different from Article 1 of said Arbitration Agreement and therefore Respondent's argument referring to the Arbitration Agreement does not hold, either.

Without any further reference to other arguments of the parties, it can be held reasonable from the foregoing that Claimant filed an application for arbitration of the dispute with the Maritime Arbitration Commission of the Exchange and that the Commission accepted the application.

Given in Tokyo, on September 1, 1981

II-2-2. Arbitral Award in a Dispute Arising from Voyage Charter Party for M.S. SUN RIVER

Claimant : Owner (Panama)
Respondent : Charterer (Korea)

- Calculation of laytime
- Outbreak of war
- Inability to do nightwork

Regarding the dispute between the above mentioned parties arising from Voyage Charter Party dated July 23, 1980 in respect of MS SUN RIVER, the arbitrators appointed in accordance with the Rules of Maritime Arbitration of the Japan Shipping Exchange, Inc. hereby render the following award having closely examined the case.

Main Text

1. Respondent shall pay to Claimant the sum of US $197,083.32 and interest thereon at the rate of 6% per annum for the period from July 22, 1981 to the date upon which payment is completed.
2. All other claims made by Claimant are not admitted.
3. The cost of this arbitration is ¥1,212,000 which shall be paid in full by Respondent. Provided, however, should Claimant first defray the above sum, Claimant shall receive reimbursement therefor from Respondent in addition to the sum described in Paragraph 1 above.
4. Tokyo District Court shall have jurisdiction over this arbitration.

Facts and Claims

I. Statement made by Parties

1. Claimant

(1) Respondent shall pay Claimant the sum of US $198,454.88 and the indemnity for arrears at the rate of 6% per annum for the period from January 5, 1981 to the date upon which the payment is completed.

(2) The cost of this arbitration and remuneration for the arbitrators shall be paid by Respondent.

II. Pleadings of Parties

1. Claimant

(1) Regarding to MS SUN RIVER (gross tonnage of 12,102.91; hereinafter referred to as the "Vessel"), a Voyage Charter using Gencon form (Exhibit A-1; hereinafter referred to as the Charter Party) was entered between Claimant and Respondent on July 23, 1980 the main pertinent clauses of which read as follows:

PART I

10. Loading port or place: One safe berth, one safe port of Yosu, Korea

11. Discharging port or place: One safe berth, one safe port Bandar Abbas or Bandar Khomeini, Iran

12. Cargo: D-Ammonium Phosphate 19,800 M/T Min/Max

PART II

6. Laytime

(c) Commencement of laytime (loading and discharging)

Laytime for loading and discharging shall commence at 1 p.m. if notice of readiness is given before noon, and at 8 a.m. next working day if notice given during office hours after noon. Notice at loading port to be given to the Shippers named in Box 17. Time

actually used before commencement of laytime shall count.
Time lost in waiting for berth to count as loading or discharging time, as the case may be.

RIDER

No. 23 Cargo to be loaded, stowed and trimmed at Shippers'/Charterers' expense and risk at average rate of 1,500 metric tons net weight per Weather Working Day of 24 consecutive hours, Sundays and Holidays Excepted, Unless Used, and if used, actually used time only to count as Laytime. Cargo to be discharted at receivers' expense and risk at the average rate of 750 metric tons net weight Weather Working day of 24 consecutive hours. Fridays and Holidays excepted, even if used.

No. 34 Allowable laydays for loading and discharging to be calculated on the quantity of Bills of Lading and time for loading and discharging to be non-reversible.

No. 35 Demmurage at Loading port and discharging port to be paid by Charterers at the rate of US $5,000.00 per day or pro rate for any part of a day for all time lost. Despatch at loading port and discharging port to be paid by Owners at the rate of US $2,500.00 per day or pro rate for laytime saved.

No. 36 Demmurage money at loading port and at discharging port to be paid within 30 days after laydays statement in mutual agreed between charterers and owners.

No. 37 In case of not accepted the Notice of readiness or not signed on Time Sheet on account of consignees without proper reason, Charterers and Owners agree to adopt Mastar's Statement as a proper Time Sheet.

No. 41 Shifting, if any, cost to be for Owners' account and time to count as laytime at both ends.

No. 43 Any dispute arising under this Charter Party to be referred to "The Korean Commercial Arbitration Association, Seoul, Korea" and "The Japan Shipping Exchange, Inc., Japan" and the award of which

to be final and binding upon both parties.

(2) The Vessel arrived at Yosu, Korea on July 29, 1980 and completed loading on August 6 of the same year. During this time despatch of 6 days, 13 hours and 38 minutes accrued in an amount of US $16,420.12.

(3) The Vessel subsequently arrived at Bandar Khomeini, Iran on August 31 of the same year, and completed discharging on November 20 of the same year.

There accrued demurrage of 42 days, 23 hours and 24 minutes in the total amount of US $214,875.00.

(4) Having substracted the despatch from the demurrage, the sum becomes US $198,454.88. Claimant requested Respondent to pay this sum on January 5, 1981 attached with relevant data. Although Respondent admitted accruing of demurrage, Respondent asked for a substantial reduction from the large sum, and failed to make payment.

2. Respondent

(1) In accordance with the Charter Party, it is very clear that demurrage money, if any, is to be settled after the laydays statement is mutually agreed between Claimant and Respondent. Claimant insists that Respondent refused to sign the statements without any reason, which is not true. Respondent asked Claimant to wait until Respondent received necessary documents from consignee for evaluation of the documents. It is quite natural and usual that Respondent should have timesheet etc. through trading channel for the evaluation and it is prerequisite for Respondent to collect necessary documents from consignee since discharging was said to have been performed at discharging port under the abnormal situations like war between Iran and Iraq.

(2) In accordance with the Statement of Facts discharging operation was not able to be undertaken from 18:00 hours to 06:00 hours at night during October 6th-November 20th, 1980 because war broke out, which was recognized and confirmed by Master as shown on the Statement of Facts.

The prevention of normal discharging operation at discharging port was attributable to war between Iran and Iraq, which was beyond Respondent's/receiver's control, and under this emergency situations Claimant should have been insured by insurance company for the Vessel's possible being stranded in the Iran—Iraq war zone.

III. Evidence

Claimant submitted Exhibits A-1 to A-11, and Respondent Exhibits B-1 to B-4, as evidence, respectively.

Reasons

1. This case concerns a dispute relating to computation of laytime at loading port and discharging port. Respondent pleaded prior to the hearing of the merits of this case that this Board of Arbitrators has no jurisdiction in accordance with Article 43 of the Charter Party. This plea was decided in the Interlocutory Award dated September 1, 1982 and found to be groundless. In this Award only the merits of the dispute concerning computation of the laytime are examined. Respondent waived its opportunity to attend the hearing before the Board of Arbitrators, but submitted its laytime statement (Exhibit A-10) in a letter addressed to the attorney for Claimant dated September 29, 1982 and further discussed its grounds for calculation of laytime in its Statement dated February 1, 1983. The Board of Arbitrators therefore makes this judgement based on an overall examination of pleas and evidence submitted by both parties.

2. Loading Port

The only difference between the allegations of the parties concerning calculation of laytime at the loading port is August 3, 1980. Whilst Claimant calculated 24 hours for the whole day as laytime used, Respondent calculated only 10 hours 50 minutes. According to the Time Sheet (Exhibit A-3), this day was Sunday and it is clear that the actual loading operation was conducted between

09:00 and 19:50. The Charter Party states in Articl 23 that

"Cargo to be loaded — Sundays and Holidays Excepted, Unless Used, and if used, actually used time only to count as laytime."

Therefore, the actual working time alone should have been counted as laytime on this day. It is judged, accordingly, that Respondent's contention concerning counting of laytime at loading port is correct. On the basis that, it is considered normal trade practice to count down to 5 digits for calculating despatch and demmurage, the time saved at the loading port is 7.11667 days and the despatch accrued is US $17,791.68.

3. Discharging Port

(1) There is no dispute between the parties concerning a remark reading

"NO WORK AT NIGHT FROM 6th Oct. TILL 20th Nov. 1980, DUE TO WAR BLACK OUT"

(NIGHT FROM 1800 Hrs to 0600)

which appears in the Statement of Facts (Exhibit A-6).

The dispute is whether the above fact had the effect of interfering with the running of laytime. Claimant conducts counting assuming that the above fact does not interfere with the running of laytime whereas Respondent alleges that the running of laytime was interfered with because 1) the above fact is clearly described in the Statement of Facts and which was countersigned by the Captain; 2) the fact resulted from the outbreak of Iran/Iraq War and is therefore due to force majeure; and 3) Claimant should have insured itself against damages or delay arising from the above fact. We shall examine the points in the order listed in Respondent's plea.

(2) The Statement of Facts is a record of facts confirmed by the parties as to whether the loading/discharging operation was actually conducted or not conducted, to be used as the reference material on which laytime counting is to be based. The laytime is to be counted based on the said Statement of Facts in accordance with the provisions of the Charter Party. The mere fact that the matters alleged by Respondent were described in the

Statement of Facts does not of itself prove the Respondent's case. It is necessary to conduct the counting of laytime, bearing in mind such facts, in accordance with the provisions of the Charter Party.

(3) Laytime is the number of days provided in the Charter Party as the period during which loading or discharging is to be conducted. If Charterer fails to finish loading or discharging during the said period, Charterer must pay the corresponding demurrage accruing from such a delay unless the delay was caused by an error on the part of the owner or its servant or agent or the delay was caused by a reason to which an exemption clause of the Charter Party applies. In the present case, it has not been established that the fact described in Reasons 3 (1) was caused by an error on the side of Claimant.

The Charter Party provides

> "Cargo to be discharged at receiver's expense and risk at the average rate of 750 metric tons net weight Weather Working day of 24 consecutive hours. Fridays and Holidays excepted, even if used."

This indicates that weather, Fridays and Holidays only constitute reasons for interfering with the running of laytime. The excepting words in this clause of the Charter Party clearly does not apply to Respondent's inability to conduct night time work. Respondent had an absolute obligation to discharge within the time provided by the above clause, subject only to the exception of weather, Fridays and Holidays. Respondent's allegation on this point cannot be admitted.

Respondent further alleges that it is to be exempted by reason of force majeure because its inability to do night work arose from the outbreak of a war. Even if the inability to conduct night time operation because of the war did amount to force majeure, the Charter Party does not provide for any exception to Respondent's above obligation by reason of force majeure. Furthermore, if (which is not clear) Respondent alleges that the alleged force majeure amounted to illegality of discharging, this cannot be recognized because it is clear that the alleged force majeure or illegality was relevant

only to a portion of the day, as normal daytime work was not interfered with in any way. Accordingly, Respondent cannot assert exemption by reason of force majeure.

(4) In this Charter Party Claimant has no obligation to assume responsibility for any damages or delay arising out of facts as described in Reasons 3 (1) and for insuring itself against same, nor does Claimant have any obligation to purchase insurance on behalf of Respondent; nor is it recognizable that such insurance coverage should be obtained in the normal course of business apart from the Charter Party. Therefore, allegations of Respondent regarding insurance are not to be allowed.

(5) In view of the above reasons combined together, it is judged that the remark "NO WORK AT NIGHT .... DUE TO WAR BLACK OUT" in the Statement of Facts concerning discharging has no effect to interfere with the running of laytime in the case. Accordingly, Claimant's assertion that the demurrage of 42 days, 23 hours and 24 minutes accrued at the discharging port amounting to the total of US $214,875.00 is judged to be reasonable.

4. Based on the above reasons, it is judged that Respondent should pay Claimant the sum of US $197,083.32 which is the difference between the amounts recognized in Reasons 2 and 3 and the interest thereon at the rate of 6% per annum for the period from July 22, 1981 to the date upon which the payment is completed.

5. The cost for this arbitration is deemed to be ¥1,212,000 which should be paid by Respondent in full.

6. Having carefully reviewed all the assertions of the parties and documentary evidences combined together, the Award as stated in the text foregoing is rendered.

Given in Tokyo, on July 8, 1983.

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