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THE JAPAN SHIPPING EXCHANGE, INC.

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CONTENTS

Case Note: "SHOEI MARU" v. "SHINKO MARU" – collision

The decision of the Osaka District Court of 12th August, 1983 (The 15th Civil Division). The docket No. Showa 54 Nen (1979) (Wa) No. 8429 (cited from Kaijiho Kenkyu Kai-shi No. 57, Dec. '83 Ed., p. 22-, The Japan Shipping Exchange, Inc., Tokyo).

Tameyuki HOSOI
Counsellor at Law, Tokyo

Parties concerned

1. Plaintiffs:

First Plaintiff	Mr. Masao Matsushima (The shipowner of the fishing boat "SHOEI MARU")
Second Plaintiff	Ms. Hisae Matsushima (The bereaved family)

2. Defendants:

First Defendant	Kaiyo Sangyo Co., Ltd. (Time Charterer of the vessel "SHINKO MARU")
Second Defendant	Ono Kaiun Ltd. (The shipowner)
Third Defendant	Mr. Yoshikatsu Ono (The Master)

(All the Defendants were represented by the same lawyer in Kobe.)

Text of the judgment

1. The First and Third Defendants should pay Yen Twenty-One Million, One Hundred and Eighty-Eight Thousand, Six Hundred and Twenty-Four (¥21,188,624.–) to the First Plaintiff and pay Yen Eleven Million, Seven Hundred and Forty-Six Thousand, Five Hundred and Seventy-Two (¥11,746,572.–) to the Second Plaintiff, both together with interest at the rate of 5% per annum. (Total amount is Yen Thirty-Two Million, Nine Hundred and Thirty-Five Thousand, One Hundred and Ninety-Six = ¥32,935,196.–)

2. All the Plaintiffs' claims against the Second Defendant and the remaining part of the Plaintiffs' complaints against the First and Third Defendants are dismissed.
3. and 4. (Translation of the irrelevant parts is omitted.)

Contention by the Parties concerned

1. The Plaintiffs' attorneys asked that the Defendants should jointly and severally pay Yen Twenty-Four Million, Eight Hundred and Ninety Thousand, Six Hundred and Ninety-Four (¥24,890,694.--) to the First Plaintiff and also Yen Fourteen Million, Eight Hundred and Fifty-Two Thousand, Five Hundred and Seventy-Eight (¥14,852,578.--) to the Second Plaintiff, both together with interest at the rate of 5% per annum.

2. In reply to the Plaintiffs' request, the Defendants' lawyer contended that all the complaints by the Plaintiffs should be dismissed.

The facts stated by the Plaintiffs' lawyer

1. Occurrence of the collision

   (1) At the time of the collision, the First Plaintiff, Mr. Masao Matsushima owned the fishing boat the "SHOEI MARU", gross tonnage 9.55 tons, launched in November 1973, and he was engaged in fishing together with the late Masanori Matsushima.

   (2) The First Plaintiff Masao Matsushima and the late Masanori Matsushima anchored the "SHOEI MARU" off Mugisaki, Shima-gun, Mie Prefecture at about midnight on the night between 7th and 8th of December, 1978 to inspect the fishing grounds.

   (3) At about that time, the "SHINKO MARU", gross tonnage 491.51 tons, net tonnage 262.52 tons, launched in March 1968, collided with the port side of the "SHOEI MARU".

(4) Due to the shock and impact of the collision, the late Masanori and the First Plaintiff Masao were thrown into the sea with the result that Masanori became missing and was later considered to have died.

2. Responsibilities

A. As for the Third Defendant (The Civil Code Sec. 709)

(1) The Third Defendant Yoshikatsu was the Master of the "SHINKO MARU" and was actually at the helm of the "SHINKO MARU" at the time of the collision.

(2) The Third Defendant Yoshikatsu failed to fulfil his duty of keeping away from the "SHOEI MARU" when he saw her white lights ahead of his vessel. He took action to avert the collision only when his vessel had already approached too closely.

(3) The Third Defendant Yoshikatsu, therefore, according to Japan's Civil Code Sec. 709, should be found to be liable for losses/damages sustained by the Plaintiffs.

B. As for the Second Defendant Ono Kaiun (the owner of the "SHINKO MARU"). (The Commercial Code Sec. 690)

(1) The Second Defendant owned the "SHINKO MARU".

(2) The collision occurred and was caused by the negligence of her Master (the Third Defendant) Yoshikatsu.

(3) Therefore, the Second Defendant Ono Kaiun must, according to Japan's Commercial Code Sec. 690, be found to be liable for losses/damages sustained by the Plaintiffs.

C. As for the First Defendant Kaiyo Sangyo (the time charterer). (The Commercial Code Sec. 704 sub-Sec. 1)

(1) The First Defendant Kaiyo Sangyo was the time charterer of the "SHINKO MARU" from the Second Defendant Ono Kaiun at the time of the collision.

(2) The accident was caused by the Third Defendant Master Yoshikatsu's negligence while the First Defendant Kaiyo Sangyo was operating the "SHINKO MARU".

(3) Therefore, the First Defendant Kaiyo Sangyo should, according to Japan's Commercial Code Sec. 704 sub-Sec. 1 be found to be liable for losses and/or damages sustained by the Plaintiffs.

3. Voluntary admittance of possible negligence on the side of the Plaintiffs

In addition to the negligence on the side of the Defendants' vessel, the "SHINKO MARU", the Plaintiffs' vessel, the "SHOEI MARU", might also be partly to blame in the sense that the "SHOEI MARU" should have warned the "SHINKO MARU" when the "SHINKO MARU" was approaching the "SHOEI MARU" as the "SHOEI MARU" was at anchor near the traffic route and also in the sense that the Plaintiffs' vessel, the "SHOEI MARU", should have taken appropriate measures to avoid the collision with the approaching "SHINKO MARU".

However, the "SHOEI MARU"'s negligence should under no circumstances exceed 50%.

4. Succession of the claim

The First Plaintiff Masao was the father of the late Masanori and the Second Plaintiff Hisae was his mother. Both the First and Second Plaintiffs succeeded to the late Masanori's rights to claim for compensation.

5. Quantum and 6. Conclusion by the Plaintiffs
(Translation omitted)

The response and the facts stated by the Defendants

The attorney for the Defendants answered as follows:

1. The Defendants do not admit the Plaintiffs' stated fact 1 (occurrence of the collision) – (1).

   The Defendants admit the fact raised by the Plaintiffs in their complaint 1 – (2). However, the Defendants deny the fact therein that the "SHOEI MARU" was engaged in inspecting the fishing grounds and that she was at anchor at the time of the accident.

   The Defendants admit the Plaintiffs' stated facts 1 – (3) and (4).

2. The Defendants admit the facts referred to in the Plaintiffs' stated facts 2 – A – (1), 2 – B – (1) and 2 – C – (1).

   The Defendants also admit the fact raised by the Plaintiffs 2 – A – (2) to the effect that the "SHINKO MARU" took some action to avoid the collision. However, the Defendants deny the remaining part therein.

   The Defendants deny the Plaintiffs' stated facts 2 – A – (3), 2 – B – (2) and (3), and 2 – C – (2) and (3).

3. The Defendants admit the confession by the Plaintiffs referred to in their stated fact 3 to the effect that there was negligence on the side of the "SHOEI MARU".

4. The Defendants admit the fact that the First Plaintiff Masao was the father of Masanori and that the Second Plaintiff Hisae was his mother, as described in the Plaintiffs' stated fact 4.

5. (Translation of the irrelevant parts omitted)

(The Defendants' statements):

The accident in question was caused by the sole negligence of the "SHOEI MARU", the details of which are as follows:

(1) The First Plaintiff Masao and the late Masanori were engaged in illegal fishing, taking advantage of the darkness of that night, in the vicinity of the entrance to the Fuseda Channel where the traffic was congested.

(2) The "SHOEI MARU" did not keep navigation lights on, contrary to regulation in Japan's Sea Collision Prevention Act, and she had stopped, but had kept her engine on stand-by, while considering whether or not to start fishing.

(3) When the Defendants' vessel, the "SHINKO MARU", tried to pass, the "SHOEI MARU" negligently put her engine astern and suddenly proceeded ahead of the "SHINKO MARU", with the result that both vessels collided with each other. Namely, had there been no negligence on the side of the "SHOEI MARU", the accident would not have occurred.

[(4) and subsequent irrelevant parts omitted.]

Evidence

(Translation omitted)

Reasons

(Stated by the Court)

1. As for the cause of the casualty:

(The Court considered that the "SHOEI MARU" was not anchored but was simply drifting to inspect the fishing ground before the "SHINKO MARU" approached. Other details of fact with respect to the cause of the collision considered by the Court are omitted from the translation.)

2. As for the responsibilities:

(The responsibility of the Third Defendant Yoshikatsu, stated by the Court.)

(1) Both the Plaintiffs and the Defendants admitted the fact that the Third Defendant Yoshikatsu was the Master of the "SHINKO MARU" and was actually at the helm of the "SHINKO MARU".

(2) The Defendant Yoshikatsu should have kept further away from the "SHOEI MARU" which was showing no navigation lights except for a few white lights, and was simply drifting in such a busy traffic area. The Defendant Yoshikatsu failed to fulfil such duty. Therefore, he should, according to Japan's Civil Code Sec. 709, compensate the Plaintiffs. (Summarised)

(3) (Irrelevant part omitted)

(4) Ratio of fault between the "SHINKO MARU" and the "SHOEI MARU" is 50% each. (Summarised)

(The responsibility of the First Defendant Kaiyo Sangyo, stated by the Court.)

The accident in question occurred through the negligence of the Third Defendant Yoshikatsu while the First Defendant Kaiyo Sangyo was operating the Second Defendant's vessel, the "SHINKO MARU".

In addition, the Time Charter Party is considered to be a combination of a lease contract and a labour supply contract. The accident in question was caused by the Third Defendant Yoshikatsu's negligence while the First Defendant Kaiyo Sangyo was operating the "SHINKO MARU".

Therefore, the First Defendant Kaiyo Sangyo as the Time Charterer of the "SHINKO MARU" must, under Japan's Commercial Code Sec. 704 sub-Sec. 1, bear responsibility for the losses and damages suffered by the Plaintiffs arising from the accident.

(The responsibility of the Second Defendant Ono Kaiun, stated by the Court.)

The Plaintiffs insisted that as the Second Defendant Ono Kaiun is the Owner of the vessel, they should be responsible for compensation for the losses/damages sustained by the Plaintiffs under Japan's Commercial Code 690. However, "the Owner" referred to in Sec. 690 means not the mere Owner of the vessel, but the person or the body corporate who actually and in fact operates the vessel for the purpose of transportation or carriage by sea. Therefore, when ships are leased (time chartered), the lessee (time charterer) is considered to be the manager of the carriage by sea. As found by the Court, the Second Defendant Ono Kaiun is the Owner (lessor) but the First Defendant Kaiyo Sangyo is the lessee (time charterer) of the vessel, and therefore in such a circumstance it is considered by the Court that the First Defendant Kaiyo Sangyo becomes the manager of carriage by sea whilst the Second Defendant Ono Kaiun is not. Therefore, the Second Defendant Ono Kaiun is not responsible for compensation in favour of the Plaintiffs.

3. Quantum

(Translation omitted)

Decision by the 15th Civil Division of the Osaka District Court.

Chief Judge	Mr. Takeshi Yumikezuri
Judge	Mr. Shintaro Kato
Judge	Mr. Shin-ichi Kichikawa

(For guidance):

Japan's Civil Code Sec. 709:

(Unlawful act – compensation for damage)
A person who violates intentionally or negligently the right of another is bound to make compensation for damage arising therefrom.

Japan's Commercial Code Sec. 690:

(Liability of shipowners)
A shipowner shall be liable for any damage done intentionally or negligently to another person by the mariner, such as the master, in the performance of his duties.

Japan's Commercial Code Sec. 704:

(Lease of a ship: Legal relation)
1. If the lessee of a ship makes her available in navigation for the purpose of engaging in commercial transactions, he shall, in relation to third persons, have the same rights and duties as the owner in connection with matters relating to the use of the ship.

2. In the case mentioned in the preceding paragraph, any maritime lien (preferential right) which has arisen in connection with the use of the ship shall be effective even as against the owner of the ship; this shall not, however, apply in cases where the holder of the maritime lien (preferential right) was aware that the use was not in conformity with the contract.

Comment

The fishing boat, the "SHOEI MARU", collided with the cargo vessel, the "SHINKO MARU" and the Osaka District Court considered that both the vessels were equally to blame. The point then discussed was who, on the side of the

cargo vessel "SHINKO MARU", should be liable for the losses and/or damages sustained by the opponent ship, the fishing boat "SHOEI MARU". The Court decided that the time charterer of the "SHINKO MARU", and not her owner, should be liable for the opponent vessel's claims based purely on tort.

This new precedent, which has come about as the result of a decision by the Osaka District Court, is that the shipowner shall be free of liability, which no court had clearly stated prior to this decision. There had previously been a case in which the time charterer of a vessel was considered by the court to be liable, but the point as to whether the shipowner was liable or not was not actually made clear.

The case was appealed to the Osaka High Court, but before the Court concluded the case, a compromise settlement was reportedly reached.

Arbitral Award in a Dispute Arising from a Purchase Agreement for M.V. "KYUDAI MARU"

Arbitrators: Takaharu Kutsuna, Akio Fujiwara, Takuji Tsuba
Date of Award: February 15th, 1985
Claimant: Buyers (Tokyo, Japan)
Respondent: Sellers (Kobe, Japan)

With regard to the dispute between the above mentioned parties arising from a purchase agreement for MV KYUDAI MARU dated September 1st, 1981, the undersigned Arbitrators appointed in accordance with the Rules of Maritime Arbitration of The Japan Shipping Exchange, Inc. hereby render the following arbitration award having closely studied the case.

Text

1. The Respondent shall pay the Claimant the sum of ¥17.5 million and the interest thereon at the rate of 6% per annum for the period from September 10th, 1983 to the date on which payment is fully completed.
2. The cost of this arbitration is ¥920,000, which is to be shared between the parties equally.
3. Tokyo District Court shall have the jurisdiction over this arbitration.

Facts and Claims

I: Claims Made by the Parties

The Claimant requested the award that "the Respondent shall pay the Claimant the sum of ¥35 million and the interest thereon at the rate of 6% per annum for the period starting from the day following the service of this Statement of Claims to the date on which the payment is completed."

The Respondent requested the award that "the claims made by the Claimant shall be dismissed."

II: Undisputed Facts

1. A purchase agreement was concluded on September 1st, 1981 between the Claimant and the Respondent for a motor vessel KYUDAI MARU (gross tonnage: 1,255.73 t; registered net tonnage: 786.40 t; deadweight: about 3,234.56 mt; built in July of 1974; Class: NK Short-Sea-Going Vessel; hereinafter referred to as "the Vessel") using the Memorandum of Agreement (NIPPONSALE 1977) prepared by the Documentary Commission of The Japan Shipping Exchange, Inc. (Exhibit A-1, hereinafter referred to as "the Agreement").

The relevant clauses of the Agreement read as follows:

1. The sale of the Vessel is subject to the Sellers' obtaining the Japanese Government's Export Licence within 30 days from the date of this Agreement, and subject to the Buyers' obtaining the Indonesian Government's Import Licence within 30 days from the date of this Agreement. In the event of the Licence from either of the Governments mentioned above being unobtainable within the stated period, or either of the Governments attaching such conditions to the sale as are unacceptable to the Sellers or the Buyers, then this Agreement shall be null and void.

2. The Purchase Price of the Vessel shall be Japanese Yen Three Hundred Fifty Million Only (¥350,000,000.–).

3. As a security for the correct fulfilment of this Agreement, the Buyers shall pay in advance ten (10) per cent of the Purchase Money to the Sellers' account in a bank nominated by the Sellers within Three (3) days (Sundays and Holidays excepted) from the date of this Agreement.

6. The Sellers shall deliver to the Buyers the Vessel free from outstanding recommendations and average damages affecting her present class in a dockyard in Osaka/Moji range not before October 1st, 1981, but not later than the end of October, 1981.

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.

9. Should the Vessel become an actual or constructive total loss before delivery or not be able to be delivered through outbreak of war, political reasons, restraint of Government, Princes or People, or any other cause which either party hereto cannot prevent, this Agreement shall be null and void, and the advance money shall be returned in full to the Buyers.

14. Should the Buyers fail to fulfil this Agreement, the Sellers have the right to cancel this Agreement, in which case the advance money shall be forfeited to the Sellers. If the advance money does not cover the Sellers' loss caused by the non-fulfilment of this Agreement, they shall be entitled to claim further compensation for any loss and for all 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 advance money shall at once be returned to the Buyers without interest, and the Sellers shall, in addition, make due compensation for loss caused by the non-fulfilment of this Agreement, but such compensation shall only be payable by the Sellers if such default on the Sellers' part is from other causes 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.

The 30 days as provided in Clause 1 of the Agreement was revised to read as 90 days by an agreement between the Claimant and the Respondent on October 21st, 1981. (The Claimant's Statement dated October 12th, 1983 and the Respondent's Statement dated September 28th, 1983). The time of delivery of the Vessel was agreed by the Addendum No. 1 dated October 21st, 1981 (Exhibits A-8 and A-20-5) to be before the time the Claimant

receives L/C from the "end user" but not later than the end of November, 1981.

2. Prior to the conclusion of the Agreement, the Claimant and the Respondent entered the 'Protocol of Agreement M.V. "KYUDAI MARU"' (Exhibit B-1-2, hereinafter referred to as "POA") and the Japanese version thereof titled KEIYAKUKYOTEISHO KAMOTSUSEN KYUDAIMARU (Exhibit B-1-1, hereinafter referred to as "the Provisional Agreement in Japanese") on August 4th, 1981. The Provisional Agreement is the Japanese translation of POA prepared by the Claimant upon request of the Respondent. (Testimony given by the parties at the Hearing held on January 30th, 1984.)

Relevant clauses of POA and the Provisional Agreement in Japanese read as follows:

[Protocol of Agreement]

2. The price of the Vessel shall be Japanese Yen 350,000,000.– with delivery at a berth of dockyard in Osaka/Moji range, as she is condition.

3. The Buyers shall register the Vessel under the Indonesian Flag at the Buyers' account upon her delivery in Japan.

4. The Vessel to be delivered safely at a berth of dockyard in Osaka/Moji range not before August 15th, 1981 but not later than September 15th,1981. (But delivery time to be decided upon signing of the M.O.A.)

10. Subject other details basis NIPPONSALE 1977. (Memorandum of Agreement)

11. The Memorandum of Agreement (NIPPONSALE 1977) shall be concluded not later than August 31st, 1981.

12. The Buyers shall pay in advance in cash to the Sellers 10% of the Purchase Price of the Vessel in Japanese Yen within three (3) days (Sunday and Holiday excepted) from the date of the M.O.A. 90% of the Purchase Price of the Vessel shall be paid in cash in Japanese Yen to the Sellers not later than three (3) days (Sunday and Holiday excepted) prior to the

expected date of delivery of the Vessel.

13. The sale is subject to the Sellers' obtaining Japanese Government Export Licence and the Buyers' obtaining Indonesian Government Import Licence within 30 days after signing the M.O.A.

[Provisional Agreement in Japanese]

2. The price of the Vessel shall be Japanese Yen 350,000,000 ex berth of a dockyard in Osaka/Moji range, as she is condition.
3. The Buyers shall register (the Vessel) under the Indonesian flag at the time of delivery in Japan at the expense of the Buyers.
4. The Vessel shall be delivered safely at a berth of a dockyard in Osaka/Moji range not before August 15th, 1981 but not later than September 15th of 1981. (The time of delivery of the Vessel is to be determined at execution of the Purchase Agreement.)
10. Other details shall be determined in accordance with NIPPONSALE 1977.
11. M.O.A. (NIPPONSALE 1977) shall be concluded by August 31st of 1981.
12. The Buyers shall pay advance money to the Sellers in the amount equivalent to 10% of the purchase price in Japanese Yen within three days after execution of the Purchase Agreement (M.O.A.), and shall pay 90% in cash in Japanese Yen on the date three days prior to the delivery of the Vessel.
13. The purchase of the Vessel is subject to the Sellers' obtaining Japanese Government Export Licence (E/L) and the Buyers' obtaining Indonesian Government Import Licence (I/L) within 30 days after signing of M.O.A.

3. On August 4th, 1981, the Claimant paid the Respondent the guarantee money of ¥10 million and the Respondent received the same (Exhibit A-3). On the same day, the Claimant submitted to the Respondent a memorandum (Exhibit A-2) concerning the guarantee money to the effect that "the guarantee money of ¥10 million shall be appropriated to a part of the advance of 10% (of the purchase price) when the formal Purchase Agreement

(M.O.A.) is concluded, and the Sellers shall retain the right to cancel this Agreement if the Buyers fail to fulfil the Protocol of Agreement, and the guarantee money shall be forfeited to the Sellers in such a case."

4. This Agreement was concluded on September 1st, 1981, and the Claimant asked Tomin Bank (Tokyo Tomin Bank) to remit ¥25 million to the account of the Respondent at Kobe Branch Office of the Toho Mutual Bank on September 3rd, 1981 (Exhibit A-4).

5. The Buyers (the Claimant) failed to obtain an import licence (I/L) for MV KYUDAI MARU from the Indonesian Government by November 30th, 1981. The Agreement therefore became null and void on November 30th of 1981.

6. The Respondent demanded the Claimant in writing dated December 1st of 1981 (Exhibit A-9-1) "to pay the sum of ¥17.5 million which is 5% of the purchase price of the Vessel as the penalty on the ground we (the Respondent) suffered a considerable damage because of your failure to perform the Purchase Agreement (M.O.A. dated September 1st of 1981 and ADENDAM (sic) dated October 21st of 1981) for MV KYUDAI MARU before the expiration date of the Agreement (November 30th, 1981). We demand you to pay the above mentioned sum at the time of signing for renewal of the Purchase Agreement irrespective of the sale price of the Vessel."

7. As mentioned in 5 above, this Agreement became null and void on November 30th of 1981. A copy of the Memorandum of Agreement (NIPPONSALE 1977) concerning the sale of MV KYUDAI MARU dated December 15th of 1981 and entered between the Claimant and an Indonesian buyer who is not the party to this case was sent from the Claimant to the Respondent (Exhibits B-12-1 and 12-2).

8. The Claimant demanded the Respondent to return the sum of ¥35 million by a "Letter of Demand" dated July 27th of 1983 (Exhibit B-16).

III: Allegations by the Parties

1. Allegations by the Claimant:

(1) As the import licence could not be obtained from the Government of Indonesia by the date provided by the Agreement, the Agreement expired at the end of 90 days from September 1st, 1981; but the Respondent failed to return the said advance money of ¥35 million.

(2) The existence of a special clause or an agreement for forfeiting the advance money which the Respondent alleges is denied.

(3) Prior to the conclusion of the Agreement, the Claimant proposed to the Respondent to enter a provisional agreement. The provisional agreement was concluded on August 4th, 1981 as POA with a clause for obtaining the import licence based on NIPPONSALE 1977.

POA was mainly for completing MOA (NIPPONSALE 1977) by August 31st of 1981. The Claimant submitted to the Respondent the guarantee money of ¥10 million together with the memorandum (Exhibit A-2). It was agreed that the guarantee money would be appropriated to a part of the 10% advance money when the Agreement was concluded, and the Respondent reserved the right to cancel the Agreement and to forfeit the guarantee money if the Claimant failed to perform POA. According to POA, the Claimant was to pay the Respondent 10% advance money in Japanese Yen within 3 days following conclusion of the Agreement, and the remaining 90% of the contract price to the Respondent in cash in Japanese Yen 3 days prior to the delivery of the Vessel; but the expression for the advance money as used in draft POA was revised from "shall deposit in cash" to "shall pay in advance in cash" upon request by the Respondent.

MOA provided for by POA was concluded on August 31st of 1981. (However, the formal date in the Agreement was made September 1st of

1981 as parties concerned considered the date of August 31 unsuitable for execution of agreements). Therefore, no fact falling within the requirements for forfeiture of the guarantee money of ¥10 million existed, and even though the term "deposit" was changed to "advance", it did not change the nature of the advance money nor did it justify the forfeiture by the Respondent.

(4) There was no negligence on the part of the Claimant as claimed by the Respondent in the execution of the agreements.

2. Allegations by the Respondent:

(1) The Respondent did not agree to return the advance money of ¥35 million because of legitimate grounds. The forfeiture was agreed by both parties at the time POA was concluded and was carried over to MOA. The Respondent duly forfeited the advance money of ¥35 million based on such an agreement.

(2) The original condition for invalidation provided in MOA is that MOA shall become null and void if and when an import licence was not obtained from the Indonesian Government by the Buyers (the Claimant) within 30 days from September 1st of 1981. This Agreement would have expired but the clause was modified by ADDENDUM No. 1 entered by both parties on October 21st of 1981 to if and when the Buyers failed to obtain the import licence from the Indonesian Government within 90 days after September 1st of 1981. At that time, the Respondent confirmed to the Claimant that if and when the import licence was not obtained from the Indonesian Government within the prescribed period, the sum of ¥35 million which had already been received was to be forfeited in accordance with Article 3 of this Agreement. Even though the Agreement expired because of failure to obtain the import licence from the said Government by November 30th, the Respondent was still in the position to forfeit the advance money of ¥35 million according to the above mentioned agreement. Even if the existence of the agreement

on forfeiture was not to be recognized, the Claimant is responsible for negligence or illegal action under the contract so that the Respondent provisionally claims the right to damages and offsets its right to claim for the damage with the Claimant's right to claim involved in this case.

(3) Although no documents explicitly stating the agreement on forfeiture were exchanged between the parties, the agreement on forfeiture is assumed to be present by considering the following situation.

(i) Although this Agreement became null and void as of November 30th, 1981, the Claimant did not demand the return of ¥35 million. Further, the Claimant was trying to appropriate the said advance money to a part of advance payment of the price of the Vessel under a new contract which they had subsequently concluded.

(ii) Although the Respondent explicitly and continuously expressed their intent to forfeit the said advance money if and when MOA was not concluded or expired, the Claimant had never opposed such statements, this fact being supported by a witness who was present when both parties met and consulted.

(iii) After drafts of POA and this Agreement were prepared, in order to clarify the agreement on forfeiture, the term "deposit" was amended to read as "advance". Throughout the process since conclusion of POA up to the time of conclusion of this Agreement, the word "advance" has consistently been used.

(iv) The Claimant never explained to the Respondent that Article 1 of this Agreement was contradictory to the intent of the agreement on forfeiture, and the Respondent believed the matter in question was related to the domestic sale of a vessel although it took the form of an international transaction of a vessel. Judging from their own experiences in ship sales, limited capacity in understanding English language and legal knowledge, they could not be expected to understand that Article 1 of this Agreement contradicts the intent of the agreement on forfeiture.

IV: Evidence

As documentary evidence, the Claimant submitted Exhibits A-1 through A-15 while the Respondent submitted Exhibits B-1 through B-24. The Respondent requested to examine a witness (Y) who was the broker for this Agreement.

Reasons

1. [Dispute of This Case]

This dispute arises between the Sellers and the Buyers in an international purchase of a vessel based upon MEMORANDUM OF AGREEMENT (Code name: NIPPONSALE 1977). The dispute mainly concerns the following: when the Buyers cannot obtain an approval for import from the Government of the importing nation after conclusion of the purchase agreement and the agreement is therefore invalidated, whether or not the Sellers can forfeit the advance money (the original word "deposit" on the NIPPONSALE was revised to "advance") which had been paid prior to such invalidation, and whether or not special circumstances or special agreements to justify such forfeiture existed.

2. [Construction of NIPPONSALE]

In the NIPPONSALE form, the purchase is subject to the Sellers' obtaining an approval from the Government of Japan which is the exporting nation and the Buyers' obtaining an approval from the Government of the importing nation within an agreed period after conclusion of MOA and the Agreement is to be null and void if either of the approvals cannot be obtained for any reason within the period (Article 1). On the other hand, there is a provision that the Buyers shall lodge a deposit equivalent to ___% of the purchase money "as a security for the correct fulfilment of the Agreement" at a bank designated by the Sellers (Article 3). Because of the above two articles, a situation similar to this case sometimes occurs where the money is deposited

first, and the agreement is invalidated. There is no provision about disposal of the deposited money in such a case (See Article 9), but once the agreement on which the provision is based is invalidated, the money should naturally be returned so as to restore the original state.

The above interpretation does not necessarily mean that the party in the position to obtain the governmental approval has no obligations to the other party in the process of obtaining such approvals. The party concerned should take the necessary procedure to obtain the government approval without delay and is obliged to take reasonable care not to invalidate the agreement. Such obligations are the matter of course under the fair and equitable principles implicitly expressed in an agreement of this sort. (Generally as conclusion of the agreement and realizing such purchase are the common purpose and benefit of both parties, such obligations are automatically to be fulfilled. However, in some circumstances the Buyers can gain profit by releasing themselves from the obligations of the agreement, such as when the maritime market unexpectedly collapses after the conclusion of the agreement. The Buyers in such a case are not allowed to gain from cancellation without paying any consideration by neglecting their duty to obtain the import approval and causing the agreement to become null and void.)

NIPPONSALE Article 14 provides that "should the Buyers fail to fulfil this Agreement", the Sellers may forfeit the deposited money. Such provision may be exceptionally applied to the case of negligence of duties like the above. But generally speaking, the fact that a government's approval is not obtained does not automatically constitute a default of the agreement and there is no room for application of the provision of forfeiture.

A special agreement may well be included so that the parties voluntarily guarantee to each other for obtaining the government approval and to agree to immediate forfeiture of the deposit on the failure to obtain such approval within the term prescribed. This falls in the realm of the freedom of agreements and is not the issue here. There is no such commercial practice to justify the forfeiture without setting up such special agreements. Speaking of

commercial practices, not documenting such a special agreement is contrary to the common sense in commerce. This is especially true in a case like this where an amount of money as large as ¥35 million is involved. The Claimant makes a reasonable point in this regard. (The Claimant's Statement No. 2-1 dated October 9, 1984).

3. [Forfeiture Agreement as Alleged by the Respondent]

The allegation by the Respondent in this case mainly concerns the existence of the agreement for forfeiture. The Respondent claims that albeit the absence of such agreement in the form of a document, there was a tacit agreement between the parties and the agreement was made either concurrently or prior to the conclusion of POA. The Respondent mentioned the circumstances and background before the conclusion of the Agreement which they believed sufficient to support their allegation, among which the following is emphasized. In a case like this where an enormous damage is easily foreseen if the import licence is not obtained and the Agreement is invalidated, "a businessman" cannot be expected not to have taken appropriate means to secure against the damage, and therefore such forfeiture agreement must have existed. However, NIPPONSALE is so constructed that the damage suffered by inability to obtain the import approval and consequent invalidation of the Agreement should, as a principle, be disposed by the parties at one's own responsibility, as stated above. If the parties enter the transaction under the spirit of NIPPONSALE, the damage should be regarded as a calculated risk for each party as "businessmen". The risk is considerably higher for the Sellers and in many cases places them in a more speculative position, but such a risk should be considered to be covered by a risk premium within the sale price of the Vessel. The claim by the Respondent is therefore not well founded. The issue then can be reduced to the following point: if a so-called forfeiture agreement existed implicitly between the parties, in what manner was it proposed and when was it accepted?

4. [Proposal for Forfeiture Agreement]

The Respondent claims that at the time of conclusion of POA, the Respondent requested the Claimant to give advance money of ¥35 million at the time of the conclusion of MOA, a formal agreement, as money subject to unconditional forfeiture or as money which could be forfeited in case of inability to secure a buyer in Indonesia or to obtain the import licence within the agreed period of time. (The Respondent's Statement No. 1-1 dated October 6, 1984). The Claimant, on the other hand, definitely admitted that the Respondent requested the Claimant to include "the special provision for forfeiture of advance money" in the draft of POA. (The Claimant's Statement No. 2-2 dated October 9, 1984). Arguments by the Claimant and by the Respondent sharply contradict each other on how the Claimant responded to such request: the Claimant argues that they "rejected" the request before POA was concluded while the Respondent argues that POA was prepared because the Claimant "accepted it". (The Respondent's Statement No. 2-6 dated October 28, 1983).

5. [Presence/Absence of Forfeiture Agreement]

The Claimant's draft for POA (Exhibit A-13) is submitted in relation to this point. According to the draft, there is a hand-written portion in Article 15 which reads "Should the Buyers fail to fulfil this Agreement, the Sellers have the right to cancel this Agreement, in which case the advance ten (10) per cent of the Purchase Money shall be forfeited by the Sellers." (The underline added). This passage is not included in the POA which was actually prepared (Exhibits B1-1 and B1-2). The Claimant explained that this portion was included in the draft because the draft was prepared based on the understanding that unconditional forfeiture was possible and, because that was inequitable, this part was excluded from POA. (Testimony by the representative of the Claimant company). The Respondent, on the other hand, took the position that because the intent of Article 15 was already included in Article 11 of the draft, it was excluded as not necessary. (The Respondent's

Statement No. 1-2-1 dated October 6, 1984). Article 11 reads as below: "Subject (to) other details basis NIPPONSALE 1977 (Memorandum of Agreement)."

6. [Judgment on the Presence/Absence of Forfeiture Agreement]

Having perused the case, the Arbitrators recognize and judge the above mentioned matter as follows:

(1) During the process of negotiation leading to conclusion of POA in the present case, the Claimant showed to the Respondent the draft for POA which the Claimant prepared. Having studied the draft, the Respondent proposed Article 15 as an additional clause. The intention of the Respondent who drafted the said clause was that addition of the clause would give the right to forfeit the money unconditionally.

(2) However, the Claimant refused to insert such clause having such an intent. The clause in question was thus proposed by the Respondent under a common understanding as to its intent but refused by the Claimant.

(3) So far as its intent was concerned, both parties stood on common ground, and, since the clause in question was refused based on this ground, the agreement for forfeiture cannot be recognized as having existed on reasonable ground.

(4) The Respondent does not dispute the fact per se that the proposal to include such a clause was refused by the Claimant. (Therefore, the Respondent is deemed to have admitted this fact). Nevertheless, the Respondent alleges that a clause having the same intent as the draft clause which was refused is included in NIPPONSALE form as Article 14, and since Article 1 of POA provides that details are subject to provisions of NIPPONSALE, the refusal to include the clause "cannot deny the existence of the forfeiture agreement." (The Respondent's Statement No. 1-2 dated October 6, 1984).

(5) As stated above, the forfeiture provision under Article 14 of NIPPON-

SALE does not have the meaning of a forfeiture agreement as the Respondent proposed. The provision proposed in this case was proposed by the Respondent with a special meaning different from that of Article 14 of NIPPONSALE and was refused by the Claimant as a provision having such special meaning.

(6) Thus, it must be said that there existed no special agreement for forfeiture in relation to 10% of the purchase money (i.e. ¥35 million). Then arises the problem of "memorandum" (Exhibit A-2). The Claimant submitted "memorandum" to the Respondent on the same date as they executed POA. It read as follows: "Said guarantee money of ¥10 million is to be appropriated as a part of 10% advance money when the formal Purchase Agreement (M.O.A.) for MV KYUDAI MARU is concluded, and in the event that the Buyers fail to fulfil the Protocol of Agreement, the Sellers have the right to terminate said Agreement and, in such case, said guarantee money shall be forfeited by the Sellers."

(7) The subject disputed here is what situation was supposed as "a situation when the Buyers cannot fulfil POA." The Respondent argued that such a situation was where "the Claimant cannot secure a buyer to transfer the Vessel in Indonesia." (The Respondent's Statement No. 1-1 dated October 6, 1984). But the Claimant states that the performance of POA terminates by conclusion of MOA, and "both parties are thereafter bound only by terms and conditions explicitly written in MOA." (The Claimant's Statement No. 1-12 dated December 2, 1983).

(8) The above problem may be solved by examining the process of negotiation between the parties on the POA draft mentioned above. As the Arbitrators held, it is admitted that the Claimant interpreted the intent of the POA draft such that the clause "should the Buyers fail to fulfil this Agreement" meant that the advance money would be forfeited in case the import licence cannot be obtained, and therefore they refused to insert such clause in the POA. If this was the case, then the expression in the memorandum "if the Buyers do not fulfil the Protocol

of Agreement" should also be regarded as having been prepared based on the same understanding. Therefore, so long as the ten million yen which is the subject of "the memorandum" is concerned, it is natural to consider that "the forfeiture agreement" did exist. It is also natural to consider that the memorandum as such was integrated with MOA upon execution of the latter to continue maintaining the effect.

The above point is supported by the circumstances under which POA was prepared, i.e.:

(A) POA existed as a preliminary to the conclusion of MOA in this case. Such a method of arriving at MOA via POA is not presupposed by NIPPONSALE nor is it the practice of the trade. This method reflects special conditions inherent to this case and was adopted at the initiative of the Claimant to suit their convenience. According to the general commercial practice, a broking company which deals in so-called back-to-back transactions of a vessel abroad like this would generally connect securing MOA with a transferee abroad and the conclusion of MOA within the country. This is in accordance with the principle and is a normal mode of a commercial transaction. According to the representative of the Claimant company, the Claimant intended the same originally. A pre-purchase survey of the Vessel was conducted in the middle of July, 1981 and the Claimant was told concerning conclusion of MOA in Indonesia which was scheduled to be concluded "within two weeks from the pre-purchase survey" that "it was impossible to conclude MOA within the two weeks because of the Islamic New Year Holidays from July 30 to August 9." (The Claimant's Statement No. 1-9 dated December 2, 1983). Although the Claimant was reluctant to proceed to the execution of MOA with the Respondent without securing MOA with the transferee, they were afraid to lose a precious opportunity for a transaction with a large margin if they waited. Thus the Claimant was in a dilemma.

(B) The Claimant then proposed POA as a provisional measure of disposal. Considering the development of the case as above outlined, the fact of the agreement under Article 10 of POA that "M.O.A. (NIPPONSALE) shall be completed by August 31, 1981" suggests the existence of a tacit agreement between both parties that the Claimant would secure MOA with a transferee by that time.

(C) In reality, however, the above time limit (August 31, 1981) expired without the Claimant's having secured MOA with a transferee, and MOA was concluded as of September 1, 1981. Although MOA was complete in form, it was an irregular MOA lacking satisfaction of prerequisites which should have been met.

(D) Performance of POA was completed in form by conclusion of MOA, but when the situation in substance is observed, MOA was concluded in order to avoid default of POA, at least at that time. It is admitted that irregular conditions, with no MOA secured with a transferee, continued till the time MOA between the Claimant and the Respondent became null and void on November 30, 1981.

7. [Demand for Penalty]

As held in the above, forfeiture of ¥10 million mentioned in the memorandum became justified based on the forfeiture agreement on and after November 30, 1981 when the agreed time period had passed without an import licence being obtained. A letter with the following contents was dispatched under the name of S, a representative of the Respondent company, to a representative O, the representative director of the Claimant company, on the following day, December 1 of 1981 (Uncontested Exhibit A9-1).

"We suffered an extensive damage due to a default by your company by failure to fulfil the Purchase Agreement (MOA dated September 1st of 1981 and ADENDAM (sic) dated October 21st of 1981) within the term of the Agreement (November 30th, 1981) concerning the purchase of MV KYUDAI MARU.

We demand payment of ¥17.5 million which is equivalent to 5% of the purchase price of the Vessel. Please pay the said amount at the time of execution of renewal of the Purchase Agreement irrespective of the purchase price of the Vessel."

The Claimant argued that "if a special agreement for forfeiture of advance money had indeed existed between both parties. . . . . , it would have sufficed simply by sending a notice for forfeiting the advance money. The fact that they made a demand for the amount of ¥17.5 million with the said letter per se demonstrates eloquently that "the special agreement for forfeiture of advance money never existed." (The Claimant's Statement No. 2-2-3 dated April 4, 1984). In response, the Respondent counter-argued that the notice for forfeiture of ¥35 million had already been issued on November 30 of 1981, that the Claimant accepted it and then applied for the renewal of the Agreement, and that the payment of the said penalty was demanded by the Respondent of the Claimant as a condition for renewal of the Agreement. (The Respondent's Statement No. 2-1 dated October 6, 1984).

8. [Judgment on the Relation between Renewal and Forfeiture]

The Arbitrators judge and hold the following regarding this point.

(1) The Claimant did not show a clear reaction even though they did receive a formal demand by the said letter. The Claimant claims that they "already notified the other party that there was no reason to be held responsible", but there is no sufficient evidence to support that such a notice was issued. (The Claimant's Statement No. 2-3 dated April 14 of 1984). Although the Respondent, on the other hand, claimed that the Claimant affirmed without raising any opposition the notice for forfeiting ¥35 million prior to the demand in question, judging from the statements made by the representative of the Claimant, such argument cannot be admitted as a fact.

(2) At any rate both parties clearly avoided a confrontation to leave the

demand in question in an ambivalent state not to be flatly refused nor to be insisted. In the meantime, the Claimant tried to secure a transferee in Indonesia in order to realize the transaction within the renewed period. (The period intended as the renewed period is recognized to have been 2 months by the statements, etc. by the representative of the Respondent).

(3) In the middle of December, the Claimant finally succeeded in concluding MOA with a transferee in Indonesia (Exhibit B-12), but it became null and void in the middle of January next year because the transferee could not obtain an import licence.

(4) Judging from such development, ¥10 million out of ¥17.5 million in question was the money to which the Respondent had a right based upon the existing forfeiture agreement (which was set out by the said memorandum and was integrated with MOA) without demanding it as a penalty. It would be reasonable to regard the remaining ¥7.5 million as the money to be negotiated and agreed as a consideration for renewal of the period for obtaining an import licence.

(5) Although lacking an explicit agreement for ¥7.5 million, the Claimant actually enjoyed the benefit of renewal (even though they did not enjoy the result, but that was not a fault of the Respondent), and the amount is recognized to be reasonable as a consideration for renewal in the light of the relevant situation. The Claimant therefore cannot claim the return of the said ¥17.5 million out of the advance money.

9. [Several Points Disputed Additionally]

Having exhausted judgment on the main points of dispute in this case, we would like to observe briefly on several additional matters disputed between the parties.

(1) Negligence in Agreement Conclusion

Arguments by the Respondent on this point can be summed up as follows: That the Claimant was at fault in selecting a transferee in

Indonesia who could not obtain the import licence as scheduled (the Claimant concluded the Agreement with the Respondent based upon such an erroneous selection), the Respondent had the right to claim damages from the Claimant on such ground, and if there was credit to return the said advance money, then they would offset such credit with the right. However, NIPPONSALE provides that the responsibility of a buyer is questioned when an agreement expires because of failure to obtain an import licence within an agreed time period as to whether or not they took reasonable care as a buyer to prevent expiration of the agreement by taking necessary procedures without delay for obtaining the government approval. It is easily imagined that an expectation or prediction that an import licence would be obtained by the transferee in Indonesia within the prescribed period was an important factor when the Respondent as a seller made a decision to conclude the agreement in this case, but there were no such facts as that the Claimant made any false statement on this point, that there was an error in the information or data furnished by the Claimant or that the Respondent was induced to make such a decision by erroneous information, nor was there a fact to indicate that the Claimant neglected to cooperate with the transferee in obtaining the import licence. Therefore, the arguments raised by the Respondent can be described as not well founded.

(2) Difference between "Deposit" and "Advance"

Article 3 of NIPPONSALE provides that "As a security for the correct fulfilment of this Agreement, ... pay in a deposit of . . . . . " In this case, however, the word "deposit" was replaced by "advance" in Article 13 of POA draft (Exhibit A-13), Article 3 of MOA draft (Exhibit B-19), POA (Exhibit B-1) and MOA (Exhibit A-1). That this change of term was made by the request of the Respondent and accepted by the Claimant is an uncontested fact.

The Respondent argued that "although the word "advance" per se does not express an agreement for forfeiture of the advance money, the

reason why the parties to this Agreement changed the word "deposit" to "advance" was because they wanted to show explicitly the agreement on forfeiture." (The Respondent's Statement No. 1-2-1 dated October 6 of 1984). However, the POA draft from which the Respondent himself quoted (Exhibit A-13) originally contained the draft Article 15 which was proposed by the Respondent but which was not included in POA because of opposition by the Claimant. The Arbitrators have already recognized the development under which the draft was proposed based on the common understanding that it was "the forfeiture agreement" and was refused, and so long as such a fact existed, the argument that the replacement of the word "deposit" with that of "advance" formed the agreement on forfeiture is found to be without reasons. In other words, "advance" differs from "deposit" simply in that the Sellers can utilize the advance freely as capital. Once the Agreement under which it was made is invalidated, it should be returned to restore the original state irrespective of whether it was an advance or a deposit. Therefore, the argument raised by the Respondent on this point is not well founded.

(3) Insufficient or Erroneous Understanding of English Agreement Form

The NIPPONSALE form used in this case is one of the various (15 in English) standard agreement forms prepared and adopted by The Japan Shipping Exchange, Inc.

Article 1 reads as follows:

"1. The sale of the Vessel is subject to the Sellers' obtaining the Government's Export Licence within days of their signing this Agreement, and subject to the Buyers' obtaining the Government's Import Licence within days of their signing this Agreement.

In the event of the Licence from either of the Governments mentioned above being unobtainable within the stated period or either of the Governments attaching such conditions to the sale as are unacceptable to the Sellers or the Buyers, then this Agreement shall be null and void."

The intent of the said article has already been explained in the foregoing under "Construction of NIPPONSALE". The Respondent argued that with the level of "experience and capacity in understanding English and interpretation of legal matters" of the representative of the Respondent company and their agent at the time of the conclusion of the Agreement, it was unreasonable to expect them to understand correctly the form. (The Respondent's Statement No. 1-2-2 dated October 6, 1984). Judging from the statement made by the representative and the testimony given by the witness Y of the Respondent, this point may be true. However, upon considering the whole situation comprehensively, it is recognized that where a party not confident enough to understand the English form dares to enter an agreement in English, they should be held responsible to bear the risk arising from such choice.* Generally speaking, there would have been other choices than taking such a risk such as having an appropriate counselor, and it is not considered exceptionally difficult to select such alternatives in this case. Even if the capacity to understand or interpret the English form was admittedly insufficient, it would unduly disturb order in commercial transactions if we were to solve a dispute by giving consideration to the unilateral and unique interpretation or misunderstanding of one of the parties. Therefore, we cannot accept the argument raised by the Respondent.

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* Refer to the Contract Law, Restatement #154 quoted below. The article cites as one of the cases where the party concerned should bear the risk of misunderstanding a situation when the party entered a negotiation being aware of their limited and insufficient knowledge of related matters. It is understood that a similar conclusion may be reached under Japanese law, and such judgment seems to concur with a healthy commercial common sense.

"154 WHEN A PARTY BEARS THE RISK OF MISTAKE

A party bears the risk of a mistake when – he is aware, at the time the contract is made, that he has only limited knowledge with respect to the facts to which the mistake relates but treats his limited knowledge as sufficient –" (RESTATEMENT OF THE LAW SECOND, CONTRACTS 2d)

10. [Conclusion]

As is stated in the foregoing, the claim raised by the Claimant against the Respondent is found with ground to the extent that the Claimant claims payment of ¥17.5 million and for interest thereon at the rate of 6% per annum for the period from September 10th, 1983, the day following the date of service of this Statement of Claims, until the full payment of the above. The other claims of the Claimant are dismissed as they have no reasonable grounds.

Having studied comprehensively the statements submitted by the parties, the evidence and arguments heard at the hearings and after careful deliberation, the Award as per the above main Text is given.

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