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THE ROLE OF JAPANESE AND AMERICAN LAWYERS IN MARITIME DISPUTE SETTLEMENT

The Japan Shipping Exchange, Inc. held a Panel Discussion on the above theme in Tokyo on 25th November, 1986.

The Panel Discussion was conducted under the chairmanship of Prof. Kazuo Iwasaki (Ehime University) and participated in by three American and four Japanese attorneys-at-law.

Each panelist made a speech on the subject given to him: Procedure for Attachment or Arrest of Vessels in the United States and Japan; Obtaining Evidence in the United States and Japan: Proper Procedures for Deposition Testimony; Matters of Comity and Enforcement of Foreign Judgment and Awards; Aim of American Lawyers' Access to Tokyo.

All the panelists except one gave us the manuscripts or outlines of their speeches and permitted us to publish them in the Bulletin.

Printing is in order of report as follows:

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I. ARREST OF SHIPS IN JAPAN

Mitsuhiro Toda, Attorney at Law
FUJII & TODA, Tokyo

1. Introduction

As you know, the subject to which I have been assigned is arrest of vessels. Concerning outline of the procedure of arrest of ships under Japanese Law, I recommend that you read the Article written by Mr. Tameyuki Hosoi contained in the book entitled "Arrest of Ships" published by Lloyd's of London Press Ltd., 1985. Mr. Hosoi is so competent that he can take a subject as a panelist other than the subject on which he has already given the comprehensive article. That is why I am now speaking to you on this subject.

We have 4 topics today and time is very limited. So I will give you today what the hot issues are relating to arrest of ships in Japan.

2. Three Types of Procedure for Arresting Ships

I think it is better to explain the 3 types of procedure for arresting ships in Japan before I speak about what the hot issues are. I use the translation by Mr. Hosoi.

(1) The first type is provisional arrest. This is an arrest to obtain security for satisfaction of any judgment to be obtained later. I think it corresponds to attachment for security in United States. This provisional arrest can create Japanese Jurisdiction over the foreign ship owner against whom Jurisdiction cannot be established but for this arrest.

(2) The second type is compulsory execution. This is the procedure for enforcement of the judgment against the ship as the property owned by the defendant. There are few cases in this type of arrest.

(3) The third one is Public Auction Without Judgment. This is arrest by virtue of Maritime Lien, Possessory Lien or Mortgage. It is like an action in rem under the common law system.

3. Actual Cases

Now, I would like to introduce some actual cases to show what the hot issues are surrounding arrest of ships in Japan.

A. The "LNG GEMINI" case (1984)

This is a collision case. American LNG tanker, "LNG GEMINI", came into collision with a small Japanese fishing boat which sank immediately after the collision. The claim amount of the Japanese fishing boat was less than US$200,000.

It is said that the value of the "LNG GEMINI" is estimated to be about 1,000 times the claim amount. Both parties could not reach an agreement concerning security for the claims sustained by the fishing boat. The "LNG GEMINI" was arrested by virtue of a maritime lien given to collision claims. Within 19 hours, the owners agreed to pay cash in settlement of the fishing boat's claims together with P & I club letter of guarantee the wording of which was completely in accordance with that demanded by the fishing boat.

In this case, no security was required by the court to arrest the high valued LNG tanker. Of course the arresting party had to pay for the court marshal's charges which were minor amount.

This arrest was made based upon the order for taking up the ship's important documents necessary for the navigation in accordance with Article 115 of the Civil Enforcement Act which has been in force since October 1, 1980.

By this procedure, arrest can be made much more easily than before. Before this procedure was introduced, it was impossible to obtain the arrest order before it was proved that the vessel was at present within jurisdiction of the court to which the application was made. Of course the owner of the vessel can release the vessel from the arrest by putting up security in form of cash, negotiable shares or letter of guarantee issued by P & I club or bank in accordance with Article 117 of the Civil Enforcement Act. However this release procedure can be applied only after the court ordered commencement of the proceedings for the enforced sale of the vessel. It is 5 days period within which the arresting party must apply for the commencement of the proceedings for the enforced sale of the vessel after the arrest based upon the taking-up documents order was effected.

For this 5 days period, there is no provision in respect of the procedure for release from the arrest. This is a problem. For lack of the procedure for this 5 days period, it is likely that the court may not allow release from the arrest during this period.

B. The "BUNGA MELATI" case (1983)

The ship's repairer repaired a sister ship of the "BUNGA MELATI". The owner failed to pay for the repair costs. Then the repairers arrested the vessel which was a liner container vessel.

This arrest was a provisional arrest to obtain security in preparation for enforcement of the judgment which will be obtained later.

In this case, the court required the arresting party to put up deposit of 1/3 of the claim amount. In this procedure, the claimant can not go further to

collect his claims selling the ship by public auction conducted by the marshal until he has obtained the favourable judgment. It will take a rather long period to obtain the judgment and until then he has to pay for the maintenance and custody of the vessel. This is a weakness of this procedure. However, in a particular aspect, this procedure is stronger than the procedure of arrest based upon maritime lien or mortgage.

That is in relation to the deposit required for release of the vessel. In this procedure, only cash deposit can be accepted by the court to have the vessel released. Letter of guarantee issued by bank or P & I club is not acceptable. It means that by this procedure, the arresting party can force the owner to freeze the cash equivalent to his claim amount by putting up security amounting to 1/4 or 1/3 of his claim amount.

The "BUNGA MELATI" case was settled with the agreement that payment will be made within one week partly because the owner was unable to prepare cash in short time.

C. The "YOKOHAMA" case (1983)

This case is still pending in the Tokyo District Court.

Bunker supplier arrested the vessel which was flying Panamanian flag. When the arrest was effected the owner's financial situation was awfully bad and the actual owner was in the course of application for commencement of the bankruptcy proceedings. The crew had not been paid wages for several months. The diesel oil for the generator and the food supply were almost exhausted. And the vessel was at anchor near the entrance of the ship's traffic passage.

Her state was so dangerous that she could not heave up her anchor by her own windlass. As soon as the arrest was made, the Marine Safety Agency made a strong request to the court and the arresting party to take the custody of the ship to have the ship move to safer place. The arresting party did not want to meet this request because expenses to take over the ship were estimated to be more than his claim amount.

The mortgage bank was going to arrest. Suppliers of other goods were

also going to arrest. However the dangerous situation did not allow the concerned parties to conduct slowly to get more favourable position among the claimants. At the strong administrative recommendation of Marine Safety Agency, the concerned parties, lien holders and mortgage bank finally agreed to sell the vessel on "as is where is" basis to a ship breaker.

The proceeds have been kept by the bank for security of the claims alleged by all claimants. The concerned parties negotiated to reach an agreement on distribution of the proceeds but the negotiations turned out to be unsuccessful. The bank insists that their claims protected by the mortgage have priority over the claims protected by maritime lien because Panamanian law should apply to the distribution. The lien holders contend that the applicable law should be Japanese law because the actual owner of the vessel was a Japanese corporation and all claimants insisting for the proceeds are Japanese, further that the Panamanian flag which the vessel was flying was a so called flag of convenience.

D. The "YPERMACHOS" and "MINDANAO" case (1984)

These vessels were arrested by a lot of claimants including the bank mortgagee, bunker suppliers, provision suppliers, pilots and tug boat service furnishers and they were finally sold through the procedures of the enforced sale by virtue of the mortgage and/or the maritime lien.

The problem is whether or not the mortgages have priority over the maritime liens attached to necessaries claims.

In the "YPERMACHOS" case, the court ruled that the applicable law should be Panamanian law and since Panamanian law prescribes priority of the mortgage over the maritime lien for the claims of the suppliers, the proceeds of the vessel should be distributed to the bank mortgagee prior to the lien holders for the supply claims. However the court added that, among the claims for supplies, those which were furnished in Japanese territorial waters should be decided in accordance with Japanese law which provides for priority over the mortgage (Article 849 of the Commercial Code of Japan).

Then all the claimants filed the objection complaint against this distribution

ruling by the court. After several years proceedings, the case was settled through compromise agreement before the court. It was agreed that the bank took 60% and the other lien holders 40%.

In the "MINDANAO" case, on the other hand, the court ruled that distribution should be made completely in accordance with Japanese law, therefore claims protected by maritime liens under Japanese law were admitted to receive distribution prior to the mortgage claims.

Of course, this case was shifted to the ordinary civil litigation proceedings upon filing of the complaint by the bank. And this case was also settled through compromise agreement before the court. By this, the bank received 45% and the lien holders 55%.

E. The "PETERSON LU" case (1985)

This is a very interesting case.

The "PETERSON LU" was arrested in the provisional arrest procedure. The vessel was registered in Panama. The Panamanian registered owner owns this ship alone. The Japanese supplier supplied goods to a sister ship belonging to the Taiwanese actual owner. The court admitted that the vessel was owned by the defendant Taiwanese company though she was registered in Panama in the ownership of a Panamanian corporation.

It is generally said that it is quite difficult to pierce the corporate veil. However the situation seems to be different when you arrest vessels flying flags of convenience such as Panama and Liberia.

4. Conclusion

From what I have told you so far, you may understand that because of the current bad recession in the shipping business, arrest of vessels does not necessarily have the strong effect to collect the claims as it had before.

You should be careful before arresting the vessel about whether or not the ship is worth being arrested considering owners' financial situation and details of the mortgage etc.

As to priority between mortgage and maritime lien attached to a vessel carrying a flag of a country where superiority of mortgage over maritime lien is admitted contrary to Japanese laws, I think no lawyer can give a decisive opinion. Actual cases tell us that once disputes arise on this issue, the possibility of winning for a bank or a lien holder is 50%. It means that compromise settlement is rather advisable unless you want to be the first party who fights to the bitter end to the Supreme Court of Japan spending much expense and time.

I hope this will be of some assistance to your understanding of the Japanese law on arrest of vessels. Thank you very much for listening to me.

II. PROCEDURE FOR ARREST AND ATTACHMENT OF VESSELS IN THE UNITED STATES

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This is an outline of the matters which I will cover at the panel discussion on November 25, 1986 at the Japan Shipping Exchange, Inc. It is designed as a broad and practical summary. I hope that it will be of use to my Japanese colleagues when their clients' vessels are arrested or attached in the United States or when their clients have claims on which they desire to obtain security or payment by such arrest or attachment.

1. The U.S. Dual Court System

The United States has a dual court system. The federal courts, which operate nationwide, handle suits arising under the laws of the United States (as distinguished from those of the 50 states) and suits involving over $10,000.00 between citizens of different states or between citizens of a state and citizens of a foreign country. Separate court systems in each of the 50 states handle cases of all kinds where the facts or the parties have sufficient contact with the state to give the court jurisdiction.

What are called "admiralty and maritime" claims, which embrace some, but not all, of the claims with which lawyers in the shipping business have to deal, are within the jurisdiction of the federal courts. However, most facts which give rise to admiralty and maritime claims give rise at the same time to claims which can be prosecuted in the state courts. In many situations, the claimant has a choice. Broadly speaking, arrest or attachment in the federal court,when it is available, is practically better for the claimant than proceeding in the state court. However, there are many situations in which federal maritime arrests and attachment are not available. A common such situation is one where a claimant seeks to attach a vessel different from the one on which the claim arose, but under the same ownership, and the owner has an agent authorized to accept service of process in the district where the vessel can be attached. State court attachment must therefore also sometimes be dealt with by the maritime lawyer.

2. Maritime Arrest and Attachment in Federal Court

Maritime arrest and maritime attachment, which have some different technical characteristics, are similar in most respects. The characteristics common to both will be outlined first. I hope that there will be distributed with this outline copies of the Supplemental Rules for Certain Admiralty and Maritime Claims of the U.S. District Courts which cover maritime arrest and attachment.

A. General Procedure

The arrest or attachment of a vessel is accomplished by filing a suit under the admiralty and maritime jurisdiction in the U.S. District Court in whose district the vessel is found. A court officer, the U.S. marshal, then goes on board the vessel, delivers the arrest papers to the master, and places a keeper on board the vessel so that it cannot leave. He also notifies the port authorities not to give the vessel clearance to leave until the arrest has been lifted. Escapes are practically unknown. If the vessel owner does not post a bond or an undertaking to pay any claim which may be established in the suit, the vessel will be held until the

validity of the plaintiff's claim has been decided by judgment and then sold to satisfy the judgment or, if the court determines that this is advisable, it will be sold earlier and the proceeds of the sale will be distributed by the court to those found to be entitled to them, withholding enough to satisfy plaintiff's claim if he prevails.

B. Financial Requirements on the Arresting Party

The arresting or attaching party, the plaintiff, is not required (at the outset, at least) to post any bond or other security to reimburse the vessel owner from the expense of the arrest or attachment if the suit is found unjustified. He is traditionally held not liable for such expense at all unless the court ultimately determines not only that he has no proper claim but also that he did not have reasonable grounds to believe that he did have a claim. A showing of something close to actual malice has been required. Some courts have weakened this principle to some extent in recent years. Moreover, it seems possible, at least, that under the new post arrest hearing procedure discussed in C below, the court may, in its discretion, require a bond if the attachment is to continue in effect after the hearing. However, the principle of non-liability of the claimant for expenses remains generally true, and is one of the things which makes maritime arrest or attachment a powerful weapon for claimants when it is available.

The claimant is required initially to lay out the expenses of maintaining a keeper on board the vessel so long as it is under arrest or attachment and is required to post an advance to the U.S. Marshal, usually $10,000.00, to cover such costs.

C. Pre-Arrest Review, Post-Arrest Hearing

In recent years, the maritime arrest and attachment procedure was attacked in some courts as being a deprivation of property without due process of law violating the U.S. Constitution. These attacks were based upon U.S. Supreme Court decisions holding non-maritime attachments entirely unconstitutional in

some situations and unconstitutional in others unless a prompt hearing is provided to the property owner on the validity of the claim. These attacks were rejected in the intermediate appeals courts (they never reached the U.S. Supreme Court) on the basis of the particular historical background and characteristics of maritime claims. However, in order to lay such doubts to rest, changes in the Supplemental Admiralty Rules were adopted in 1985 under which, before the marshal can proceed, the complaint in the suit in which arrest is sought has to be reviewed by the judge or other judicial officer (unless exigent circumstances make review impractical) to see if the conditions for arrest appear to exist (Rule C(3)). Also, after the arrest or attachment, the owner of the vessel or other party affected can require a prompt hearing at which the plaintiff "shall be required to show why the arrest or attachment should not be vacated or other relief granted". (Rule E(4)(f)) The kind of showing which will be required after arrest is still being worked out. I believe that most judges will require affidavits signed by persons with knowledge attesting to the truth of all the essential elements of plaintiff's claim.

D. Possibility of Quick Action by Claimants

Because ships are often in port for a very short time and clients often do not learn that the ship is expected or hire counsel in the port until the last minute, maritime lawyers in the United States have developed the ability to arrest or attach vessels on very short notice on the basis of telex advice of the facts, sometimes within 3 or 4 hours if all the arrangements mesh together perfectly. The new requirement of court review of the complaint will slow this down somewhat, it is hard as yet to tell how much.

E. Usual Prompt Posting of Security

In by far the largest number of instances, the vessel owner will immediately either put up a bond in the amount of plaintiff's claim plus interest or give to plaintiff a letter of undertaking from a P & I club guaranteeing to pay any claim which plaintiff establishes. This is what generally happens in all cases in which

the vessel owner is not in financial difficulty. The incentive for the vessel owner to do this is very strong no matter what his doubts of the validity of plaintiff's case since delay of the vessel even for the time required for the court hearing now mandated by the rules can be very expensive and the recovery of these expenses from plaintiff is difficult or impossible in most cases.

Because of this, it has become the practice in the case of claims of the type which are usually covered by insurance for the claimant to request security from the vessel owner in advance of the vessel's arrival or the institution of suit unless the vessel's call at the port is for a purpose, such as bunkers, from which it can easily be diverted by the owner.

F. When in Rem Arrest is Available

The vessel can be "arrested in rem" if the claim which the plaintiff is asserting is a maritime lien claim against the vessel. Such claims are thought of as claims against the vessel itself, as the defending party. Collisions or other accidents in which the vessel is involved, personal injuries on board the vessel, damage to cargo on board the vessel, and failure to pay for services and materials furnished to the vessel give rise to maritime liens. Most claims against the owners under charters of the vessel are lien claims. Some claims which one might expect to be lien claims, such as claims on the contract for construction of the vessel, are not lien claims, however. Claims which arise involving one vessel are not lien claims against other vessels in the same ownership so that, unless the same vessel is involved as the one on which the claim arose, only attachment, and not arrest, is available.

G. When Maritime Attachment is Available

Vessels or other property of a defendant other than the vessel or property involved in the claim can be attached or garnisheed in a maritime action if, but only if, the defendant "shall not be found within the district". The theory, which has historical origins, is that the attachment is for the purpose of acquiring jurisdiction over the defendant, with security only incidental, and that

if attachment is not necessary to acquire jurisdiction, the attachment will not be allowed at all. The word "found" is interpreted by the courts to mean that attachment is available only if the defendant has no agent in the U.S. District Court district where the vessel is found who is authorized to accept service of process in the suit on behalf of the defendant. Virtually all vessels which come into a port have a local agent for some purposes, and it is a question of fact in each case whether that agent has the kind of authority to accept service of process which would prevent maritime attachment. It can generally be expected that the local agents of companies operating liner services or whose vessels make frequent calls into a port will have that kind of authority, so that maritime attachment is not available.

3. Attachment Under State Law

Vessels or any other property of a defendant can also be attached under provisions which are found in the laws of all or almost all of the 50 states. These laws are broadly similar, but they differ considerably in detail. I will talk about the law of California because I am familiar with it and because there is heavy trade between Japan and Californian ports.

Attachment under state law is available not only in the state courts but also in the federal courts in cases where the basis for jurisdiction is not the maritime nature of the claim, but the fact that the claim is between citizens of one state and citizens of another state or foreign country. In California, the federal court is preferable for claimants because cases come to trial much faster there.

In order to attach under California law, plaintiff must post a bond guaranteeing payment of defendant's damages from the attachment if plaintiff does not ultimately prevail in the suit. The amount of that bond in California Superior Court is only $7,500.00, but defendant can have the bond increased by whatever damages defendant can show are to be anticipated from the attachment. In the case of a vessel which is not released from attachment immediately by the posting of a bond by defendant, these damages and the bond required can be very large.

The requirements for preliminary proof of plaintiff's claim in order to obtain an attachment are more stringent than in maritime arrest or attachment. In order to attach without prior notice to the defendant, plaintiff must present affidavits showing that the property might be removed or concealed or plaintiff might otherwise suffer irreparable injury if defendant received notice. Affidavits must also be presented showing all the facts necessary to entitle plaintiff to a judgment on the claim on which attachment is sought. Shortly after the attachment, a hearing is held at which defendant is entitled to present counter affidavits. The attachment will be vacated unless the court determines, on the basis of both sets of affidavits, that plaintiff will "probably prevail" in the action.

The fact that one must present affidavits of witnesses proving the facts at the time when one first applies for attachment means that it is difficult to put together an attachment under California law on short notice as is often necessary in maritime cases. This is another advantage of federal maritime arrest or attachment when it is available.

4. Immunity of Governmental Agencies

Under the U.S. Foreign Sovereign Immunities Act, 28 U.S.C. §1602 et seq., property belonging to agencies and instrumentalities of governments foreign to the United States is exempt from arrest or attachment even though the agency or instrumentality is engaged in a commercial operation of such nature that it is generally subject to court jurisdiction. This is worth keeping in mind due to the prevalence of government owned shipping operations. Judgment must be obtained against the foreign government agency or instrumentality before its vessels or property can be seized on execution of the judgment. However, under Section 1605(b) of the Foreign Sovereign Immunities Act, if a plaintiff has a maritime lien against a vessel belonging to the foreign governmental agency or instrumentality, it can serve a notice on those in possession of the vessel and will then, if it prevails in its claim, be entitled to a personal judgment against the foreign agency or instrumentality which owned the vessel at the time the notice

is served. However, any actual attempt to arrest the vessel causes loss of the plaintiff's maritime lien if the plaintiff knew or should have known at the time of the arrest that the vessel belonged to the foreign governmental entity.

Vessels and property of the governmental entities of the United States are also exempt from arrest or attachment. The United States government and state and local government entities recognize claims and do not claim sovereign immunity in most situations which would arise in the shipping business. There are special statutes concerning the presentation and resolution of such claims.

5. Effect of Bankruptcy

If the owner of a vessel has filed for relief under the U.S. bankruptcy laws before the vessel is actually arrested or attached, it is not possible to arrest or attach the vessel. Bankruptcy proceedings which prevent such arrest or attachment include not only proceedings in which the debtor is liquidated, but proceedings in which the debtor is able to postpone payment of its debts and/or reorganize, often on very liberal terms. If the defendant files bankruptcy proceedings after the vessel is arrested or attached, the vessel is not released but remains in the custody of the bankruptcy court. There usually ensues, however, a vigorous contest between the creditors claiming liens on the vessel and unsecured creditors on the question whether the vessel is to be sold to satisfy the liens or is to be allowed to continue to operate to earn money for the general creditors. As a practical matter, bankruptcy proceedings complicate the prospect of any recovery for plaintiff no matter how good his lien claim.

6. Effect of Mortgages on the Vessel

If the defendant is not able to post security against the claim on which the vessel has been arrested or attached, holders of any mortgages on the vessel immediately get into the game. Since sale of the vessel under process of the court in an action in which she has been arrested in rem on a maritime lien claim "wipes the vessel clean" of liens, mortgagees must intervene in the proceedings in which the vessel has been arrested. Unless the value of the vessel is sufficient

to cover all claims and mortgages, litigation then ensues as to the priority between the mortgage and the claim on which the vessel has been arrested or attached and other claims. In the United States, as a practical matter, claimants will usually be dealing with what from the United States' point of view are classified as foreign preferred ship mortgages. These mortgages do not have priority over many of the type of claims which will usually be involved in in rem attachments, such as claims for services rendered to the vessel by U.S. suppliers, tort liens such as collision claims and personal injury claims, and cargo damage claims if presented on a tort basis. This is a subject which can, and usually does, create great complications.

I hope that this brief sketch of a complicated subject will be of some help to those who attend this panel discussion. I hope that it has not been pitched on too elementary a level. Thank you for inviting me.

III. OBTAINING EVIDENCE IN THE UNITED STATES AND JAPAN: PROPER PROCEDURES FOR DEPOSITION TESTIMONY

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1. Introduction

The subject which I take up in this discussion is "obtaining evidence in the United States and Japan" and also "proper procedures for deposition testimony". Due to the limited space I will explain only the general outline of each procedure. Regarding the deposition to be taken by the American Consular Officer in Japan, please refer to the detailed information issued by the American Embassy, Tokyo. This is uptodate information.

2. Outline of International Conventions and Domestic Law

There are several international conventions ratified by many countries relating to international judicial assistance and we also have old domestic law in this regard. In order to provide or receive such judicial assistance to or from other countries, there must be legal grounds based on international convention or agreement. I now explain the existing conventions, laws, and agreements.

(1) Law concerning Judicial Assistance Requested by Foreign Court

This law was enacted in 1905 and provides to give judicial assistance in service of judicial documents and taking evidence in Japan. However, the application of this law is based on a reciprocal guarantee between two countries and on the condition that such a request should be made through diplomatic channels. With regard to the reciprocal guarantee, Japan has established such judicial assistance with 21 countries including U.S.A. Therefore, this law is applicable for U.S. courts to serve court documents and take evidence in Japan.

(2) International Convention Relating to Civil Procedures in 1954

This convention provides service abroad of judicial and extra-judicial documents in civil and commercial matters. Japan is a signatory, but the United States is not.

(3) The Japan-United States Consular Convention in 1964

This convention authorizes American Consular Officer to administer oaths to any person in Japan in accordance with U.S. laws and to take deposition on behalf of U.S. court or other judicial tribunals or authorities.

(4) International Convention Relating to Service Abroad of Judicial and Extra-judicial Documents in Civil and Commercial Matters in 1968

This convention also relates to service abroad of judicial and extra-judicial documents. Both Japan and United States are signatories to this convention.

(5) International Convention on Taking Evidence Abroad in Civil or Commercial Matters in 1970

The United States is a signatory to this convention, but Japan is not.

3. The Japan-United States Consular Convention

Regarding deposition in Japan, the most convenient procedures will be

deposition testimony taken by an American Consul. Under this procedure, both Plaintiff's and Defendant's attorneys may attend the deposition and conduct direct and cross-examination on a witness. The Consul has to administer the oath to a witness at the beginning. The deposition will proceed according to U.S. law and in English. Any witness who cannot speak English may be assisted by an interpreter. Any objection made by the attorneys will be recorded in the deposition transcript which will be later decided, good or bad, in a trial. If you have any problem between the attorneys during the deposition, you may call the Consul who will solve such a problem. A video camera can be used during the deposition but, for reasons of security, you must obtain prior approval from the Embassy to bring such a camera into the Embassy. After the deposition is completed, the stenographer transcribes the testimony and delivers the original transcript to the Embassy. The Embassy then calls the witness, who will make any necessary correction and sign the transcript. When signed, the Consul will send the original transcript together with all relevant exhibits to the court which requested such a deposition.

With regard to such a deposition, you must bear in mind that a "special visa to take deposition in Japan" will be required, otherwise you will not be allowed to enter the deposition room. You cannot take deposition on a normal "sightseeing visa".

This deposition can be conducted when a witness agrees to give his voluntary testimony and, in case a witness is not prepared to give his voluntary testimony, the production of such a witness has to be done through the court procedures mentioned in 4 below.

Regarding the evidence to be taken in the United States by the Japanese Consul under this convention, for practical reasons it is limited to the deposition of a Japanese witness or a Japanese speaking witness (this practice has been established by administrative guidance). The deposition is conducted by the Consul or his nominated person according to Japanese procedures and in Japanese. There is no way to force the witness to appear before the Consul. The Japanese attorneys for the Plaintiff and Defendant may attend the

deposition.

4. Taking Evidence through the Established Judicial Assistance between Japan and the United States

There are two cases. One is a request made by the Japanese court to the U.S. court and the other is a request made by a U.S. court to the Japanese court.

(1) Request to U.S. courts

Such a request will be made by the Japanese court through the following channel:

From Japanese court handling the case ⟶ Japanese Supreme Court ⟶ Minister of Foreign Affairs ⟶ Japanese Embassy in U.S. ⟶ Department of State, U.S. ⟶ U.S. Court which takes evidence. The request and any documents attached thereto should be accompanied by English translation. The matters to be requested are taking deposition, inspection, obtaining an expert opinion, etc. U.S. procedures will be followed to take evidence under this judicial assistance. The question of whether the Japanese attorneys may attend the hearings for the examination of a witness will be decided by U.S. laws. There had been 18 such requests by the Japanese courts as of 1974.

(2) Request to Japanese courts

In case of a request made by U.S. courts, such a request should be made through the following channel:

From U.S. Embassy ⟶ Japanese Ministry of Foreign Affairs ⟶ Japanese Supreme Court ⟶ Japanese District Court which takes evidence. Such a request should specify the parties concerned, the method of taking evidence, the name and address of the witness, the matters to be questioned, etc. All relevant documents should be accompanied by Japanese translation (such translation should be certified by diplomatic personnel or by a consul of the

sending state, or a translator of the receiving state who should execute an affidavit for correctness of such translation). Japanese civil procedures will be followed for taking evidence under this procedure. The court may charge a fine against a witness who refuses to appear in the court or force him to appear. After taking evidence, a record will be made in Japanese and sent to the sending state through the diplomatic channel as stated before.

IV. OBTAINING EVIDENCE IN THE UNITED STATES AND JAPAN: PROPER PROCEDURES FOR DEPOSITION TESTIMONY

Michael J. Ryan, Attorney at Law
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I. Procedures for deposition testimony in Japan

A. By Stipulation

1. Rule 29 of the Federal Rules of Civil Procedures specifies "... that the parties may by written stipulation (1) provide that depositions may be taken before any person, at any time or place, upon any notice, and in any manner and when so taken may be used like other depositions..."

2. Procedure:

a) Stipulation should be "So Ordered" by U.S. Judge so as to comply with the Japanese requirement that a court order authorizes

the deposition. See U.S. Dept. of State advice, "Obtaining Evidence In Japan." (copy annexed)

b) Obtain short term commercial visa.

3. Disadvantage:

a) Unavailable absent an agreement by the parties;

b) Can only be used to take deposition of "willing" witness.

Note that contempt penalties are available to persuade an unwilling U.S. citizen to testify before a U.S. consul in a foreign country. 28 USC § 1783, 1784.

B. By Notice

1. Rule 28(b) of the Federal Rules of Civil Procedure provides: "In a foreign country, depositions may be taken (1) on notice before a person authorized to administer oaths in the place in which the examination is held, either by the law thereof or by the law of the United States."

2. Procedure:

a) If oral examination, serve written notice specifying time and place for taking deposition and the name and address of each person to be examined or if name not known, general description sufficient to identify person or class to which he belongs. Rule 30, Fed. R. Civ. P.

b) Written interrogatories – serve written notice stating name and address of person to be deposed or general description sufficient to identify person or class to which he belongs and name or title and address of officer before whom deposition to be taken; opposing party may serve cross questions within 30 days after notice; party

may serve redirect questions within 10 days after service of cross questions.

c) Court order must issue authorizing an American consular officer to take the deposition on notice.

3. Officer before whom testimony taken: "A person authorized to administer oaths in the place in which the examination is held, either by the law thereof or by the law of the United States." Rule 28(b) Fed.R.Civ.P.

a) Necessary that deposition be taken before American consular officer.

4. Disadvantages:

a) Depositions of party witnesses taken before U.S. Consulate are subject to perjury and contempt penalties; however, this would not apply to non-party witness who elects to attend at deposition.

b) Can only be used for a "willing" witness.

C. **By Commission**

1. Deposition may be taken "before a person commissioned by the court, and a person so commissioned shall have the power by virtue of his commission to administer any necessary oath and take testimony." Rule 28(b) (2), Fed.R.Civ.P.

2. Procedure:

a) "A commission...shall be issued on application and notice and on terms that are just and appropriate." Rule 28(b), Fed.R.Civ.P. Make motion before court requesting issuance of commission; must give notice to opposing party; Court must issue commission to American consular agent directing that deposition be conducted.

b) Deposition may be taken upon oral examination or written questions.

c) It is recommended that the officer who is commissioned to take testimony be provided with copy of Rules 26(b), (c), 28(c) and 30(c), (d), (e), (f) of Federal Rules of Civil Procedure and Rules 607 and 611(b) and (c) of Federal Rules of Evidence (this is mandated by Local Rule 17 with respect to commissions issued out of Southern District of New York).

D. **Letters Rogatory** Rule 28 (b) (3) Fed.R.Civ.P.

1. Definition: "Letters Rogatory are the medium, in effect, whereby one country, speaking through one of its courts, requests another country, acting through its own courts and by methods of court procedure peculiar thereto and entirely with the latter's control, to assist the administration of justice in the former country; such request being made, and being usually granted, by reason of the comity existing between nations in ordinary peaceful times." (THE SIGNE 37 F.Supp. 819, 820, Ed. La. 1941).

2. Procedure:

a) Application to district court, upon notice to opposing parties, for issuance of Letters Rogatory. Letters are passed via diplomatic channels to Japanese court.

b) Foreign court follows its customary procedure for taking testimony. Witness is summoned to appear before Japanese judge who poses written questions annexed to the Letters. Production of documents can be compelled through this method.

3. Disadvantages:

a) Execution of Letters can take in excess of 6 months;

b) No "live" testimony.

4. Note: Japan is **not** a signatory to the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, Mar. 18, 1970, 23 U.S.T. § 2555, T.I.A.S. No. 7444, codified at 28 U.S.C. § 1781.

II. Obtaining testimony in United States for Japanese proceedings

A. Statutory basis for providing assistance to foreign tribunals is found in 28 U.S.C. § 1782:

"(a) The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court. By virtue of his appointment, the person appointed has power to administer any necessary oath and take the testimony or statement. The order may prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country or the international tribunal, for taking the testimony or statement or producing the document or other thing. To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure.

A person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legal applicable privilege.

(b) This chapter does not preclude a person within the United States

from voluntarily giving his testimony or statement, or producing a document or other thing, for use in a proceeding in a foreign or international tribunal before any person and in any manner acceptable to him."

See also **In Re Letters Rogatory From the Tokyo District Court, Tokyo, Japan** 539 F.2d 1216 (9th Cir. 1976.)

B. Procedure in Southern District of New York (procedure may vary, subject to local court rules).

1. Submit ex parte application to court for order designating commissioner before whom deposition to be taken; Japanese court may appoint a commissioner which will be accepted by U.S. court absent good cause.

2. After entry of order, court clerk issues subpoenas for person(s) to be deposed.

V. OBTAINING EVIDENCE IN JAPAN (Material)

Deposition of a Willing Witness

Article 17 of the Japan-United States Consular Convention authorizes American consular officers to take depositions in Japan, "on behalf of the courts or other judicial tribunals or authorities of the sending state (United States), voluntarily given, in accordance with the laws of the sending state (U.S.) and in a manner not inconsistent with the laws of the receiving state (Japan)". Therefore, depositions may be taken in Japan either (1) pursuant to a commission to take a deposition issued by a court to an American consular officer or (2) on notice, provided a court order specifically authorizes an American consular officer to take the deposition on notice.

The names of all persons to be deposed must be included in the commissions and court orders noted above. The original court order must be sent to the embassy in advance. (These documents must bear seal of court).

Depositions are conducted in accordance with the regulations found in 22 CFR 92.49 et seq. American attorneys may travel to Japan to conduct an examination of witnesses at the embassy or a consulate as described in 22 CFR 92.57, but only if they have first obtained a "special visa" from a Japanese consular officer in the United States. This special visa must be applied for at least two weeks before departure for Japan. The request should be made on letterhead stationery and include the following information: (1) the name and location of the court; (2) name and occupation of each witness; and (3) a summary of the case. The original or a certified copy of the commission or order for a U.S. consular officer to take the deposition must accompany the request. Special visas may also be required of deposition participants other than attorneys. Inquiries should be made of the appropriate Japanese consular officer. In addition, names of lawyers should be provided to the U.S. Embassy in Tokyo since the Japanese Foreign Ministry checks with the Embassy before approving visa issuance.

To comply with provisions of the Code of Federal Regulations (22 CFR 92.669) and the Consular Convention, a consular officer will preside over and remain present throughout the deposition. The statutory consular fee will be applied.

The prescribed statutory fee for consular services in connection with deposition taking is 90 dollars per hour, which must be deposited in full prior to performance of the consular services [22CPR 22.5(c)]. You should notify the embassy/consulate of the necessary time required to take the deposition. Be aware that if the witnesses will be deposed in Japanese, the use of interpreters will approximately double the time required. In addition, the embassy/consulate requires a 50 dollar deposit to cover clerical time involved in consular certification of the completed deposition and for postage. Any unused portion from your deposit will be refunded. As federal regulations prohibit the performance of consular services in advance of payment of statutory consular fees, depositions cannot be convened until the required funds have been deposited. Payment should be made by international money order or certified check payable to the American Embassy, Tokyo, Japan or to the appropriate American consulate.

Since the embassy/consulate does not provide interpreters or stenographers, attorneys must arrange directly with such persons for their services and payment of their fees. A list of interpreters and stenographers and current charges is available directly from the embassy/consulate. Such fees for interpreters range from 50,000 to 70,000 yen per day and stenographic services from 40,000 to 60,000 yen per day plus transcript fees of 1,500 to 2,000 yen per page. The exchange rate fluctuates daily; on March 15, 1985, it was 261 yen to one U.S. dollar.

The embassy/consulate does not provide tapes, taping equipment or equipment operators. If a video taped deposition is planned, please inform embassy immediately so that embassy can provide commercial rates.

The usual procedure is as follows: after the deposition of witnesses is completed, the stenographer transcribes the testimony and delivers the original

transcript to the embassy/consulate. Witnesses then come to the embassy/consulate to initial pages, make any necessary corrections and sign in the presence of a consular officer. Once all witnesses have signed, consular certification is made and the deposition, along with any exhibits, is sent by registered air mail to the clerk of the court that requested the deposition. If you plan to have the deposition taped without subsequent transcription, the embassy/consulate asks that the court order or commission specify whether audio or video tape is to be used. Tapes are sent directly by embassy/consulate by registered air mail to the court clerk immediately following completion of the deposition. Any change in the above procedure would have to be agreed to by both parties in the dispute and, if necessary, covered by an amended court order.

The embassy/consulate does not schedule the appearance of deponents.

Please note that for administrative and security reasons, the embassy/consulate's deposition room and consular staff are not available for deposition taking outside working hours 8:30 a.m. to 5:00 p.m. or on weekends or holidays.

The embassy/consulate cannot schedule a deposition until both court order/commission and deposit (90 dollars times the number of hours required plus 50 dollars clerical fee) are received at the embassy/consulate. We suggest that the court order be worded "on or about" a date for maximum flexibility in scheduling. The court order/commission should be addressed to "any consul or vice consul at (Tokyo; Naha; Osaka; Kobe; Fukuoka; Sapporo), Japan".

Please inform all attorneys, for both the plaintiff and the defense of the above requirements, particularly the special deposition visa. Should you have further questions about the procedures for holding depositions overseas, please contact an officer of Citizen Consular Services, U.S. Department of State, (202) 647-3675.

Compulsion of Testimony

Compulsion of evidence in Japan can only be achieved pursuant to a letter rogatory. Letters rogatory involve invoking the judicial authority of the

Japanese courts to compel the witness to appear. Under this method the court in the United States before which an action is pending issues a "letter rogatory" or "letter of request" to the judicial authorities in Japan, asking that a named witness be deposed. The letter is then passed through diplomatic channels to the Japanese court where it is executed then returned to the U.S. Due to the diplomatic formalities involved and the uncertainties of the crowded judicial docket in Japan such a request could take up to six months, or longer, to be executed and returned to the U.S. Nevertheless, ordinarily, it should bring results and the cost is moderate.

Such requests are executed by Japanese district courts in accordance with the laws of Japan. The Department of State understands that the following conditions must be met before such a request will be h .ored:

A) The request must be made through diplomatic channels (as mentioned);

B) The letter of request should have attached documents showing parties to be examined, the type of evidence to be examined, the name, nationality and address of the persons to be examined and the items with respect to which they should testify;

C) The letter of request must assure the Japanese court that compensation for all expenses incurred by the Japanese court will be paid;

D) The letter of request must assure the Japanese court that the requesting court will honor similar requests from the Japanese court.

Please note that when a witness is compelled to appear pursuant to a letter rogatory, the witness appears before the Japanese judge who will pose the written questions annexed to the letter rogatory.

In executing the request the Department understands that U.S. counsel may ask to participate in the proceedings which will be conducted in the Japanese language. Retention of local counsel is preferable in this situation.

Also, for more detailed information about Japanese procedure, it is suggested that local Japanese counsel be retained. Upon request the Department can

forward a list of Japanese attorneys for any United States consular district in Japan, i.e., Tokyo, Osaka-Kobe, Naha, Sapporo and Fukuoka and an information flyer on preparation of letters rogatory.

Compulsion of Documents and Other Physical Evidence

As in the taking of depositions United States consular officials have no authority to compel the production of any document or other article. However, production of documents and other physical evidence may be compelled through the Japanese courts by letters rogatory.

Note: This information is intended only as a general guide. For more specific information concerning Japanese law, regulations, court procedures, etc., local Japanese counsel should be consulted. Further, the execution of letters of request are purely within the discretion of the Japanese authorities.

VI. MATTERS OF COMITY AND ENFORCEMENT OF FOREIGN JUDGEMENTS AND AWARDS IN JAPAN

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1. Enforcement of Foreign Judgements in Japan

Japan has signed no treaty or convention on the enforcement of foreign judgements in Japan.

However, Japan's Code of Civil Procedure, Article 200 (Effect of a foreign judgement), provides:

> Article 200. A foreign judgement which has become final and conclusive shall be valid only upon the fulfilment of the following conditions:
> (1) That the jurisdiction of the foreign court is not denied in (Japanese) laws and orders or treaties;
> (2) That the defendant defeated, being Japanese, has received (from a foreign court) service of summons or any other necessary orders to commence proceedings, otherwise than by a public notice or has appeared (before a foreign court) without receiving service thereof;
> (3) That the judgement of the foreign court is not contrary to public order or good morals in Japan;
> (4) That there is mutual guarantee (between Japan and the foreign country).

Japan's Civil Execution Act, Article 22 (6), provides that one can enforce and execute in Japan a foreign judgement which has become final and conclusive

in a foreign country and which has been recognised by a Japanese court.

Article 24 of the Civil Execution Act of Japan further provides as follows:

1) A Japanese district court, having jurisdiction over the place where the defendant lives, has authority to consider recognition and execution of a foreign judgement in Japan.

2) The Japanese court shall consider the judgement for execution without intervening in the contents of the foreign judgement.

3) The application for an execution judgement under the 1st Paragraph of this Article shall be dismissed if the Applicant cannot prove that the foreign judgement was final and conclusive or if the foreign judgement does not fulfil any one of the requirements as set forth in Article 200 of the Japanese Code of Civil Procedure.

4) The Japanese judgement giving execution authority to the foreign judgement shall state that the execution in Japan of the foreign judgement is now lawful and executable.

As seen above, there are several requirements to be met for a foreign judgement to become recognised and enforceable by a Japanese court, and I will now make some comments on the above provisions.

(a) It is said that an applicant, namely, a person or a body corporate (usually a plaintiff) who wants a foreign judgement to be enforced in Japan should submit to a competent court in Japan a certificate issued by an authority in that foreign country to the effect that the judgement is final and conclusive in the foreign country.

(b) As a precautionary measure, I should like to draw your attention to another aspect in that a foreign court's decision to start bankruptcy, composition or corporate reorganisation proceedings in the foreign country has no legal effect at all in Japan as set forth in Japan's Bankruptcy Act (Article 3, (3)), Composition Act (Article 11) and Corporate Reorganisation Act (Article 4, (2)).

(c) **From the Japanese judicial view point,** the foreign court which issued the judgement has to have jurisdiction with respect to the judgement.

This means that it is the Japanese court which eventually has the right to consider whether or not the foreign court has jurisdiction over the matter upon which the foreign judgement has been made, if the foreign judgement is required to be recognised and enforced in Japan.

If a defendant in a foreign court proceeding has voluntarily replied to the plaintiff's petition in the lawsuit, a Japanese court is likely to consider that the foreign court in question has jurisdiction from the Japanese viewpoint too.

(d) An applicant will probably have to prove that, if the defendant is a Japanese subject, he received a service of summons other than a public notice from the foreign court, i.e., that the Japanese defendant received a service of summons or writ in the foreign court proceeding at the initial stage, so as to give him the opportunity to defend his position and interest.

In this respect, a country which has ratified the Hague Convention 1954 (Convention Relating to Civil Procedure) and the Hague Convention, 1965 (Convention on the Service Abroad of Judicial and Extra Judicial Documents in Civil or Commercial Matters), should follow as strictly as possible what both the Conventions or either of them provides. For example, a court before which a lawsuit has been brought shall send a Request through diplomatic and official governmental channels to the defendant in a foreign country, and this Request must be accompanied by **a translation** in the language officially used in the receiving country. Japan has ratified both these Conventions, and the U.S.A. has ratified the Hague Convention, 1965.

Some of my Japanese clients have occasionally received by mail a writ or service of summons without any Japanese translation, directly from a

state court in the U.S.A. or from an American attorney at law representing a plaintiff.

In view of the above Conventions, it is doubtful whether the service of a writ or summons by mail from an American state court or an attorney to a Japanese defendant without a Japanese translation, whether the mail was registered or not, has lawful effect under Japanese procedural law and, therefore, an American court judgement which may be obtained in favour of a plaintiff against a Japanese defendant will, as a result of such service of the writ or summons, be under the risk that a Japanese court will later dismiss the plaintiff's application for recognition and enforceability in Japan of the American judgement.

(e) As for the requirement that the judgement of a foreign court shall not be contrary to Japanese public order or good morals, I will mention the following interesting case.

Divorce in Japan is rather strictly restricted unless the parties mutually agree to the divorce.

If a foreign court has allowed a divorce for some reasons which would not be permitted by a Japanese court, the judgement would be considered by a Japanese court to be contrary to public order or good morals in Japan and would accordingly not be recognisable for execution (Yokohama District Court, 7th September, Showa 46 nen [i.e., AD 1971], Hanrei Jiho 665–75).

The Osaka District Court decided on 22nd December, Showa 52 nen (AD 1977) that a foreign judgement was not recognisable, since there was in Japan another final and conclusive case, the contents of which did not comply with those of the foreign judgement (Hanrei Jiho 728–76).

(f) There should be a mutual guarantee between Japan and the foreign country which rendered the judgement, and the plaintiff should prove that point to obtain recognition for execution from a Japanese court.

It is considered that if a foreign court is authorised to intervene in the contents of a Japanese court judgement other than its procedural fairness, then the Japanese court will tend to decide that there is no mutual guarantee between Japan and that foreign country.

The following cases in Japan recognised that there was a mutual guarantee in favour of:

(1) The judgement by a Californian Court
   – Recognised by the Tokyo District Court Decision, 19th March, Showa 32 nen (AD 1957), Kakyuushin Minji Hanrei-shu 8-3-525

(2) The judgement by a Californian Court
   – Recognised by the Tokyo District Court Decision, 6th September, Showa 44 nen (AD 1969), Hanrei Jiho 586-73

(3) The judgement of the Commercial Court in Zurich, Switzerland
   – Recognised by the Tokyo District Court Decision, 13th November, Showa 42 nen (AD 1967), Kakyuushin Minji Hanrei-shu 18-11/12-1093

(4) The judgement by a Hawaiian Court
   – Recognised by the Tokyo District Court Decision, 24th October, Showa 45 nen (AD 1970), Hanrei Jiho 625-66

(5) The judgement by the Court in the District of Columbia in the United States
   – Recognised by Japan's Supreme Court Decision, 7th June, Showa 58 nen (AD 1983), Minshu 37-5-611, Jurist 10-214.

However, the following Japanese court decided that there was no mutual guarantee between a Japanese court and a Belgian court:

– The Tokyo District Court decision, 20th July, Showa 35 nen (AD 1960), Kakyuushin Minji Hanrei-shu 11-7-1522.

It is reported that Belgian courts have the authority to intervene in the

contents of a foreign judgement (e.g., a Japanese judgement) unless there is a treaty between the two countries. As you see in Article 24 (2) of the Civil Execution Act of Japan, a Japanese court is **not** allowed to intervene in the contents and/or the merits of cases which foreign courts have already considered if such a foreign judgement is under application for recognition for execution in Japan. In turn, if a foreign court, e.g. Belgium, is generally authorised under its country's law to recheck and reconsider the merits and/or contents of the case when the Japanese court's final and conclusive judgement is under application for recognition for execution in that foreign country, e.g., Belgium, then the Japanese court considers, as above reported, that there is no mutual guarantee, and the application for recognition of the foreign, e.g., Belgian judgement, is consequently dismissed.

For your guidance, Article 12 of Japan's Oil Pollution Compensation Act provides that a final judgement of a foreign court having jurisdiction under Article 9 of the Convention on the Civil Liability as to Oil Pollution Damages shall in principle be recognisable in Japan.

2. Enforcement of Foreign Arbitral Awards

Japan has ratified the Convention on the Recognition and Enforcement of Foreign Arbitral Awards concluded in New York on 10th June, 1958.

The following case has been reported:

The Osaka District Court Judgement, 22nd April, Showa 58 nen (AD 1983), Docket No. Showa 56 nen (Wa) No. 4919, Hanrei Jiho 1090-146.

In the above case, Plaintiff Texaco Overseas Tankship Ltd. (a British corporation) brought an arbitration proceeding against a Japanese shipping company Okada Kaiun K.K. (the Defendant) in New York City in compliance with an arbitration clause contained in the charterparty concluded between the Plaintiff and the Defendant.

The arbitration clause provided that the Shipowner, Okada Kaiun, and the Charterer, Texaco Overseas Tankship, were both entitled to appoint an arbitrator, that the two arbitrators so appointed were jointly to appoint a third arbitrator, and that should either of the parties not appoint his own arbitrator within 20 days of receipt of the request for appointment of an arbitrator, then the first party was entitled to appoint the second arbitrator without further notice to the second party.

The Owner, Okada Kaiun, did not appoint an arbitrator within the 20 days, whereby the Charterer appointed the Second Arbitrator and the two Arbitrators appointed the Third Arbitrator.

This tribunal eventually gave an award against the Owner, Okada Kaiun.

The Charterer, Texaco Overseas Tankship, applied to the Osaka District Court for recognition to enforce the New York Arbitration Award, and the Court recognised the Award.

VII. MATTERS OF COMITY AND ENFORCEMENT OF FOREIGN JUDGMENTS AND AWARDS

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I. Enforcement of Foreign Judgments

A. Criteria of Hilton v. Guyot 159 U.S. 113 (1985)

1. Opportunity for full and fair trial abroad.
2. Trial before court of competent jurisdiction.
3. Proper citation or voluntary appearance by defendant.
4. Foreign legal system likely to provide impartial administration of justice.
5. No demonstration of prejudice or fraud in the proceedings.
6. Reciprocal treatment by foreign country of U.S. judgment as conclusive.

B. Modern Practice: **Uniform Foreign Money-Judgments Recognition Act**

1. Adopted: California, Illinois, Maryland, Massachusetts, Michigan, New York and Oklahoma.
2. Grounds for non-recognition of judgment:
   a) Inconclusive judgment:
      i) foreign system does not provide impartial tribunals or procedures compatible with due process;
      ii) foreign court had no personal jurisdiction over defendant;
      iii) foreign court did not have subject matter jurisdiction.
   b) defendant did not receive notice of foreign proceedings.
   c) judgment obtained by fraud.
   d) cause of action or claim is repugnant to public policy.
   e) judgment conflicts with another final judgment.
   f) proceeding in foreign court contrary to agreement between parties.

g) foreign court was "seriously inconvenient forum."

C. Modern Practice: States which have not adopted Uniform Recognition Act:

1. Reciprocity – No longer essential criterion since Eric R R. v. Tompkins 304 U.S. 64 (1938).
2. Requisite subject matter and personal jurisdiction.
3. Notice of proceeding and opportunity to be heard.
4. System of jurisprudence must be impartial.
5. No fraud in foreign proceeding.
6. Foreign judgment must not violate public policy.

II. Enforcement of Arbitration Awards

A. Convention On the Recognition and Enforcement of Foreign Arbitral Awards, codified at 9 USC § 201.

1. U.S. and Japan are signatories.
2. Provision for enforcement: "Each contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon..."
3. Procedure for enforcement:

"...the party applying for recognition and enforcement shall, at the time of application, supply:

a) The duly authenticated original award or a duly certified copy thereof;

b) The original agreement referred to in article II or a duly certified copy thereof."

VIII. AIM OF AMERICAN LAWYERS' ACCESS TO TOKYO

Outline of Special Measures Law Concerning the Handling of Legal Business by Foreign Lawyers

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Introduction

When I first saw this subject, "Aim of American Lawyers' Access to Tokyo", I thought there would be nothing for us Japanese lawyers to talk about. I thought that all we had to do was stay awake and listen to what American lawyers say about this subject. Moreover, even if it is necessary for us Japanese lawyers to talk about this subject I firmly believed that somebody other than myself would take care of it. Contrary to my expectation, however, at the meeting held 10 days ago among us Japanese lawyers this very subject was assigned to me, mainly due to imbalance of power among us. I am not sure whether I am the right person to talk about this topic but I now feel responsible and must say something about it.

I am sure that this is the most interesting subject for you American lawyers sitting here and that it is the most embarrassing subject for us Japanese lawyers. I just hope that at least it is not the most boring subject for the

audience and hope that they will all stay awake during my speech.

As everybody in this room may already know, the new law, which is named "Special Measures Law Concerning the Handling of Legal Business by Foreign Lawyers" was promulgated on May 23 this year. I believe that this seminar is a very good opportunity for us to explain to you about the outline of the new law and I hope my explanation will help you make out some interpretation of the law and will also help you get the discussion going.

Before I start to explain in some detail I think I have to tell you one thing. That is, as I have not been involved in drafting this law, I do not know exactly how and why this law was made up. Even if you ask such a question as, "Why did you make such a ridiculous law?", I am not in a position to give you any proper answer. Maybe some other Japanese lawyers sitting here could assist in solving your problems. I just hope that however ridiculous you may think it is, this law is better than no law at all.

Now I go into details.

I have picked up some of the most important points from the law and I will explain them one by one. The relevant Articles to these points are set out in the resumé.

1. Definitions

Art. 2 of the law provides definitions of the terms which are used in the law. Foreign lawyers who will be admitted to practise in Japan shall be called "foreign-law jimu-bengoshi" or "solicitor at foreign-law" or "non-litigational attorney at foreign-law".

2. Reciprocity

The relevant Articles are Art. 1 and Art. 10 (2). The law takes a position that reciprocity should be guaranteed between Japan and the foreign country from where the foreign lawyer is coming. As provided in Art. 10 (2) unless treatment substantially similar to the treatment under this law is accorded in the foreign country, approval shall not be granted. In the case of a federal

country stipulated by Ministry of Justice ordinance, the term "foreign country" shall mean the states, territories and other constituent units of such foreign country, as to be stipulated by the said ordinance. Therefore, in the case of the United States, if Ministry of Justice ordinance stipulates that it shall mean the states, then we should check each individual State to see whether treatment substantially similar to the treatment under this law is accorded or not to Japanese lawyers. As far as I understand it, the State of New York allows Japanese attorneys to practise there to an extent substantially similar to the treatment under this law but the State of California does not. This means that New York attorneys will be allowed access but attorneys from California will not.

It is said that there are still strong arguments that unless a fair number of main States, such as New York, California, Hawaii, Michigan, Washington D.C., etc., open doors for Japanese lawyers to practise law in such States this law should not allow any American lawyers to do their business as attorneys in Japan. This issue still remains to be solved in the future.

3. Qualification

The most important Article is Art.10, Clause 1, Sub-clause 1. As you see, the law requires more than 5 years experience as a foreign lawyer before he is approved as a foreign-law jimu-bengoshi. He shall also satisfy other requirements as provided in Sub-clauses 2 and 3 of Clause 1, Art. 10. It is said that the period of 5 years has been decided taking into account the provisions concerning Legal Consultants of New York.

4. Scope of Practice

The most important Article is Art. 3, Clause 1. As you see from this Article the scope of practice is limited only to the performance of legal business concerning the law of the country of primary qualification. This means that a foreign-law jimu-bengoshi shall not perform legal business concerning Japanese law at all, or the law of countries other than his own

except in cases where Art. 5 and Art. 16 are applicable. Also there are some other restrictions stipulated in the Article whereby he cannot handle legal business even if it is related to his own law or he can perform it only jointly with a Japanese lawyer.

It is interpreted that there is no restriction concerning nationality or residence of clients. He can receive instructions from any clients in the world.

It is said that legal business includes everything such as giving legal advice, consultation, representation, drafting contracts, conducting negotiations and so on.

In the case of a New York attorney, therefore, what he can perform in principle is legal business concerning New York law and Federal law. If, for example, a dispute arises from a charter party which provides that the governing law is to be New York law, then he can handle the case. However, in a collision case where the governing law has been decided to be Japanese law, he cannot perform legal business on that case. It may be interpreted that until the governing law of a particular case has been decided he may perform legal business as long as there are reasonable grounds that American law (Federal law) would govern the case.

5. Rights and Duties

The most important Article is Art. 49, which prohibits a foreign-law jimu-bengoshi to employ Japanese lawyers or to form a partnership with them. On the other hand, a Japanese lawyer is permitted to employ a foreign-law jimu-bengoshi.

Among other rights and duties stipulated from Art. 44 through Art. 48, a foreign-law jimu-bengoshi shall be physically present in this country for at least 180 days of each year.

6. Others

(1) Supervision

A foreign-law jimu-bengoshi shall be under the supervision of a ben-

goshi association and the Japan Bengoshi Federation (Art. 21).

(2) Effective date

This law shall become effective as of a date, which shall be no later than 2 years from the date of its promulgation, to be stipulated by Cabinet order.

EDITOR'S NOTE: Since the date of the seminar at which the above paper was given, the required Cabinet order has been made bringing the new law into effect as from 1st April, 1987. Further information is available from the Ministry of Justice Gaikoku-ho Jimu-Bengoshi Shikaku Shinsashitsu (Office for Screening Foreign-Law Lawyers), Tel: (03) 580-4111 extn 2788 or 2789.

IX. THE OUTLINE OF "SPECIAL MEASURES LAW CONCERNING THE HANDLING OF LEGAL BUSINESS BY FOREIGN LAWYERS"

(Promulgated on May 23, 1986)
(Effective as from April 1, 1987)

(Free translation)

1. Definitions

Article 2 (Definitions)

(1) Bengoshi
This shall mean a bengoshi under the provisions of the Bengoshi Law (Law No. 205 of 1949).

(2) Foreign Lawyer
This shall mean a person who, as his profession, engages in legal business in a foreign country (in the case of a federal country stipulated by Ministry of Justice ordinance, the term "foreign country" shall mean, throughout this law, the states, territories, and other constituent units of such federal country, as stipulated by Ministry of Justice ordinance) and who corresponds to a bengoshi.

(3) Foreign-Law Jimu-Bengoshi
This shall mean a person who has received approval under the provisions of Article 7 and who has obtained registration in the registry under the provisions of Article 24.

(4) Country of Primary Qualification
This shall mean the foreign country in which a person who has received approval under the provisions of Article 7 obtained the qualification as a foreign lawyer that served as the basis for such approval.

(5) Law of the Country of Primary Qualification

This shall mean the law that is or was effective in the country of primary qualification.

(6) Legal Business Concerning the Law of the Country of Primary Qualification

This shall mean legal business in respect of a legal case, all or the major portion of which is governed, or should be governed, by the law of the country of primary qualification.

(7) Specified Foreign Country

This shall mean a specified foreign country other than the country of primary qualification.

(8) Law of a Specified Foreign Country

This shall mean the law that is or was effective in the specified foreign country.

(9) Designated Law

This shall mean the law of a specified foreign country as to which designation under the provisions of Article 16(1) has been received by a person who has received approval under the provisions of Article 7.

(10) Legal Business Concerning Designated Law

This shall mean legal business in respect of a legal case, all or the major portion of which is governed, or should be governed, by the designated law.

(11) Japan Bengoshi Federation

This shall mean the Japan Bengoshi Federation, established under the provisions of the Bengoshi Law.

(12) Bengoshi Association

This shall mean a bengoshi association established under the provisions of the Bengoshi Law.

(13) In Japan

This shall mean within the enforcement area of this law.

2. Reciprocity

Article 1 (Purposes)

The purposes of this law are to open, under guarantees of reciprocity, a path whereby persons qualified as foreign lawyers can handle, in Japan, legal business concerning foreign law, and, by providing special measures imposing, inter alia, order similar to that applicable to bengoshi on the handling of such legal business, to promote stability in relation to international business law affairs as well as to contribute to improvement in the handling, in foreign countries, of legal business concerning Japanese law.

Article 10 (Standards for Approval)

(2) Even where the applicant conforms with the standards set forth in Articles 10 (1) (i) – (iii), the Minister of Justice shall not grant approval unless treatment substantially similar to the treatment under this law is accorded to bengoshi in the foreign country mentioned in Article 10 (1) (i).

(3) The Minister of Justice shall, before granting approval, ask the opinion of the Japan Bengoshi Federation.

Article 14 (Cancellation of Approval)

(3) The Minister of Justice may, where treatment substantially similar to the treatment under this law has ceased to be accorded to bengoshi in a foreign country, cancel the approvals of persons who received approval with such foreign country as their country of primary qualification.

3. Qualification

Article 7 (Qualification To Become a Foreign-Law Jimu-Bengoshi)

A person who is qualified as a foreign lawyer and who has received the approval of the Minister of Justice shall qualify to become a foreign-law jimu-bengoshi.

Article 10 (Standards for Approval)

(1) The Minister of Justice shall not grant approval unless the person who has made application under the provisions of Article 9 (1) (hereinafter referred to as the "applicant") conforms with the following standards.

(i) He is qualified as a foreign lawyer and, after acquiring such qualification, engaged in practice as a foreign lawyer in the foreign country in which he acquired such qualification for at least 5 years.

(ii) He is not:

1) a person who has been sentenced, under the laws and regulations of a foreign country, to a punishment corresponding to imprisonment,

2) a person who has received, under the laws and regulations of a foreign country, a judgment corresponding to conviction in an impeachment proceeding,

3) a person who has been disciplined, under the laws and regulations of a foreign country, by a punishment corresponding to one of the punishments mentioned in item 3 of Article 6 of the Bengoshi Law, unless 3 years have elapsed from the imposition of such discipline, or

4) a person who is treated, under the laws and regulations of a foreign country, similarly to an incompetent or quasi-incom-

petent person or an unrehabilitated bankrupt.

(3) The Minister of Justice shall, before granting approval, ask the opinion of the Japan Bengoshi Federation.

Supplementary Provisions 2 (Exception Concerning Years of Practical Experience)

If a person who is qualified as a foreign lawyer is, as of the effective date of this law, actually employed in Japan by a bengoshi and is providing services to said bengoshi based on his knowledge concerning the law of the foreign country in which he acquired qualification as such foreign lawyer, such person's provision to a bengoshi, in Japan, after the date of acquisition of such qualification and before the effective date of this law, of services based on such knowledge concerning the law of such foreign country shall be deemed, for the purposes of Article 10 (1) (i), to be practice as a foreign lawyer in the foreign country in which he acquired such qualification, up to a total of 2 years.

4. Scope of Practice

Article 3 (Scope of Practice)

(1) The practice of a foreign-law jimu-bengoshi shall consist of the performance of legal business concerning the law of the country of primary qualification, upon the request of a party or other interested person or upon the charge of a public agency. However, the performance of the following legal business is excluded.

(i) Representation in regard to procedures before a court, public prosecutor's office or other public agency in Japan, or the preparation of documents for submission to any such agency in regard to such procedures.

(ii) Acting as counsel in a criminal case, acting as attending adult in

a juvenile protection case, or assistance in a case of a demand for investigation regarding the extradition of a fugitive criminal.

(iii) Expression of an expert opinion or other legal opinion in regard to the interpretation or applicability of law other than the law of the country of primary qualification.

(iv) Service of procedural documents for a court or administrative agency of a foreign country.

(v) Representation in the entrustment of the preparation of a notarial deed under Article 22 (v) of the Civil Execution Law (Law No. 4 of 1979).

(vi) Representation or the preparation of documents (as used in this Art. 3 the term "documents" excludes expert opinions) in regard to a legal case, the chief purpose of which is the acquisition, loss or change of rights concerning real property situated in Japan or of industrial property rights, mining rights or other rights arising upon registration with an administrative agency in Japan or rights concerning such rights (hereinafter referred to as "industrial property rights, etc.").

(2) Even if it is legal business that he may perform, as his practice, under the provisions of Article 3 (1), a foreign-law jimu-bengoshi must, in regard to the following matters, perform them jointly with a bengoshi or upon receipt of the written opinion of a bengoshi.

(i) Representation or the preparation of documents in regard to a legal case, other than a legal case described in Article 3 (1) (vi), a purpose of which is the acquisition, loss or change of rights concerning real property situated in Japan or of industrial property rights, etc.

(ii) Representation or the preparation of documents in regard to a

legal case concerning family relations, in which a Japanese national is a party.

(iii) Representation or the preparation of documents in regard to a legal case concerning a will or gift at death affecting property situated in Japan and owned by a resident of Japan, estate division or estate administration in regard to property situated in Japan that was owned at the time of death by a resident of Japan, or other legal case concerning inheritance, in which a Japanese national is a party.

Article 4 (Prohibition of Handling Legal Business Outside Scope of Practice)

A foreign-law jimu-bengoshi shall not perform legal business exceeding his scope of practice under the provisions of Article 3 (1).

Article 5 (Legal Business Concerning Designated Law)

(1) A foreign-law jimu-bengoshi may, despite the provisions of Article 4, perform legal business concerning designated law, if he has received designation under the provisions of Article 16 (1) and has obtained supplementary registration of the designated law under the provisions of Article 34 (1). However, the legal business set forth in Article 3 (1) (i), (ii) and (iv) – (vi) and the expression of an expert opinion or other legal opinion in regard to the interpretation or applicability of law other than the designated law are excluded.

(2) The provisions of Article 3 (2) shall apply, mutatis mutandis, to the performance by a foreign-law jimu-bengoshi of legal business concerning designated law under the provisions of Article 5 (1).

Article 16 (Designation)

(1) The Minister of Justice may, when a person who has received approval

satisfies either of the following conditions, grant to such person designation of the law of a specified foreign country.

(i) He is qualified as a foreign lawyer of the specified foreign country.

(ii) His knowledge concerning the law of the specified foreign country is of the same level at that of a person who is qualified as a foreign lawyer of said specified foreign country, and he has 5 or more years of practical experience in regard to the handling of legal business concerning such law.

(2) The provisions of Articles 10 (3) and 11 shall apply, mutatis mutandis, to designation under the provisions of Article 16 (1).

5. Rights and Duties

Article 44 (Indication of Status as a Foreign-Law Jimu-Bengoshi)

A foreign-law jimu-bengoshi shall, when engaging in his business, use the title "foreign-law jimu-bengoshi" and annex to such title the name of the country of primary qualification.

Article 45 (The Office of a Foreign-Law Jimu-Bengoshi)

(1) The office of a foreign-law jimu-bengoshi shall be called a "foreign-law jimu-bengoshi office".

(2) The name of the office of a foreign-law jimu-bengoshi shall include the surname and given name of one or more of the foreign-law jimu-bengoshi who compose such office and shall not include the name of any other individual or organization.

(3) Notwithstanding the provisions of Article 45 (2), a foreign-law jimu-bengoshi who is employed by a bengoshi may use the name of the office of such bengoshi.

(4) A foreign-law jimu-bengoshi office shall be established within the district of the bengoshi association or associations to which the foreign-law jimu-bengoshi who compose such office belong.

(5) A foreign-law jimu-bengoshi shall not, under any name, have more than one office in Japan.

Article 46 (Indication of Law of the Country of Primary Qualification and Designated Law)

(1) A foreign-law jimu-bengoshi shall, in a manner stipulated by the rules of the Japan Bengoshi Federation, display within his office, in a place easily visible to the public, a sign indicating the law of his country of primary qualification and any designated law.

(2) Necessary matters concerning the indication of the law of the country of primary qualification and designated law, other than the display of a sign under the provisions of Article 46(1), shall be stipulated by the rules of the Japan Bengoshi Federation.

Article 47 (Use of Title as Foreign Lawyer, etc.)

(1) A foreign-law jimu-bengoshi may, when engaging in his business, use his title as a foreign lawyer in his country of primary qualification, but only as an annex to the title "foreign-law jimu-bengoshi" and the name of the country of primary qualification.

(2) A foreign-law jimu-bengoshi may, when engaging in his business, use the name of a corporation, association or other business entity of his country of primary qualification that has the conduct of legal business as its purpose and to which he belongs, but only as an annex to his own surname and given name and the name of his office and only in the following cases.

(i) When there is no other foreign-law jimu-bengoshi using the name

of such business entity.

(ii) When there are one or more other foreign-law jimu-bengoshi already using the name of such business entity and he has his office in common with them.

Article 48 (Duty of Physical Presence)

(1) A foreign-law jimu-bengoshi shall be physically present in this country for at least 180 days of each year.

(2) If a foreign-law jimu-bengoshi leaves this country and is in regions outside this country, owing to his own or his relative's injury or illness or to other unavoidable circumstances, the period during which he is in such regions outside this country shall, for the purposes of Article 48(1), be deemed to be a period of physical presence in this country.

Article 49 (Prohibition of Employment of Bengoshi, etc.)

(1) A foreign-law jimu-bengoshi shall not employ a bengoshi.

(2) A foreign-law jimu-bengoshi shall not, based on a partnership or any other kind of agreement, engage in a joint enterprise with a specific bengoshi for the purpose of performing legal business or receive a share of the fees or other profits gained by a specific bengoshi in the performance of legal business.

6. Others

A. Supervision

Article 21 (Purposes of Bengoshi Associations and of the Japan Bengoshi Federation, etc.)

A foreign-law jimu-bengoshi shall be deemed to be a bengoshi for purposes

of the application, mutatis mutandis, of the provisions of Articles 31 (1), 41, 42 (2) (including cases of application, mutatis mutandis, pursuant to Article 50), 45 (2), 48 and 49 of the Bengoshi Law.

B. Effective Date

Supplementary Provisions 1 (Effective Date)

This law shall become effective as of a date, which shall be no later than 2 years from the date of its promulgation, to be stipulated by Cabinet order.

NOTE ON JSE COMBINED TRANSPORT BILL OF LADING

The 5th Meeting of the Documentary Committee of The Japan Shipping Exchange, Inc. for 1984/85 on November 27, 1985 resolved on drafting the Negotiable Combined Transport Bill of Lading.

The intent of drafting was that "it would be meaningful to establish and possess a standard negotiable combined transport bill of lading in view of the current development of combined transport in Japan". Based on the resolution, a sub-committee for discussing the drafting of the negotiable combined transport B/L was established under the Documentary Committee.

The sub-committee held 13 meetings between January 10th and September 17th, 1986, drafted the "NEGOTIABLE COMBINED TRANSPORT BILL OF LADING" (Code Name: JSE-CT B/L), and submitted the draft to the second meeting for 1986/87 of the Documentary Committee held on October 30, 1986. The draft was approved by the said Committee as submitted.

1. Policy for Deliberation

(1) To establish a standard Combined Transport Bill of Lading which may be used mainly for consolidators and freight forwarders wishing to issue a combined transport B/L as a carrier by combined transport. (2) The issuer of the combined transport B/L shall be responsible for all the sections of transport from taking charge of the goods to their delivery to the merchant. (3) The combined transport carrier shall be liable for loss of or damage to the goods on the basis of the so-called modified network system. (4) The contract shall be as simple as possible and the language shall be simple and easy to read.

2. Method of Deliberation

In addition to the combined transport B/Ls currently used by the members

of the sub-committee, COMBIDOC (COMBINED TRANSPORT DOCUMENT issued by BIMCO: Baltic and International Maritime Council in July, 1977), FBL (NEGOTIABLE FIATA COMBINED TRANSPORT B/L issued by FIATA: Federation Internationale des Associations de Transitaires et Assimiles in 1978), and JIFFA MODEL FORM (established in March, 1986 by Japan International Freight Forwarders Association) were compared and used as references in drafting the form.

3. Layout

The format prepared by JASTPRO (Japan Association for Simplification of International Trade Procedures) is used as the basis. The latter format is based, in its turn, on ICS (International Chamber of Shipping) format.

4. Title, Code Name and Columns

(1) The title of "NEGOTIABLE COMBINED TRANSPORT BILL OF LADING" is used to indicate its negotiability. "THROUGH BILL OF LADING" was suggested for use in the title, but this was not adopted because of a feeling that it suggested transport using the same transport mode.

The code name of "JSE-CT B/L" is used to indicate the combined transport bill of lading of The Japan Shipping Exchange, Inc.

(2) Columns

(a) The receiver of cargo is usually printed as "Consignee" on B/Ls issued in Japanese shipping circles, but if the name of the receiver is described in the "Consignee" column, the B/L may, in US and other overseas countries, be deemed to be a "straight B/L" and, in contrast with Japanese law, transfer by endorsement cannot be made. Therefore, the column is titled "Consigned to the order of".

(b) "Final destination (for the Merchant's reference only)" column printed on usual B/Ls was deleted because the combined transport is from door to door. The column "For delivery of the Goods please apply to:"

is provided instead to identify the party to whom inquiries concerning the scheduled arrival date, the cargo claim procedure, the place of storage, etc. should be made.

(c) The column "Merchant's Declared Value..." was provided to describe the declared value of the goods by the Merchant, and the column "Note:" is for noting that the liability of the Carrier is limited to a certain amount in respect of loss or damage to the Goods under Clauses 8 & 19 on the back of the form.

(3) The column for signature

The column "SIGNATURE as the Carrier" is to identify that the signatory to the Bill is the Carrier. It corresponds to the provisions of Article 25 of the Uniform Customs and Practice for Documentary Credits 1983 Revision (hereinafter referred to as "Uniform Rules for Documentary Credits") to the effect that "Unless otherwise stipulated in the credit, banks will reject a transport document issued by a freight forwarder unless it ... indicates that it is issued by a freight forwarder acting as a carrier...."

5. Notes on the back clauses

(1) Clause 1 (Definition)

Other forms include definitions of "Container", "Vessel", etc., but only "Carrier", "Merchant" and "Goods" are defined in view of the policy of simple clauses. "Goods" are identified to include containers supplied by those other than the Carrier.

(2) Clause 2 (Negotiability)

This Bill of Lading is indicated to be a negotiable bill, transferable by endorsement, and constitutes the title to the Goods.

(3) Clause 3 (Applicability to transport by one mode of transport)

The B/L is made applicable to transport by one mode of transport only such

as port to port container transport.

(4) Clause 4 (Law and Arbitration)

Japanese law is made the governing law, and disputes concerning this Bill of Lading are to be referred to arbitration by the Tokyo Maritime Arbitration Commission (TOMAC) of The Japan Shipping Exchange, Inc. Arbitration was chosen as a more convenient means to resolve disputes because of the number of parties involved in combined transport and a plurality of nationalities of the parties.

(5) Clause 5 (Method and Route of Transportation)

The Carrier is given the liberty to choose the means, route and procedure for handling the Goods. Compared to the general deviation or liberty clause, the carrier in this combined transport B/L is usually not the actual carrier and therefore the article is written in simple language.

(6) Clause 6 (Hindrance, etc. Affecting Performance)

This is the so-called Abandonment Clause. As with Clause 5, this article is simpler than the conventional clause; it provides that, in the event of any unforeseen situation arising or being anticipated, the Carrier has the option either (i) to terminate the performance of the Contract and place the Goods at the Merchant's disposal at any place deemed convenient by the Carrier, or (ii) to deliver the Goods at the place designated by the Merchant.

It also provides that the Carrier is entitled to full freight and charges, and that the Merchant shall pay any additional costs of carriage to and delivery and storage at such place as above-mentioned.

(7) Clause 7 (Defences and Limits of Liability for Carrier, Servants, etc.)

Paragraph 1 provides that the defences and limits of liability provided for in this B/L apply in any action for loss or damage to the Goods, etc. even when the action is founded in tort.

Paragraph 2 is the so-called Himalaya clause, and extends the applicability of the Carrier's defences and limitation of liability to any parties related to the transport under this B/L if an action is brought against the same.

Paragraph 3 provides that the aggregate of the amounts recoverable from the Carrier, his servants, agents, etc. shall not exceed the limits provided in the B/L.

(8) Clause 8 (Liability of the Carrier)

The Carrier's liabilities are placed under the so-called modified network system. The liabilities are classified into two: Paragraph 1 deems the Carrier liable for loss or damage to the Goods occurring between receipt of and delivery of Goods if such loss or damage was caused by reasons other than those deemed excusable. Provided, however, that the liabilities are limited to US$2 per kilo of the total weight of the Goods lost or damaged.

Irrespective of Paragraph 1, Paragraph 2 provides that the International Carriage of Goods by Sea Act of Japan (Hague Rules legislation) shall be applied in determining the liability for loss of or damage to the Goods occurring during transport by sea; the International Warsaw Convention to loss or damage occurring during transport by air; and other compulsorily applicable laws, if any, to loss or damage occurring during transport other than by sea or air. In the absence of any such laws, the general principle of Paragraph 1 shall apply.

The compensation is to be calculated by reference to the invoice value, freight and insurance premium of the Goods unless the Merchant has declared a value for the Goods and it is described in the column on the face of the B/L. (Paragraph 3)

(9) Clause 9 (Delay, Consequential Loss)

The Carrier is deemed not responsible for delay and consequential loss. Arrival times are not guaranteed.

(10) Clause 10 (Notice of Loss and Time Bar)

Notice of loss is to be made prior to removal of the Goods by the party receiving delivery if the damage is apparent, and within 7 days including Sundays and holidays after removal if the damage is not apparent. The time bar is set to expire unless an arbitration is filed within 9 months, since a claim by the issuer of this B/L to the actual carrier may become impossible by reason of time-bar if the Merchant first makes his claim towards the end of the 1 year period after the Goods were delivered or should have been delivered.

(11) Clause 11 (Delivery)

This provides measures to deal with a situation when the cargo-owner refuses to receive delivery of the Goods. The Goods not removed are naturally stored in warehouses, but the liability of the Carrier is set to terminate at the time the Goods are placed in the warehouses, and the Merchant is held responsible for storage fees, etc.

Paragraph 2 provides for disposal of perishable goods, and that their sale, etc. may be made at the discretion of the Carrier.

(12) Clause 12 (Failure of Delivery)

If the Goods cannot be delivered by the Carrier within 90 days after the date they should have been delivered, the Goods are deemed to have been lost. There was an opinion that 90 days was too short a period in view of the procedures for combined transport.

(13) Clause 13 (Description of Goods)

This is the so-called "unknown clause". The content has been simplified. The number of Goods described in B/L is used as prima facie evidence of the number of Goods received by the Carrier. Other contents are deemed unknown to the Carrier, and the shipper is deemed to have guaranteed the accuracy of the descriptions. Any damages, etc. to the Carrier because of inaccuracy are to be compensated by the shipper.

(14) Clause 14 (Merchant-packed Containers)

As the incidence of accidents is high for merchant-packed containers, detailed rules were provided.

Paragraph 1 provides that the Carrier is not held liable for any damage to the contents of a container filled, packed and sealed by the Merchant if the loss, damage, etc. was caused (a) by the manner in which the container was filled, packed, etc; (b) by the unsuitability of the contents for carriage in a container; or (c) by defects of the container itself.

Paragraph 2 provides that the contents are deemed to be undamaged if the container is delivered with seals intact, and the Carrier is in such case not liable for the condition of the contents.

Paragraph 3 provides that the Carrier has the right to inspect the contents for the purpose of freight calculation (Clause 21 (2)), etc.

Paragraph 4 provides that these provisions are applicable to carrying equipment other than a standard container.

(15) Clause 15 (Deck Cargo)

Goods in containers may have to be carried on deck, and it is not known which containers may be carried on deck. Therefore, a general discretionary right to carry the Goods on deck is provided in Paragraph 1.

Paragraph 2 provides that Goods carried on deck shall not be specifically referred to as "on deck stowage" on the face of this B/L, and that such Goods shall also be subject to the International Carriage of Goods by Sea Act of Japan.

These correspond to Article 28 (b) of the Uniform Rules for Documentary Credits:

> "Banks will not refuse a transport document which contains a provision that the goods may be carried on deck, provided it does not specifically state that they are or will be loaded on deck".

Paragraph 3 provides that the Carrier is held not liable for loss of or damage to the Goods carried on deck if the Goods are specifically scheduled to be placed on deck by prior agreement with the Merchant and the B/L records this fact

on its face.

(16) Clause 16 (Livestock and Plants)

This is the usual provision concerning livestock and plants.

(17) Clause 17 (Dangerous Goods, Contraband)

Paragraphs 1, 2 and 3 concern dangerous goods, while Paragraph 4 concerns contraband.

Paragraph 1 provides that the Merchant should comply with international treaties or laws concerning the transport of dangerous goods, and that the Merchant should notify the Carrier of the dangerous nature of the Goods when placing the same into the custody of the Carrier.

Paragraph 2 concerns the Merchant's failure to provide such information; the Carrier has the liberty to throw such Goods overboard if they pose a danger to persons and/or property and the Merchant is liable for such situation and for damage caused by such dangerous goods.

Paragraph 3 provides for measures to be taken by the Carrier for Goods which become hazardous during carriage, their dangerous nature being known to the Carrier in advance.

Paragraph 4 provides measures to be taken by the Carrier when the Goods are found to be contraband.

(18) Clause 18 (Refrigerated Goods)

Paragraph 1 imposes an obligation on the Merchant to notify the Carrier in advance that refrigeration is required and also of the temperature range required for the refrigerated goods. If the refrigerated container is to be carried aboard, the Merchant is required to guarantee that adequate packing and setting of the thermostatic controls have been made.

Paragraph 2 exempts the Carrier from liability for any damage to the Goods caused by latent defect or derangement of the refrigerating machinery of the container provided that the Carrier has exercised due diligence to maintain such

equipment in an efficient state.

(19) Clause 19 (Valuable Goods)

The provision is the ordinary one concerning valuable goods. The Carrier is not liable for any loss, etc. to valuable goods unless the Carrier is notified in advance and the B/L states that the goods are valuables, and the appropriate freight has been paid in advance.

(20) Clause 20 (Heavy Lift)

The provision is the ordinary one concerning heavy goods, and a heavy lift is defined as one exceeding 1 metric ton gross per single piece or package.

(21) Clause 21 (Freight and Charges)

Paragraph 1 concerns the earning and payment of freight and charges on receipt of the Goods by the Carrier.

Paragraph 2 provides that the container may be opened for calculation of freight. It provides that damages may be claimed in the event that the Merchant's declaration is incorrect. The damages being a sum equal to either five times the difference between the correct freight and the freight charged or double the correct freight less the freight charged whichever sum is the smaller.

Paragraph 3 provides that taxes, etc. levied on the Goods shall be paid by the Merchant.

Paragraph 4 provides that the shipper, etc. who are included in the definition of the Merchant are jointly and severally responsible to the Carrier for freight and charges if the freight is to be collected.

(22) Clause 22 (Lien)

This article provides that the Carrier has a lien on the Goods for any amount due under the Bill of Lading and for General Average contributions.

(23) Clause 23 (General Average)

When General Average is declared during the course of carriage by sea, the Merchant may be liable for General Average contributions in accordance with the York-Antwerp Rules 1974. Since the actual carrier during the sea transport will declare General Average, the Carrier under the B/L will be in the position of cargo owner to the actual carrier; therefore the provision has been substantially simplified.

JSE-CT B/L (Issued Oct., 1986 by the Documentary Committee of J.S.E.)

NEGOTIABLE COMBINED TRANSPORT BILL OF LADING

CT B/L No.

Shipper (Shipper's Reference No.)

Consigned to the order of

Notify Party

RECEIVED by the Carrier the Goods stated below in apparent good order and condition unless otherwise noted, for transportation from the place of receipt to the place of delivery, subject to the terms and conditions provided for on the face and back hereof.
One of the original Bills of Lading must be surrendered duly endorsed in exchange for the Goods or delivery order.
IN WITNESS whereof, the number of original Bills of Lading stated below have been signed, one of which being accomplished, the other(s) to be void.

Place of Receipt	Port of Loading	For delivery of the Goods please apply to:
Ocean Vessel	Voy No.	
Port of Discharge	Place of Delivery	

Particulars furnished by Shipper

Container No.	Seal No. Marks and Numbers	No. of Containers or Pkgs	Kind of Packages; Description of Goods	Gross Weight	Measurement

SAMPLE

Total number of Containers or other Packages or Units (in words)

Merchant's Declared Value (See Clauses 8 & 19):

Note:
The Merchant's attention is called to the fact that according to Clauses 8 & 19 of this Bill of Lading the liability of the Carrier is, in most cases, limited in respect of loss of or damage to the Goods.

Freight and Charges	Revenue Tons	Rate	Per	Prepaid	Collect

Exchange Rate	Prepaid at	Payable at	Place and Date of CT B/L issue
	Total prepaid in local currency	No. of original CT B/L	SIGNATURE as the Carrier

LADEN ON BOARD THE OCEAN VESSEL

Date By

An enlarged copy of back clauses is available from the Carrier upon request.

1. Definitions

"Carrier" means the party on whose behalf this Bill of Lading has been signed.

"Merchant" includes the shipper, consignor, consignee, owner and receiver of the Goods and the holder of this Bill of Lading.

"Goods" means the cargo described on the face of this Bill of Lading and includes any container not supplied by the Carrier.

2. Negotiability

(1) This Bill of Lading shall be deemed to be negotiable, unless marked "non-negotiable".

(2) By accepting this Bill of Lading, the Merchant and its transferees agree with the Carrier that, unless it is marked "non-negotiable", it shall be deemed to constitute the title to the Goods and the holder, by endorsement of this Bill of Lading, shall be entitled to receive or to transfer the Goods herein mentioned.

3. Applicability

Notwithstanding the heading "Combined Transport Bill of Lading", the provisions set out and referred to in this Bill of Lading shall also apply when the transport is performed by one mode of transport.

4. Law and Arbitration

The contract evidenced by or contained in this Bill of Lading shall be governed by Japanese law. Any dispute arising from this Bill of Lading shall be referred to arbitration in Tokyo by Tokyo Maritime Arbitration Commission(TOMAC) of The Japan Shipping Exchange, Inc. in accordance with the Rules of TOMAC and any amendment thereto, and the award given by the arbitrators shall be final and binding on both parties.

5. Method and Route of Transportation

(1) The Carrier reserves to himself a reasonable liberty as to the means, route and procedure to be followed in the handling, storage and transportation of the Goods.

(2) The Goods may be stowed by the Carrier in containers or similar articles of transport used to consolidate goods.

6. Hindrances, etc. Affecting Performance

If at any time the performance of the contract as evidenced by this Bill of Lading is or is likely to be affected by any hindrance, risk, delay, difficulty or disadvantage of whatsoever kind, the Carrier (whether or not the transport is commenced) may elect

(i) to treat the performance of this contract as terminated and place the Goods at the Merchant's disposal at any place which the Carrier deems safe and convenient, whereupon the responsibility of the Carrier in respect of such Goods shall cease; or

(ii) to deliver the Goods at the place designated for delivery.

In any event the Carrier shall be entitled to full freight and charges on the Goods received for transportation, and the Merchant shall pay any additional cos of carriage to and delivery and storage at such place as abovementioned.

7. Defences and Limits for Carrier, Servants, etc.

(1) The defences and limits of liability provided for in this Bill of Lading shall apply in any action against the Carrier for loss of or damage to the Goods or delay in delivery, whether the action be founded in contract or in tort.

(2) If an action is brought against a servant, agent or independent contractor of the Carrier, such person shall be entitled to avail himself of the defences and limits of liability which the Carrier is entitled to invoke under this Bill of Lading.

(3) The aggregate of the amounts recoverable from the Carrier and his servants, agents or independent contractors shall in no case exceed the limits provided for in this Bill of Lading.

8. Liability for Loss or Damage

(1).(i) The Carrier shall be liable for loss of or damage to the Goods occurring between the place of receipt and the place of delivery, unless such loss or damage was caused by:

(a) an act or omission of the Merchant or person other than the Carrier acting on behalf of the Merchant or from whom the Carrier took the Goods in charge; or

(b) compliance with the instructions of the person entitled to give them; or

(c) the lack of or insufficiency of or defective condition of packing ; or

(d) handling, loading, stowage or unloading of the Goods done by or on behalf of the Merchant; or

(e) inherent vice or nature of the Goods; or

(f) insufficiency or inadequacy of marks or numbers on the Goods, coverings or containers; or

(g) strikes or lockouts or stoppage or restraint of labour from whatever cause, whether partial or general; or

(h) any cause or event which the Carrier could not avoid and the consequence whereof he could not prevent by the exercise of reasonable diligence.

(ii) When the Carrier establishes that in the circumstances of the case, the causes or events specified in (c) to (g) of the preceding sub-paragraph could attribute to the loss or damage, it shall be presumed that it was so caused. The Merchant shall, however, be entitled to prove that the loss or damage was not, in fact, caused either wholly or partly by such causes or events.

(iii) When the Carrier is liable under this paragraph, compensation by the Carrier shall not exceed US$2 per kilo of gross weight of the Goods lost or damaged, provided that higher compensation may be claimed if the value for the Goods has been declared by the Merchant and has been stated in this Bill of Lading.

(2) Notwithstanding anything provided for in the preceding paragraph:

(i) if it is proved that loss of or damage to the Goods occurred during transport by sea or inland waterways, the liability of the Carrier for such loss or damage shall be determined by the provisions of the International Carriage of Goods by Sea Act of Japan, 1957(Hague Rules Legislation); or

(ii) if it is proved that loss of or damage to the Goods occurred during transport by air,the liability of the Carrier for such loss or damage shall be determined by the provisions of the Convention for the Unification of Certain Rules relating to International Carriage by Air signed at Warsaw, October 12th, 1929, as amended by the Hague Protocol, 1955; or

(iii) if it is proved that loss of or damage to the Goods occurred during any particular stage of transport other than by sea, inland waterways or air, the liability of the Carrier for such loss or damage shall be determined by the provisions of the law, if any, which would be mandatorily applicable if a contract for such particular stage of transport had been made under the laws of the country where such loss or damage occurred,and if there are no such provisions of the law as above mentioned, paragraph (1) of this Clause shall apply.

(3) When the Carrier is liable under this Clause, compensation by the Carrier shall be calculated by reference to the Merchant's net invoice value of the Goods plus freight and insurance premium if paid, unless the value for the Goods has been declared by the Merchant and has been stated in this Bill of Lading.

9. Delay, Consequential Loss

In no event shall the Carrier be liable for delay in delivery, any loss of profit or consequential loss or damage. Arrival times are not guaranteed by the Carrier.

10. Notice of Loss and Time Bar

(1) Unless notice of loss of or damage to the Goods, indicating the general nature of such loss or damage, shall be given in writing to the Carrier or to his representative at the place of delivery before or at the time of removal of the Goods into the custody of the person entitled to delivery thereof under this Bill of Lading or, if the loss or damage is not apparent, within seven consecutive days thereafter, such removal shall be *prima facie* evidence of the delivery by the Carrier of the Goods as described in this Bill of Lading.

(2) In any event the Carrier shall be discharged from all liability in respect of loss or damage unless arbitration is filed pursuant to Clause 4 within nine months after delivery of the Goods or the date when the Goods should have been delivered.

11. Delivery

(1) If delivery of the Goods is not taken by the Merchant within a reasonable time after the Carrier has called upon the Merchant to take delivery thereof, the Carrier shall be at liberty to store the Goods, whereupon the liability of the Carrier in respect of the Goods shall wholly cease and the costs of such storage shall forthwith upon demand be paid by the Merchant to the Carrier.

(2) If the Goods are unclaimed during a reasonable time or whenever, in the Carrier's option, the Goods will become deteriorated, decayed or worthless, the Carrier may, at his discretion and subject to his lien and without any responsibility attaching to him, sell, abandon or otherwise dispose of such Goods solely at the risk and expense of the Merchant.

12. Failure of Delivery

Failure to effect delivery within 90 days after the time it would be reasonable to allow for completion of the combined transport operation shall give to the party entitled to receive delivery, the right to treat the Goods as lost.

13. Description of Goods

(1) This Bill of Lading shall be *prima facie* evidence of the receipt by the Carrier of the total number of containers or other packages or units enumerated overleaf. Proof to the contrary shall not be admissible when this Bill of Lading has been transferred to a third party acting in good faith.

(2) No representation is made by the Carrier as to the weight, contents, measure, quantity, quality, description, condition, marks, numbers or value of the Goods and the Carrier shall be under no responsibility whatsoever in respect of such description or particulars.

(3) The shipper warrants to the Carrier that the particulars relating to the Goods as set out overleaf have been checked by the shipper on receipt of this Bill of Lading and that such particulars and any other particulars furnished by or on behalf of the shipper are correct.

(4) The shipper shall indemnify the Carrier against all loss, damage or expenses arising or resulting from inaccuracies in or inadequacy of such particulars.

14. Merchant-packed Containers

(1) If a container has not been filled, packed or stowed by the Carrier, the Carrier shall not be liable for any loss of or damage to its contents and the Merchant shall indemnify the Carrier against any loss, damage, injury or expense, if such loss, damage, injury or expense has been caused by:

(a) the manner in which the container has been filled, packed, closed or sealed; or

(b) the contents being unsuitable for carriage in container; or

(c) the unsuitability or defective condition of the container unless the container has been supplied by the Carrier and the unsuitability or defective condition would not have been apparent upon reasonable inspection at or before the time when the container was filled, packed or stowed.

(2) If the container is delivered by the Carrier with seals intact, such delivery shall be deemed to be full and complete performance of the Carrier's obligations hereunder and the Carrier shall not be liable for any loss of or damage to the contents of the container.

(3) The Carrier has the right to inspect the Goods or package at any time and anywhere without the Merchant's agreement.

(4) The provisions of paragraphs (1) through (3) of this Clause also apply with respect to trailers, transportable tanks, flats and paliets which have been filled, packed or stowed by the Merchant.

15. Deck Cargo

(1) The Carrier is entitled to carry the Goods in containers under or on deck of the vessel.

(2) When the Goods are carried on deck, the Carrier shall not be required specially to note, mark or stamp any statement of "on deck stowage" on the face hereof. The Goods so carried shall be subject to the International Carriage of Goods by Sea Act of Japan, 1957, and shall be deemed to be carried under deck for all purposes including general average.

(3) The Carrier shall not be liable in any capacity whatsoever for any delay or loss of or damage to the Goods which are carried on deck and specially stated herein to be so carried, whether or not caused by the Carrier's negligence or the vessel's unseaworthiness.

16. Livestock and Plants

Livestock and plants are carried without responsibility on the part of the Carrier for any accident, injury, illness, death, loss or damage arising at any time whether caused by negligence or any other cause whatsoever.

17. Dangerous Goods, Contraband

(1) The Merchant shall comply with rules which are mandatory according to the national law or by reason of international Convention, relating to the carriage of goods of dangerous nature, and shall in any case before such Goods are taken in charge by the Carrier inform the Carrier in writing of the name, label and classification of such Goods as well as the exact nature of the danger and indicate to him the precautions to be taken.

(2) If the Merchant fails to provide such information and at any time, the Goods are deemed to be a hazard to life or property, such Goods may at any place be thrown overboard, unloaded, destroyed or rendered harmless, as circumstances may require, without compensation, and the Merchant shall be liable for all loss, damage, delay or expenses arising out of their being taken in charge or their carriage, or of any service incidental thereto.

(3) If the Goods shipped with the knowledge of the Carrier as to their dangerous nature are deemed to be a hazard to life or property, they may in like manner be thrown overboard, landed at any place, destroyed or rendered innocuous by the Carrier without liability on the part of the Carrier except as to general average, if any.

(4) Whenever the Goods are found to be contraband or prohibited by any laws or regulations of the port of loading, discharge or call or any place or waters during the carriage the Carrier shall be entitled to have such Goods thrown overboard, discharged or otherwise disposed of at the Carrier's discretion without compensation and the Merchant shall be liable for and indemnify the Carrier against loss of any kind, and any expenses arising out of such shipment.

18. Refrigerated Goods

(1) The Merchant undertakes not to tender for transportation the Goods which require refrigeration without previously giving written notice of their nature and particular temperature range to be maintained and in the case of refrigerated container packed by the Merchant further undertakes that the Goods have been properly stowed in the container and that its thermostatic controls have been adequately set by him before receipt of the Goods by the Carrier.

If the above requirements are not complied with, the Carrier shall not be liable for any loss of or damage to the Goods howsoever arising.

(2) The Carrier shall not be liable for any loss of or damage to the Goods arising from latent defects, derangement, breakdown, stoppage of the refrigerating machinery, plant, insulation and/or any apparatus of the container, vessel, conveyance and any other facilities, provided that the Carrier shall before or at the beginning of the transport have exercised due diligence to maintain such equipment in an efficient state.

19. Valuable Goods

The Carrier shall not be liable for any loss of or damage to or in connection with platinum, gold, silver, jewellery, precious stones, precious metals, radioisotopes, precious chemicals, bullion, specie, currency, negotiable instruments, securities, writings, documents, pictures, embroideries, works of art, curios, heirlooms, collections of every nature or any other valuable goods whatsoever including goods having particular value only for the Merchant, unless the true nature and value of the Goods have been declared in writing by the Merchant before receipt of the Goods by the Carrier, and the same is inserted in this Bill of Lading and ad valorem freight has been prepaid thereon.

20. Heavy Lift

(1) The weight of a single piece or package exceeding 1 metric ton gross must be declared by the Merchant in writing before receipt by the Carrier.

(2) In case of the Merchant's failure in the above declaration, the Carrier shall not be responsible for any loss of or damage to or in connection with the Goods, and at the same time the Merchant shall be liable for loss of or damage to any property or for personal injury arising as a result of the Merchant's said failure and shall indemnify the Carrier against loss or liability of any kind suffered or incurred by the Carrier as a result of such failure.

21. Freight and Charges

(1) Freight and charges shall be deemed fully earned on receipt of the Goods by the Carrier and shall be paid in any event, whether the vessel and/or the Goods be lost or not, or the transport be broken up or frustrated or abandoned at any stage of the entire transit.

(2) For the purpose of verifying the freight basis, the Carrier may at any time open any container or other package or unit in order to ascertain the weight, measurement or value of the Goods. If the particulars furnished by the Merchant are incorrect, it is agreed that a sum equal to either five times the difference between the correct freight and the freight charged or to double the correct freight less the freight charged, whichever sum is the smaller, shall be payable as liquidated damages to the Carrier.

(3) The Merchant shall pay all dues, taxes and charges including consular fees levied on the Goods and all fines and/or losses sustained or incurred by the Carrier in connection with laws and regulations of any government or public authorities in connection with the Goods.

(4) The shipper, consignor, consignee, owner and receiver of the Goods and holder of this Bill of Lading shall be jointly and severally liable to the Carrier for the payment of all freight and charges and for the performance of the obligation of each of them hereunder.

22. Lien

The Carrier shall have a lien on the Goods for any amount due under this Bill of Lading and for general average contributions to whomever due and for the cost of recovering the same, and may enforce such lien in any reasonable manner.

23. General Average

The Merchant shall admit that general average may be declared during the course of or in respect of the carriage of the Goods by sea and shall in such a case undertake to make, for settlement of the general average, such contribution due from the Goods as is determined in accordance with the York-Antwerp Rules 1974.

Introduction for
'KAIUN' (Shipping)

(No. 713 February and No. 714 March)

The Japan Shipping Exchange, Inc. has been publishing the monthly magazine named 'Kaiun' (Shipping) in Japanese since 1921.

This magazine has been valued and is working as an opinion leader in shipping circles and other concerns in Japan.

Undermentioned are the contents of its recent issues, February and March editions.

We hope you will find information you are seeking in the following articles.

OPINION

[February]

Page

The following will be important in order to revitalize Japanese shipbuilding:-

(1) to strengthen cost competitiveness by means of reduction of ratio of labour cost.

(2) to retain and enhance specialization in production by way of improving the ability of developing technology.

It will be necessary to promote factory automation by introducing a number of computers and industrial robots into the process of design work and production as has already been undertaken by the automobile and electronics industries.

Computer Integrated Manufacturing System (CIMS) in shipbuilding is considered the best means to convert shipbuilding from a labour-intensive industry

to a knowledge-intensive industry.

* *Comment on the theory of hollowing of industry* 48

by Prof. Marumo, Akinori

It is not necessary to regard the trend of economics becoming service-oriented as unhealthy.

The argument that the increase of direct investments abroad under the appreciation of Yen results in the hollowing of industries or deindustrialization in Japan probably comes from a view point of strict adherence to either the traditional industrial structure or the international specialization of industries.

You should refrain from underestimating the strength of American industries.

[March]

* *Can Japanese deep sea shipping be revived by cutting seamen?* 10

by Mr. Miyawaki, Tetsuya

The causes of Japanese deep sea shipping's troubles are worldwide over-tonnage on a large scale and the strong appreciation of the Yen.

Overtonnage was brought about by the speculative building of a large volume of FOC vessels. Accordingly, there is now a pressing need to restrict further building of FOC vessels.

Misguided Government policy has led to the strength of the Yen against the Dollar and has led to the inability of the shipping industry to cope by itself with this serious situation.

* *The principle of negotiation for the revision of the seamen's labour agreement* 15

by Mr. Gohko, Yuzo

Substantial mutual understanding between management and labour through negotiation free from traditional customs.

INTERVIEW

[February]

Mr. Chang, Yung Fa, Chairman of Evergreen Group 42

The fact that U S Lines have plunged into financial difficulties might give you the impression that round-the-world services in general can not succeed. Our round-the-world services, however, are composed of both east-bound and west-bound services and entirely different types of vessels are being operated. Therefore our round-the-world services should not be equated with the concept of the round-the-world services of such company.

[March]

* Mr. Masuda, Sunao, President of the Japan Reefer Association 28

The Japanese reefer fleet amounts to more than 30% of the world fleet. We are now suffering from the severe influences of a stagnant market and the strong appreciation of the Yen. In these circumstances we have established the Japan Reefer Association in order to seek cooperation and to discuss means to stabilize management.

* Mr. Ajiro, Kiyoshi, Advisor, Overseas Business Dept. The Sumitomo Bank. Ltd. 40

Recently Hong Kong is showing good performance in each field of real estate, stock market and exports.

DISCUSSION

[February]

* *Will a cruising boom come to Japan?* 10

Mr. Yanagihara, Ryohei
Mr. Gohko, Yuzo
Mr. Onishi, Nobuo

The Pacific Ocean and China will in the near future become a potential area for cruising like the Caribbean and Mediterranean.

Passenger ship companies will be needed to sell to customers the pleasure of cruising such as one cannot experience on shore.

If such an effort is continued, you can expect to gain constantly a substantial number of Japanese people who would like to enjoy cruising.

PROPOSAL

[February]

INSURANCE

[March]

The Japanese Hull Insurance Market published Special Clauses Class No. 6 newly drafted to bear comparision with the Institute Time Clauses-Hulls on 1st April, 1987, the coverage of which is wider than that of Special Clauses Class No. 5 being in general use at present.

PEOPLE

[February]

Mr. Chiba, Yoshimichi 8
Director, General Manager of Transport Division
Sumitomo Corporation

[March]

* *Mr. Sasaki, Toshio* 8
General Manager, Physical Distributions Division
Honda Motor Co., Ltd.

Although the freight market has started to improve with the rising rate of freight, for as long as there remain some lines carrying cargoes at lower rates, I am afraid that raising freight rates means self-strangulation.

Only Lines which can cope with the actual situation of the strong Yen and fierce competition among trans-Pacific liner operators and can attain international competitiveness will become winners in this cut-throat struggle for survival.

BUDGET

[March]

* *Summary of the budget of Ministry of Transport for fiscal 1987 for ocean going shipping in Japan* 20
by Mr. Nagao, Masakazu

ANALYSIS

[March]

* *Economic situation in Tanker trade* 27
by Mr. Hohji, Senta

Influence of lowering of new building cost and acute change to the strong Yen on time charter hire.

REVIEW

[February]

Problem of Employment of Seafarers 60

by Mr. Ohki, Godo

REPORT

[February]

* *Consideration of the ILO Preparatory Technical Maritime Conference* 77

by Mr. Kaba, Akira

* *Japanese Shipbuilders Willing to Build Cruise Ships* 15

[March]

* *The tough financial problems of the trans-Pacific liner trade* 60

It is said that the total deficit suffered by the Japanese "Big Six" Lines may be reduced by half by the end of fiscal 1987, but...

* *Decisions for Shipbuilders; their wisdom is requested* 32

Discussion begins in earnest on difficult problems such as grouping or re-organization, which is now unavoidable for the industry, and the disposal of facilities.

The shipbuilding industry will continue to face a serious situation for further 2–3 years. I would like the industry to make a fresh start to regain vitality.

It is no exaggeration to say that the good sense of the shipbuilding industry is being appealed to in this re-construction programme in order to avoid repeti-

tion of the same mistakes.

LEGAL MATTERS

TOPICS

REGULAR FEATURES

Shipping and Shipbuilding Statistics

Books

Subscription Rates for 'KAIUN' (Shipping):

(DOMESTIC)

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