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(SUMMARY)

Importance of the Advice of English Lawyers in Tokyo Arbitration

Hironori TANIMOTO*

This is to introduce the summary of my speach of above-mentioned title in the "Maritime Law Seminar" organized by INCE & CO., one of the biggest Law Firm in London, with the assistance of The Tokio Marine and Fire Insurance Co., Ltd. in cooperation with our Japan Shipping Exchange, Inc., on November 1, 1990 in Tokyo. The seminar was quite successful gathering about 300 participants.
It is very true, as I spoke in this seminar, that the advices and opinions of lawyers from overseas, not limited to those from England, are mostly needed among the business field in Japan. I sincerely hope this report will be of use to the concerned in arbitration conducted by our Japan Shipping Exchange in Tokyo.

Winning a dispute by arbitration depends very much on how efficiently the parties sort out and prepare the real and documentary evidences and testimonies at the outset of the dispute and have expert opinions rendered if necessary regardless of where arbitration takes place whether in London or Tokyo.

Laws seem to change with age in countries like England where case laws prevail much more than in Japan with firmly established statutory laws. This is the reason for relying on the services of a solicitor. People of the practical level alone cannot fully and precisely prepare for such cases.

The Japanese climate tends to avoid bringing disputes to courts or

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arbitrations as much as possible and to resolve the matter by discussion and consultation among those of the practical level. One may be proud of such a custom in more than one way.

However, if an attempt at amicable solution by consultation becomes aborted, the matter must be submitted to legal proceedings. As most of maritime business practices of Japan have been nurtured based on the customs and usages of English laws, judging disputes over such business by prioritizing the Japanese laws over such customs and usages is not necessarilly accepted on the practicable basis and does not result in a practical solution.

Arbitration by Japan Shipping Exchange are considered invaluable when trying to resolve such problems by resorting to legal procedures in Japan. The arbitrators of Japan Shipping Exchange are chosen from among the shipping industries, shipbuilding companies, trading houses, cargo owners, stevedoring, warehouse companies, underwriters, ship-brokers, etc.

This is because arbitrators can render arbitration awards either by "law" or "ex bono et aequo (good faith and equity)" in Japan. Thus, the arbitrators of the Shipping Exchange who are businessmen automatically rely on "ex bono et aequo" in rendering awards.

An arbitrator, however, is not allowed to give awards at his whim so long as he firmly maintain his neutral standpoint and aims at an equity even though he may be relying on "ex bono et aequo". Arbitration at the Shipping Exchange (referred to as "TOMAC arbitration" (Arbitration of Tokyo Maritime Arbitration Commission of JSE)), in particular, is conducted by arbitrators who are businessmen, who rely on customs and usages of super-national standards if such are available, and who try to render reasonable and rational awards. They will certainly not spare efforts in confirming the intention of parties concerned, in re-confirming the intent of applicable provisions contained in the concerning contract, and in referring to recent trends of English case laws.

In the light of actual situation surrounding TOMAC arbitrations, we believe that there is a limit to our efforts of resolving disputes by consultation as agreements increase their complexity, particularly in respect of international

character. This in turn increases the need for arbitration in Tokyo.

Various "appropriate preparedness" which I discussed in the beginning should be thoroughly attended. When considering what are most appropriate, trend in decisions in England plays an important role.

In this context, I believe needs for acqainting ourselves with legal people -including solicitors - increase, and sophisticated practical measures recommended by competent lawyers will be increasingly appreciated by arbitration in Tokyo.

Developments of the Japanese Maritime Law in 1980s (2)

Takashi AIHARA*

This part of the article is aimed to review cases in 1980s dealing with the contract of carriage of goods by sea.

II. Cases (cont.)

3. Contract of Carriage of Goods by Sea (cont.)

(b) Perils of the sea[1]/Seaworthiness[2]

⑥ Judgement of Tokyo District Court dated as February 10, 1982[3]

<Facts> During the voyage from Cuba to Japan, the cargo (unrefined sugar) was damaged by sea water. Subrogating the cargo owner, the insurer instituted this suit against the carrier to recover the damage. The cause of the damage was that sea water came into the holds through the ventilators due to the stormy weather. The vents had no water-tightness and were not firmly covered with the canvases. The dampers were not able to be operated because of the rust of their bearings and were kept open. The issues of this case were following. (1) Whether did the stormy weather represent to the Perils of the sea? (2) Whether was the leakage through the ventilators caused by the unseaworthiness of the vessel? (3) Whether did the carrier perform his duty of care completely?

<Judgement> The court admitted the claim of the plaintiff. The opinions on the above issues were as follows.

(1) The Perils of the sea mean the stormy weather accompanied with such unforeseeable extraordinary waves that even tough vessels may be sunk or stranded or cannot escape other fatal damages. The stormy weather in this case, whose force of wind was 9 and height of wave was 9m, was easily foreseeable in the north Pacific Ocean in winter and did not correspond to the Perils of the sea.

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(2) The ventilators of the vessel did not need to have wind-tightness as well as water-tightness originally and structurally. The canvas covers were prepared on board against wind and water. In this condition, it was admitted that the vessel was sufficiently seaworthy. Therefore, even though the dampers were not able to be operated, only bad maintenance can not lead the conclusion that the vessel was not seaworthy.

(3) It is supposed that the cause of the damage must have been that the vents were not firmly covered with the canvases or that they were incompletely covered. Therefore, it is not recognized that the defendant performed his duty of care sufficiently and he can not escape the liability because of the breach of his duty.

⑦ Judgement of Kobe District Court dated as March 30, 1983[4)]

<Facts> During the voyage from India to Japan, the cargo (linings of carpets) was damaged by sea water. Subrogating the cargo owner, the insurer brought this suit against the carrier to recover the damage. According to the argument of the plaintiff, the cause of the damage was that sea water came into the hold through hatch covers or that the hold was not water-tight. On the other hand, the carrier insisted on the exemption under the Perils of the sea.

<Judgement> The court admitted the claim of the plaintiff. The outline of the reason was as follows. And, this case was governed by the Indian law.

(1) It is understood that, to get the exemption under the Perils of the sea, the heavy weather the vessel met needs to be such an extraordinary event that it is not able to be foreseen in the same sea and in the same season. However, it is rather ordinary event that it becomes stormy in the South China Sea and East China Sea in that season and the stormy weather was to some extent forecast when the vessel left Hong Kong. Though the hull of the vessel suffered some damages, they were not serious. In addition, in spite of the heavy weather, it was possible to re-fix the on-deck cargoes and none of them was lost into the sea. On all these facts, it is concluded that the heavy weather the vessel encountered did not correspond to the Perils of the sea.

(2) It is recognized that the McGregar-type hatch covers of the vessel were comparatively popular among those cargo boats adopted at that time; that the works for inspection and improvement of them had finished by the time of departure of this voyage; and that during the heavy weather the crew of the vessel took a measure in a way to keep the hatch covers water-tight. However, it is supposed that, if the maintenance of the hatch covers has been done sufficiently since the construction of the vessel and if during the bad weather the necessary care is taken to keep them cargo-worthy, it will be possible to escape the leakage of sea water and cargo damages. As it is not possible to say that the defendant and his employees perform their duty of care completely to keep the vessel seaworthy, the defendant cannot be exempt from his liability under the Perils of the sea.

<Comment> The standard of the Perils of the sea shown in the both cases above is generally accepted in Japan and is used to be strictly applied. As to seaworthiness, as it is at the time of departure that a vessel must be seaworthy, the opinion of the case ⑦ which did not distinguish clearly between the seaworthiness of the vessel and the duty of care of the carrier is somewhat questioned.

⑧ Judgement of Tokyo District Court dated as December 25, 1984[5)]

<Facts> During the carriage by a refrigerator boat from Thai to Okinawa, Japan, the cargo (young plants of pineapple) was rotten. According to the argument of the plaintiff, the cause of rotting was as follows. The temperature of the holds could not fall below the temperature (10° C-15° C) within the time (48 hours) indicated by the plaintiff due to troubles of the cooling devices. In consequence, the cargo was kept under the extraordinary high temperature and humidity and was rotten. The plaintiff claimed a compensation against the carrier on the ground that the carrier did not take care to keep the holds suitable for the carriage and custody of the cargo, and that he failed to take care to keep the cargo from acceptance to delivery. On the other hand, the carrier asserted that the rotting resulted from the peculiar nature of the cargo and that he was not liable for the damage because of the exemption.

<Judgement> The court dismissed the claim. The outline of the reason was as follows.

(1) It is found that the vessel replaced the crankshafts for repairing its cooling devices before this carriage; that the result of the test after such replacement revealed that the refrigerators were able to cool down only to −17° C; and that they could cool down to −17° C without a hitch. In this carriage, the plaintiff indicated the captain to keep the temperature within the holds below 15° C-10° C. However, even if the heat by breathing of the plants is taken into consideration, it will not be possible to say that the vessel was lacking in ability to refrigerate.

(2) In this carriage, the temperature of the holds became below 15° C when 49-79.5 hours have past since the beginning of refrigeration and thereafter it was kept almost within 15° C-10° C as the plaintiff indicated. As to the carriage by a refrigerator boat, it is generally accepted that banana shall be refrigerated to the temperature suitable for keeping it within 48 hours after the beginning of refrigeration and the other fruits shall be within 72 hours. As it is recognized that the cargo in this case shall be treated in the same manner as the latter, the argument of the plaintiff that there was a fault of the defendant in his judgement that the cooling period of the cargo was within 72 hours shall be denied. In addition, as 8 hour delay for refrigerating some holds could be permitted in the circumstance of this case, it should be said that there were no improper operations of the cooling devices.

(c) Carrier's Duty of Care[6)]

⑨ Judgement of Tokyo District Court dated as August 26, 1985[7)]

<Facts> During the carriage from Japan to England, the cargo (steel) gathered foamy rust. The cargo owner, the plaintiff asserted that the cause of the damage was the corrosion of the cargo by the dust of apatite which was the cargo of the former voyage and was left in the hold. The plaintiff claimed compensation against the carrier.

<Judgement> The court dismissed the claim. The outline of the reason was as follows.

There were no proofs sufficient to find that the dust of apatite left in the hold was the cause of the foamy rust; that the cause was the congelation in the hold; and that the foamy rust resulted from any cause which arose after loading of the cargo. Therefore, it is impossible to find that the damage resulted from any fault of the carrier. It is rather reasonable to consider that there was some moisture in the bundles of steel at the shipment and that the normal rust of the steel was made progress by such moisture and finally became the foamy rust.

<Comment> In this case, as normal rust was found on the cargo before the shipment, the shipper presented the Letter of Guaranty on such normal rust and in exchange for it the carrier issued the clean Bills of Lading. Though this court did not refer to this point, its holding that the carrier will not be liable unless the plaintiff can prove the cause of damage is questioned.

The principle is that the bearer of a clean B/L can pursuit the liability of the carrier if only he proves the occurrence of damage and, on the other side, that the carrier will not be able to escape his liability unless he prove the existence of one of the exemptions or his non-fault. In this case, did the court hold that the plaintiff bears the burden of proof on the cause by presenting the L/G? If not, it should be said that it ignored the principle of proof provided in the Carriage of Goods by Sea Act.

(4) Limitation of Value/Container

⑩ Judgement of Tokyo District Court dated as January 24, 1983[8)]

<Facts> The cargo (frozen shrimp) was damaged due to a trouble of the refrigerator container. The issue of this case was the meaning of a "package" for the limitation of value. Which was a package, a container itself or carton in it? It was stated on the B/L that the number of packages was 196 cartons.

<Judgement> The court hold that a carton was a package on the following ground.

The meaning of a package should be determined finally by inquiring a reasonable intent of the parties. In the American law, it seems to be recognized that the most important factor for inquiring it is the statement on the B/L. When the number of goods is mentioned by using a term meaning a package like a

"carton", it is supposed that each carton is a package and the carrier has to prove the intent of the parties that a container is a package. In this case, as the number of goods was stated by using "cartons" and the carrier did not rebut the presumption, it was recognized that a carton was a package.

<Comment> This case was governed by the U.S.COGSA and the interpretation of the art.4(5) of the Act was discussed. Therefore, the court only found the leading interpretation in the American law and it did not refer to the Japanese law. Though we cannot find any Japanese cases treating this issue under the Japanese law, the opinions of scholars seem to support the solution of the American law and the container clause in the Visby-Rules.

[to be continued]

[Notes]

1) The art.4 sec.1 of the International Carriage of Goods by Sea Act, the Japanese COGSA provides for the "Perils peculiar to the sea and other navigable water" as one of the exemptions. The term "Perils of the sea" used in this article means such Perils as mentioned above.
2) The art.5 of the Act provides for the duty of the carrier to keep the vessel seaworthy in the same manner as the provision of the Hague-Rules.
3) Published in the Kaijiho-Kenkyukaishi no.48 (in Japanese)
4) Published in the Kaijiho-Kenkyukaishi no.58 (in Japanese)
5) Published in the Kaijiho-Kenkyukaishi no.65 (in Japanese)
6) The art.3 sec.1 of the Act provides:

   The carrier is liable for any loss, damage or delay of the goods resulting from his own or his employee's negligence of taking necessary care on the acceptance, shipment, stowage, carriage, custody, dischargement and deliverance of the goods. (rough translation)
7) Published in the Kaijiho-Kenkyukaishi no.73 (in Japanese)
8) Published in the Kaijiho-Kenkyukaishi no.63 (in Japanese)

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Arrest and Releae of Vessels and Maritime and Possessory Lines under Japanese Law

Tameyuki HOSOI*

Part I. ARREST OF VESSELS

A. Introduction.

No action "in rem" is allowed under Japanese law.

Arrest as a provisional seizure may be granted and enforced against a vessel as one of the debtor's properties in order to secure the claims against the debtor that may be adjudged valid by the court at a later date.

Arrest to implement maritime lien and mortgage rights, or to execute a final and conclusive court judgment, may also be granted.

A writ can be served on the vessel's master, for he is considered the statutory authorized agent for the owners when a vessel is away from her registered port.[1]

A sister ship may also be arrested, except in case of an application for arrest based on maritime lien or a mortgage.

B. Types of Arrest Procedures.

1. Provisional Arrest.

This is a procedure to arrest a vessel, usually by lodging a partial counter-security in favor of the shipowner, in order to obtain security in full for a claimant's probable claim against a shipowner. The merits of the case will later be

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decided by a court in Japan or in another jurisdiction. If the court eventually finds that the claim has no merit, the arrested ship must be released.

As this procedure gives the claimant the right to arrest the vessel only temporarily, as security for his probable but not yet determined claim, no actual sale by auction will automatically follow. If security is put up by the debtor, who is usually the shipowner, the vessel or any prior security can be released.

2. Compulsory Execution.

This is a procedure by which one can execute on the vessel as the debtor's property to enforce a judgment already determined by the court, allowing the claimant to recover on his claim.

This procedure naturally leads to the actual sale of the arrested ship, unless the debtor puts up security. A foreign court judgment[2] and a foreign arbitration award[3] can also be executed in Japan against a ship when she calls at a Japanese port, subject to a Japanese court's recognition of the validity of such judgment or award.

3. Maritime Lien, Mortgage, Etc.

A mortgage right, maritime lien, and possessory lien enable a claimant to arrest the vessel concerned, which will subsequently be sold by public auction without the claimant having to first obtain a court decision based on hearing procedures.

C. Sources of National Law.

The legal basis of the provisions on maritime arrest under Japanese law is mainly to be found in Chapter 6 of Japan's Code of Civil Procedure, 1890 (as amended), in Chapter 3 of the Civil Execution Act of Japan, 1979 (as amended), and in Chapter 4 of the Commercial Code of Japan, 1899 (as amended).

D. International Conventions.

Japan has not signed the International Convention Regarding the Immunity of State-Owned Vessels (Brussels, 10 April 1926) and the Supplementary

Protocol dated 24 May 1934.

Nor has Japan signed the International Convention Regarding the Arrest of Seagoing Ships (Brussels, 10 May 1952).

Japan has signed neither the 10th of April 1926 Brussels Convention nor the 1967 Conventions on Maritime Liens and Mortgages.

Japan has not signed any bilateral agreement intended to prevent vessels of the respective contracting states from being arrested.

E. Competency of Courts or Other Authority.

The court competent to conduct the main proceedings or the local court in whose district the vessel is located has primary jurisdiction to issue an order of arrest of the vessel. No other government agencies deal with an order of arrest.

The court in Japan has jurisdiction, in principle, to arrest vessels for claims whether or not a contract contains an arbitration clause or a foreign jurisdiction clause.

Essentially, rules for arrest do not differ according to whether the claim is based upon tort or contract.

F. Immunity of State-Owned Vessels.

A public vessel, whether Japanese or foreign, usually cannot be the object of arrest.

G. Basis for Arresting Vessels.

(a) Provisional Arrest.

A vessel can be arrested for any type of monetary claim against the owners whether or not the claim is secured by maritime liens or mortgages. The claim need not have fallen due.[4] A claim subject to a condition precedent, a claim subject to time, and even a surety's right of future possible indemnification against the principal obligor are a proper basis for provisional arrest, so long as it can be shown that unless an arrest is ordered, the future enforcement of the claim may be endangered.

Since a later increase in the claim amount may prove difficult if the time bar

expires before such increase, it is advisable that the claim be set out in the maximum possible amount.

(b) Maritime Lien.

A maritime lien enables a claimant to arrest and sell a vessel by court auction. The proceeds are paid into a fund, from which the claimant can receive the amount of his claim.

Under Japanese law, maritime lien rights usually supersede mortgage rights. There is no distinction between mortgages, i.e., no "preferred" mortgage.

Under Japanese law, the following claims may give rise to a maritime lien:

1) Expenses relating to the sale of the vessel and her appurtenances by public auction, and the expenses of preservation after the commencement of the proceedings for the sale by public auction.
2) Expenses of preservation of the vessel and her appurtenances at the last port.
3) Public dues levied on the vessel in respect of the voyage.
4) Pilotage and towage.
5) Salvage awards and the vessel's contribution to general average.
6) Claims which have arisen from the necessity for the continuation of the voyage.
7) Claims of the master and other mariners which have arisen from their contracts of employment.
8) Claims which have arisen from the commercial sale, construction, or equipment of the vessel, in cases where the vessel has not yet made any voyage after her sale or construction; and claims in respect of the equipment, food and bunkers of the vessel for her last voyage.[5]
9) Cargo claim rights provided by Article 19 of Japan's International Carriage of Goods by Sea Act, 1957, which is the Japanese version of the Hague Rules, 1924.
10) Claim rights, such as collision damage claims, which may be limited by Japan's Limitation of Shipowners Liability Act, 1975, as amended in 1982 (this is the Japanese version of the Convention on Limitation of

Liability for Maritime Claims, 1976).

Supply of bunkers possibly gives rise to a maritime lien either in items (6) or (8) above.

"Her last voyage" in item (8) above does not necessarily mean the physical and historical last voyage leading to the end of a vessel's life. A scholar indicates that "her last voyage" is the last voyage of a certain series of voyages in a commercial unit or cycle. This should be developed in more detail by future court cases and analyses thereof.

Among the maritime lien rights described above, superiority is in principle given in the order in which they are listed. In practice, many of the maritime lien-related items are initially paid by a vessel's or a charterer's local agent. Such a local agent is usually considered to be entitled to reimbursement from the vessel's owners by virtue of the maritime lien. However, the fee for the agent's services does not always give rise to a maritime lien.

Many of the maritime lien rights are time barred if not asserted within one year after they arise.

In the case of an arrest of a vessel based upon a maritime lien, only the particular vessel against which the claim was asserted may be arrested. No sister ship may be arrested on the basis of maritime lien. Sister ships may be arrested by means of provisional arrest.

A claimant seeking an arrest for a lien need not lodge any deposit with the court other than for court costs, revenue stamps, or the like.

A maritime lien recognized by the law of a country other than Japan, if recognized by the country where the principal claim was created and by the law of the flag of the vessel to be arrested, is also likely to be recognized in Japan, subject to circumstances, even if Japanese substantive law does not recognize such a lien.

On the one hand, this favors a claimant, since he can arrest a ship even for foreign based claim that would not give rise to a lien under Japanese law.

On the other hand, this may work against a claimant if, for instance, the claim gives rise to a maritime lien in the country where it arose, but the claim does give rise to a maritime lien under the law of the country whose flag she flies.

Maritime lien rights even enable claimants to arrest a time chartered vessel for claims owed by the time charterers.

(c) Possessory Lien.

A dockyard, for example, is usually entitled to keep a vessel that was equipped or repaired in the dockyard until the equipment or repair charges are paid, even if such charges do not fall within the above maritime lien rights.

If the shipowner is, for some reason, unable to settle the charges, the dockyard may proceed with the sale of the vessel by public auction supervised by the court,[6] so long as the vessel remains in the custody of the dockyard.

If the vessel leaves the dockyard, the possessory lien vanishes (depending upon the circumstances).

(d) Mortgages

A mortgage, whether Japanese or foreign, can be foreclosed by means of the arrest of the mortgaged vessel.[7]

H. Other Specific Preconditions to An Arrest.

In the provisional arrest proceedings, a court will order an arrest as security for a claim. The party seeking the arrest must show that a later judgment in an ordinary proceeding might not be enforceable if the vessel is not attached now, or that it is probable that, without arrest, the debtor will try to evade his liabilities by removing the vessel from Japanese waters. The mere existence of an unpaid claim is not necessarily sufficient to warrant an arrest.[8]

An application for the arrest of a vessel by a claimant is occasionally approved by the court without hearing any defenses from the shipowner or the charterer. It then takes some time for the shipowner to have the vessel released, by putting up security with the court, etc.

The vessel may be arrested in Japanese territorial waters without the shipowner having a reasonable time in advance to check and verify the accuracy of the claim. (This is more likely to occur when the vessel is time chartered since in that case the shipowner usually has no immediate and direct access to verification

of the merits of the claim, which often arises from actions of the time charterer through its local agent.) The shipowner can, if worried about such an arrest, apply for a special court order to restrain a claimant from arresting the vessel by submitting a valid reason and security to the court beforehand.

I. Definition of "Ship" or "Vessel".

The property to which the rules regarding "arrest of vessels" are applicable is a vessel of more than 20 gross tons.[9]

The definition of "vessel" or "ship" for the purposes of the law relating to arrest is "a water navigable structure for commercial use."[10]

Whether or not oil rigs are included seems to be an open question. Barges without their own driving power and riverboats could be vessels depending upon the circumstances.

The arrest of a vessel does not legally affect loading or discharge of cargo on board. If a vessel has perishable cargo on board, however, her arrest possibly will cause problems with the cargo interests, vessel's crew, etc., with the result that the arrest or the enforced sale proceedings will not proceed smoothly.

It is permissible to arrest cargo, bunkers, or freight in relation to, for instance, salvage claims against these items.

J. Evidence Necessary to Support an Arrest Application.

It is not usually sufficient to simply allege that a claim exists. Supporting evidence must, to a certain extent, be produced.

1. Provisional arrest.

It is only necessary to show the court the probability of a valid claim in order to secure arrest as a provisional seizure.[11] It is also necessary to show that unless an arrest is ordered, the enforcement of the claim may be endangered.[12]

It is recommended that documentary evidence be prepared to fulfill these two requirements in time.

2. Compulsory execution.

It is necessary to show the court the full validity of a claim in the form of a court judgment, etc.

3. Maritime Lien, Mortgage, Etc.

It is necessary to show the court the validity of a claim by a mortgage certificate, maritime or possessory lien vouchers, etc.

K. Sister Ships.

It is possible to arrest ships other than those having a direct connection with a claim. That is, a claim which has arisen in respect of one vessel may be pursued by arresting any other vessel belonging to the same owner. This does not apply to an application for arrest based on maritime lien, civil law possessory lien, or foreclosure of a mortgage.

The question of whether or not the vessel of an "associated" owner can be arrested depends upon the circumstances. For instance, assume that an owner holds a controlling influence both in company A, which owns vessel A (in respect to which the claim arose) and in company B, which owns Vessel B (which is to be arrested). Whether the claimant can arrest Vessel B depends upon the circumstances.

L. Demise Chartered and Time Chartered Vessels.

In Japan a claim, whether contractual or noncontractual, against the demise charterer or time charterer of a vessel usually provides a sufficient basis for the arrest of that vessel insofar as a claim due to maritime lien is concerned.

Otherwise, a claimant is only permitted to arrest property belonging to the actual defendant if he is a demise charterer or a time charterer.

It is theoretically possible to attach bunkers belonging to the charterer or to preclude their removal by injunction, if the cause of action is against the charterer.

M. Procedure for Arresting Vessels.

1. Form of Application.

(a) Information Necessary.

A written application is usually required in order to arrest a vessel.

In most cases, the following information is required to be supplied and filled in on the application form:

1) Applicant's full name and his registered (or principal) address.
2) In case the applicant is a corporation, the full name of one of the directors who is authorized to represent it in the litigation.
3) In case counsel in Japan is appointed to represent the applicant, the full name of the counsel (not only the name of the company or law firm to which he belongs).
4) The registered name of the vessel to be arrested (and the identification number), her nationality, port of registry, gross tonnage, type and number of engines, and the place where she is berthed.
5) The full name of the master of the vessel, if known.
6) The full name and the address of the registered owner of the vessel.
7) In case the registered owner is a corporation, the full name of one of the representative directors, if available.

(b) Documentation Necessary.

If a corporation is involved either on the side of the plaintiff or that of the defendant, a certified copy of the registration or a certificate of nationality of the corporation issued by the authorities is, if obtainable, usually acceptable to a court in Japan, in addition to a certified copy of the registration of the vessel.

In order to prove the existence of a foreign corporation and of its representative director with reference to his authority, whether plaintiff or defendant, an affidavit prepared by the party's clerk or secretary or by one who reasonably knows the party is usually accepted. It is recommended that the affidavit be notarized by a local notary public.

In the court, Japanese is the only official language.[13] Therefore, all documents written in a foreign language should, time permitting, be translated into Japanese. Translation may be made by the counsel who acts in the arrest proceedings.

2. Must the Arresting Party Lodge Security?

(a) Provisional arrest.

A claimant usually needs to put up one of the following deposits with the court or its agency to arrest a ship. (The deposit is refundable, without interest, on some conditions, e.g., obtaining the written consent of the owner of the arrested ship, or a court decision to release the security.)

1) Cash.
2) Negotiable instrument, for example, a company's share certificates, or government bonds.
3) Letter of guarantee issued by a bank or an insurance company (not a P & I Club) registered in Japan.

A deposit, as above, is to cover possible damage sustained by the owner of the ship if the arrest is later found to have been wrongful.

Theoretically, the amount of counter-security is wholly at the discretion of the court and, subject to the case, the court will occasionally require an amount equivalent to roughly one-third to one-fifth of the amount of the claim.

Cash, including a special banker's draft (cashier's check) issued by an authorized commercial bank in Japan, is acceptable in its full amount as a deposit.

Government bonds or other reliable negotiable securities are acceptable, but they are often undervalued because of less stability.

A bank guarantee or a letter of undertaking issued by an authorized bank or insurance company in Japan is also acceptable to the authorities. A letter of undertaking issued by a P & I Club is not acceptable for this purpose.

(b) Compulsory Execution.

Arrest by compulsory execution of a court judgment usually needs no deposit other than the court costs, etc.

(c) Maritime Lien, Mortgage, Etc.

No deposit is necessary.

In addition to counter-security, as above, the court usually asks the arresting party to tentatively pay the court costs in advance. These are usually nominal, but occasionally go over ¥1,000,000, especially if the court requires a special fund to cover the cost of the watch and maintenance of the vessel during the arrest proceedings.

3. Representation by Counsel (Bengoshi); Power of Attorney.

A party, whether an individual or a corporation, may theoretically act in legal matters for himself. In admiralty cases, however, he usually employs counsel (bengoshi) to conduct the proceedings for him.

There is no division (as in England) in the profession between barristers and solicitors. Only a counsel qualified to practice under Japanese law — bengoshi —is entitled to represent the applicant. No gaikokuho jimu bengoshi (a foreign attorney licensed in a limited capacity) is allowed to do so.

It is necessary to give a counsel bengoshi a written power of attorney to enable him to represent the party.

In addition to a general authority which statutorily includes actions in an arrest proceeding, some other items, if they are necessary, must be specifically written, word by word, in the power of attorney, e.g., withdrawal of the action, compromise, appointment of sub-counsel.[14]

The power of attorney must be executed by an individual applicant or a representative of a corporation.

An affidavit describing the existence of a corporation and the authority of its representative should accompany the power of attorney.

If time does not permit a party to formally execute the affidavit and the power

of attorney in advance, a cable, telefax, or telex authorization by the party or by counsel in his country instructing Japanese counsel may be accepted by the court. If so, formal documentation should be submitted as soon as is reasonably possible.

One must be able to prove that the power of attorney was granted properly, for example, by a board resolution for a corporation. This cannot be done in the power of attorney itself, but by the affidavit, if the affidavit is the only available means of proving the authority of the signatory of the power of attorney.

In the case of a foreign party, his native language can be used in executing the power of attorney and the affidavit, so long as they are translated into Japanese eventually.

4. Court Hearing.

The court may decide whether or not to grant an arrest application, even without a formal hearing.[15]

N. Proceedings for Maintaining an Arrest.

1. Provisional Arrest.

The provisional court, theoretically, upon application by the claimant, may nominate and order a guard to watch and preserve the arrested vessel on behalf of the court, with the condition that the claimant advances funds in respect of arrest and custody,[16] so as not to allow the vessel to physically leave the port without the court's permission.

If a Japanese flag vessel has been arrested, entry of the application for the provisional proceedings is made in the register.[17]

The arresting party does not, in principle, have to take further steps in this respect.

However, the provisional court may, upon application by the shipowner, order the arresting party to file a substantive lawsuit in an ordinary civil court asserting the claim upon which the arrest in the form of provisional seizure was made, within such time as is fixed by the court. Should the arresting party not

comply with that order, the arrest proceeding shall terminate.[18]

If the maintenance of an arrest causes some extra cost, but the arresting party puts up no deposit to cover it, the court may terminate the arrest.

2. Compulsory Execution and Maritime Lien, Mortgage, Etc.

Since the executing court recognizes arrest of a vessel based on maritime lien, the proceedings for sale of the arrested vessel through auction starts. Hence, the arresting party must not usually initiate other ordinary proceedings in order to maintain the arrest.

The court, upon application by the claimant, may nominate and order a guard to watch and preserve the arrested vessel on behalf of the court so as not to allow her to physically leave the port without the court's permission. The costs necessary for the preservation shall, initially, be advanced by the claimant to the court.

If a Japanese flag vessel has been arrested, entry of the application for the enforced sale of the vessel is made in the register. After such registration has been made, third parties cannot effectively obtain rights on the vessel that would prejudice the claimant.

3. Costs and Advances for Court Proceedings

The amount the arresting party will have to spend in court costs and in costs of keeping a vessel as a result of the arrest proceedings must be tentatively paid in advance by the claimant.[19]

Lawyers' fees for preparation, application for arrest, and initiating execution of the court order of arrest might perhaps total ¥1,000,000, and possibly more.

Lawyers' fees to maintain and finalize the arrest proceedings depend upon the circumstances.

4. Enforcement of the Order of Arrest

The arresting party must go to the marshal/ bailiff (executory authorities) and apply for enforcement (service) of the order of arrest.

The execution (service) of arrest must be made within 14 days of the issuance

of the court order, and the ship's nationality certificate must be presented to the court then. This requirement, however, causes an interesting practical problem described hereinafter.

5. Service of The Order of Arrest

It is usually sufficient to serve the order of arrest on the master, whether the vessel is Japanese or foreign. The written court order of arrest can be handed over to the vessel's master by the marshal/bailiff. If the master refuses to receive the order, it can be left in an appropriate place on the vessel.

Japanese jurisdiction does not require that both the consulate in Japan and the relevant register must be notified if a foreign vessel is involved.

However, Japanese jurisdictions occasionally require foreign shipowners, who may be far from the place of arrest, to be served some sort of court documents in order to maintain the arrest, unless the master remains aboard the vessel or the shipowner's legal counsel bengoshi in Japan has been appointed.

6. Time Element

(a) Provisional Arrest

An arrest can occasionally be obtained the same day or often within a few days of the application, provided the requisite paperwork, counter-security, etc., and a marshal/bailiff have been taken care of.

(b) Compulsory Execution and Maritime Lien, Mortgage, etc.

An arrest itself can be carried out fairly quickly.

However, there is no definite period during which the enforced sale shall be concluded. It usually takes several months from the time of the arrest of a vessel until the time of the auction, subject to circumstances.

O. Procedure for Releasing Vessels From Arrest

1. Provision of Bail by Defendants

(a) Provisional Arrest

The debtor (shipowner) can obtain the release of his arrested vessel by putting up security, the amount of which is fixed by the court when the order of provisional arrest has been given.[20] Occasionally that is in the maximum amount, which is the amount of the claim plus interest thereon.

In releasing a vessel provisionally arrested, however, cash is the only security.

(b) Compulsory Execution and Maritime Lien, Mortgage, etc.

The shipowner can obtain the release of his vessel arrested on the basis of a court judgment and maritime lien, mortgage, etc., by putting up security, the amount of which should be equivalent to the amount of all the claims plus the court execution costs.

The following kinds of security are usually accepted by the court to release the arrested ship:

1) Cash.
2) Negotiable instrument, for example, a company's share certificates, or government bonds.
3) Letter of guarantee issued by a bank or an insurance company recognized in Japan.
4) A letter of undertaking issued by the Japan P & I Club, subject to circumstances.

In order to take steps to release the vessel, the master can statutory represent the shipowner, if the vessel is away from her registered port. [21]

Security is also refundable on some conditions.

In practice, a letter of undertaking issued by a P & I Club (whether Japanese or foreign), or an escrow account, is often accepted by the arresting party out of court, in exchange for the withdrawal of the arrest procedure.

2. Appeal by Defendant

(a) Provisional arrest

If the arrest as a provisional seizure was granted without a hearing which is usually the case, the first decree to arrest a vessel by the provisional court is not

final. Upon a protest (objection), a hearing is held, and the same court may reverse or change the contents of the decree, which then becomes a more formal decision.[22] However, an application for the protest itself does not automatically stop the effect of the arrest proceedings.

A speedy way to release the vessel from arrest is to put up security with the authorities, leaving the dispute as to the substance of the claim to a later stage in ordinary litigation proceedings.

(b) Compulsory Execution and Maritime Lien, Mortgage, etc.

An objection may be made against the sale of the vessel at any stage, from the commencement of the enforced sale until the distribution of the proceeds, on the grounds of either the procedure being improper, the absence of the right of execution, etc.

However, such an objection does not automatically revoke the sale proceedings or the distribution of the proceeds unless the court orders cancellation upon the posting of security.

The revocation may be made within a few days of the application therefor.

P. Forced Sale in The Arrest Procedure

1. Provisional Arrest

An arrest in this category is a provisional proceeding and not a final one. Hence, there should be no sale of the arrested vessel at this stage.

Danger of deterioration of the vessel or high custodial costs are not necessarily grounds for applying to have the vessel sold while under provisional arrest.

2. Compulsory Execution and Lien, Mortgage, etc.

Once a vessel has been arrested, the court may order that it be sold. Usually this does not require a special court order.

The arresting party, shipowner, registered mortgagees, registered tax authorities, etc. in principle must be notified of the commencement of the enforced sale proceedings by the court.

The notice of the date of auction shall be given at least two weeks beforehand. The date of the determination of the successful bidder shall be fixed within a week after the date of auction.

The sale of the arrested vessel is carried out by the court marshal (bailiff) at a public auction. The court may, however, order sale by tender instead of public auction, in which case the tendered prices are not known to the other bidders until the court marshal has opened the sealed tenders.

Two-tenths of the offered price usually must be deposited in cash, negotiable instrument, cashier's check, or a bank guarantee by the bidders.[23] The deposit is usually refundable after the successful bidder has been determined. The remaining eight-tenths of the price shall be paid in cash to the court within a certain time after the successful bidder has been determined by the court.

The sale proceeds themselves do not usually earn interest.

There are, in normal circumstances, no foreign exchange control difficulties which hinder or prevent the transfer of sale proceeds out of Japan.

When a Japanese vessel is sold through the court, the successful bidder will obtain the ownership of the vessel, free from any encumbrances, except that the bidder must pay for a claim giving rise to the possessory lien, etc.

(Priority of claims)

The proceeds of the sale of the ship shall be distributed by the court at the date fixed by the court, at which time all creditors are heard.

The priorities among claims are summarized as follows:

1) Costs for the sale, including costs for preservation, for the custodian, and for maintenance of the vessel.
2) Maritime lien.
3) Ship's mortgage.
4) National and local taxes and dues in Japan.

3. Appraisal

For compulsory execution and lien/mortgage enforcement, the court shall appoint an expert, often a professional surveyor, to evaluate the ship for the

auction.

If the court considers the valuation improper, it may order further appraisal.

The minimum price is declared by the court, usually taking into account the expert's appraisal. If no bid meets the minimum price, the court may, subject to circumstances, propose a lower price as the new minimum price.

Q. Claims for Damages by The Owner of the Arrested Vessel

Japanese law grants damages to the shipowner if his vessel is attached unlawfully.

In Japan, that the claim eventually fails on the merits is not necessarily sufficient for the arresting part to have to pay damages. Damages are only payable if the arresting party has acted in bad faith, negligently or by intent.

The counter-security that the arresting party has provided to the court should be available to the shipowner to satisfy damages claims.

R. Special Remarks

1. Bankruptcy/Corporate Reorganization Proceedings

Bankruptcy of the shipowning company does not necessarily stay the arrest proceedings, but corporate reorganization proceedings may do so.[24]

2. Difference in Treatment of National Vessels and Foreign Vessels

Upon arrangement by the court, an arrest of a Japanese registered vessel is to be recorded in the Japanese Ships Register.[25] The equivalent foreign authority is not usually informed by the Japanese court of an arrest of a foreign flag vessel.

There is no other substantive difference between Japanese vessels and foreign vessels insofar as examination on arrest is concerned.

However, foreign vessels can be arrested more readily because, if the debtor has no other property within Japanese jurisdiction that may be attached, and enforcement will otherwise have to be effected abroad, a prima facie case for arrest will have been made out.

3. Language

In the court, Japanese is the only official language. The documents written in foreign languages usually must be translated into Japanese. However, no official certificate of translation is usually necessary.

4. Vessel Ready to Depart

Usually no vessel having completed all the preparations for commencing a voyage can be arrested. However, there are uncertainties in the application of this provision, which should be clarified in the future by judicial precedents.

5. Notice to The Harbor Authorities

As a precautionary measure, it is recommended that the arresting party notify the harbor authorities of the arrest of the vessel, to prevent her from sailing without authority.

In one case, a Korean flag general cargo carrier left the Port of Tokyo, where she had been arrested, without the authority's permission. The port authority (Japan Maritime Safety Agency, whose function is somewhat similar to the United States Coast Guard) had been informed of the arrest. A few days after her disappearance from Tokyo, the Maritime Safety Agency found her in Kanmon Strait, the western end of Japan's main island, about 1,000 km away from Tokyo. The Agency chased her and eventually captured her in the Tsushima Strait.

6. Significance of A Ship's Nationality Certificate

Sections 120 and 189 of the Civil Execution Act of Japan require that in all of the three above described ways to initiate arrest proceedings, a ship's nationality certificate, as well as other documents necessary for navigation, must be taken into the physical custody of the court by a court bailiff (marshal) within two weeks of the time that the arrest order is issued by the court. In other words, if the court bailiff fails to obtain the ship's nationality certificate for some reason, that may lead to the revocation of the court order of the arrest, and the arrest proceedings would, at least in theory, be lifted.

One of the reasons why the Civil Execution Act requires that a court take actual possession of a ship's nationality certificate and navigation documents during the arrest proceedings is the assumption that no ship can sail in any part of the world without such papers on board. Therefore depriving the vessel of those papers is seen as a means of assuring that she remains in port throughout the entire court action.

(a) A Ship in A Dockyard

One can imagine that a ship may sometimes have to stay in a dockyard for repair or for some other reason for a relatively long time. In such a situation, the ship's personnel will occasionally be repatriated to their home countries. If so, the court bailiff may encounter some difficulty in locating the ship's nationality certificate without the cooperation of the dockyard.

Moreover, where the dockyard itself is holding the ship, as well as its nationality certificate for the purpose of securing its possessory lien rights for repair costs, and where no responsible ship's personnel remains on board, then one should look into Section 174, Sub-section 2 of the Civil Execution Rules.

These Rules state in effect that a court is entitled to ask for the submission of a ship's certificate, etc. from a person who holds the ship in custody, but a court has no right to keep holding the ship against the will of a custodian of some kind.

Usually a shipyard may have a possessory lien to hold a ship in question if she was repaired by the shipyard until the shipyard is paid for the repair and for maintenance of the ship. Therefore if a ship is held by a shipyard for repair costs, etc., a creditor of the owner of the ship would have some difficulty in arresting her.

(b) Hindrance to Submission of Nationality Certificate, etc.

What would happen if the master or the owner of a ship to be arrested were to hide the ship's nationality certificate from the court bailiff? Is the owner or the master of a ship to be arrested and subjected to some criminal or administrative punishment for the fact that they have hidden the nationality certificate from a

court bailiff? It is not certain what sort of direct criminal or administrative punishment would be available against a person who by intent hid a ship's nationality certificate.

If it is found that the shipowner or any ship's personnel intentionally hid or destroyed the ship's nationality certificate in order to escape the arrest proceedings before the court, the owner or such a person possibly could be held liable for losses or damages which may be sustained by the applicant for the arrest of the ship.

However, an arrest may often be the last means for a creditor to settle his claim against a shipowner. In order words, a ship could be the only possible practical asset from which the creditor may recover. Should such be the case, it would be almost of no use that such a creditor is given by law a further claim right against the same shipowner or his employees on the ground of their intentional prevention of the execution of the court order to arrest the ship.

I stress that it is unclear what administrative or criminal penalties can be visited upon a master or crew member or other person who knowingly fails to relinquish or otherwise hides the ship's nationality certificate, etc.

(c) The "Stolt Maria Pando" Case

A Spanish flag ship "STOLT MARIA PANDO" was required by the Yokohama court marshal to submit to him her nationality certificate, etc., in May 1989. The Spanish Master presented some ship's documents to the marshal, who then came back to the Yokohama court, believing that the arrest order was consummated as normal. The Master, however, weighed the anchor and left for Kobe on the next day. The arresting party was dismayed to find that the arrest proceedings would become nullified, and immediately proceeded to Kobe on land by Shinkansen bullet train.

When the Master was questioned by the arresting party people in Kobe, he replied that he had given her Spanish local navigational certificate to the marshal in Yokohama. However, he still retained a Spanish ocean-going certificate, whereby he insisted that he was legally able to navigate from Yokohama to Kobe.

Eventually, his ocean-going certificate also was taken off the vessel by the Court Authorities.

However, this event caused a considerable amount of confusion on the side of the arresting party and the marshal, namely which court can or must give an order to arrest of the escaped vessel now in Kobe, the Yokohama District Court or the Kobe District Court?

The Master himself was not penalized for his behavior, presumably because it is unclear what administrative or criminal penalties can be visited on him.

Citations to Authority for Part I:

1. The Commercial Code of Japan, 1989, as amended, §713.
2. Japan's Code of Civil Procedure, 1890, as amended, §200.
3. Japan is signatory to the 1958 New York Arbitration Convention.
4. Code of Civil Procedure as above, §737.2 (to be amended before December 1991).
5. Commercial Code as above, §842.
6. The Civil Execution Act of Japan, 1979, as amended, §195.
7. Ibid., §189.
8. Code of Civil Procedure as above, §738 (to be amended before December 1991).
9. Commercial Code as above, §682.2; Civil Execution Act as above, §112.
10. Commercial Code as above, §684.
11. Ibid., §740.2.
12. Ibid., §738.
13. The Court Act of Japan, 1947, as amended, §74.
14. Code of Civil Procedure as above, §81.2.
15. Ibid., §742 (to be amended before December 1991).
16. Civil Execution Act as above, §116.
17. Ibid., §176 (to be amended before December 1991).
18. Code of Civil Procedure as above, §746 (ibid.).

19. Civil Execution Act as above, §14.
20. Ibid., §120 and §189.
21. Code of Civil Procedure as above, §743 (to be amended before December 1991).
22. Ibid., §745 (ibid.).
23. Civil Execution Act as above, §66; The Civil Execution Rules of the Supreme Court of Japan, §39.
24. Japan's Corporate Rehabilitation Act, 1952, as amended, §67.
25. Civil Execution Act as above, §48.

Part II. A COMPARATIVE VIEW

A decision of a Chinese Maritime Court in the "GONOSAN" case caught my attention recently, and it raises some interesting and important legal issues.

The following discussion relies on a Japanese translation of the Chinese Court's decision prepared by Ms. Onodera of The Japan shipping Exchange, Inc. of Tokyo ("JSE"), as contained in the Kaijiho Kenkyu Kaishi (Maritime Law Journal) Vol. 95, p. 72. Several points raised in the decision are quite interesting when considered in the context of Japanese law.

The case concerns a shipowner's (possessory) lien on cargo pursuant to nonpayment of hire, and the losses, etc., sustained by the ship as a result of its ensuing detention in port.

A. Summary of The .Facts as Admitted By The Court

The Plaintiff was a Liberian company, Ocean Shipping Lines Inc. (which I assume is actually operated from Hong Kong), and which was the owner of the Philippine flag cargo ship "GONOSAN".

The Defendant was a Turkish corporation, Marti Chartering Co.

The Defendant and the Plaintiff entered into a voyage charter of the ship in Copenhagen, Denmark, in September 1986.

The charter party contained a cargo lien clause to the effect that should the charterers fail to pay the charter hire in the sum of US$282,500 in total within 7

days after the ship had accepted approximately 15,000 kilotons ("K/T") of steel cargo at Turkish ports (Mersin and Istanbul), and also after the ship's master had issued a bill of lading (the "B/L"), the owners would be entitled to exercise a lien against the cargo aboard the ship until owners were paid in full the total sum of the hire, hull damages in relation to the cargo, and detention. The B/L incorporated the terms and conditions of the charterparty.

Seven days passed, but the charterers did not pay the hire.

When the ship arrived at Shanghai, China, her port of destination, the owners exercised their lien rights against 800 K/T of the 15,000 K/T of steel cargo aboard the ship, and forced her to remain in the port. Negotiations commenced thereafter between the owners and the charterers. As a result the charterers paid about 60% of the contracted hire.

However, the owners then applied to the Shanghai Maritime Court to recognize their right to detain a further 5,000 KT of the cargo discharged from the ship until they received the remaining 40% of the hire and received the costs arising from the unscheduled stay in Shanghai, including the port charges plus interest, totaling more than US$200,000.

On 20th December 1986, the Court recognized the owners' lien right on 1,000 K/T (instead of 5,000 K/T), subject to the condition that the owners put up a US$50,000 bank guarantee.

Meanwhile, the Court asked the Defendant to provide US$185,000 in cash or a bank guarantee covering the same amount within 30 days of the date when the Defendant received the Court's decision.

The case was finally closed on 16th January 1987, after various discussions and the further payment in cash by the charterers of the remaining claims, when the US$50,000 bank guarantee was returned to the owners.

B. Comparison With Japanese Law

The following points may illustrate some differences between Japanese law and Chinese law, as they appear from this decision.

First, it is not clear whether the Turkish charterers were summoned to the

Shanghai Maritime Court.

Under Japanese law, a ship's master is statutorily considered to be authorized to represent a shipowner. Accordingly, any order or notice from a court to the master will be deemed to have reached the shipowner.[1] However, an agent in a port of call is not statutorily a legal representative of its principal.[2]

In the GONOSAN case, it is not clear to whom and how the notices and the decisions from the Court to the charterers were actually delivered. Was the ship's master or the charterers, local agent in Shanghai considered to be lawfully able to receive such documents for and on behalf of the charterers under Chinese law?

One possibility is that the notices were sent to Marti Chartering Co. in Turkey from China via diplomatic channels, registered airmail, or international telex.

Under Japanese law, such notices usually should be sent via diplomatic channels, following the Hague Conventions, 1954 and 1965, unless otherwise specifically arranged. Accordingly, it will often take considerable time for the notices to reach a defendant.

Second, it is also not clear whether the charterers were actually represented by any local counsel.

The name of two legal counsel for the Plaintiff, Mr. Shen Zhen-quo and Mr. Tang Yi-lin, both belonging to Shanghai Admiralty Law Firms, are listed. However, there is no name at all referred to as counsel for the Turkish Defendant in the above-mentioned Maritime Law Journal report of this case.

The question then is, who was actually supposed to or allowed to attend the Court proceedings on behalf of the Turkish charterers? Would a Chinese court be able to proceed even without the participation of a foreign party?

Under Japanese law, a court usually must issue a notice of summons to a foreign entity via diplomatic channels,[3] or if that is not practicable, then it must publish a public notice in the jurisdiction for 6 weeks. Only upon expiration of the period may the court then proceed with the case, whether or not the defendant or its counsel attends the hearing.[4] A company's representative director is statutorily authorized to act for his company.[5]

Third, one must inquire as to which country's law was applied by the

Chinese Court to interpret the B/L and the charterparty.

In Japan, a court usually defers to the parties' intent as to applicable law as expressed in a civil or commercial contract. For example, if the B/L and the charterparty referred to U.S. law, a Japanese court in most cases tries to approach the matter from the point of view of U.S. law.[6]

If there is no express statement on applicable law, a Japanese court would tend to take into account the place where the agreement was concluded (Denmark, in this case), etc.[7]

As there seems to be no indication in the judgment as above-reported on the matter of applicable law, I assume that the Chinese Maritime Court in principle applied their own law to determine the matter.

Fourth, it is not clear from the summary of the decision whether under Chinese law a shipowner must obtain permission from a court to exercise a lien on cargo once it has been discharged from the ship onto the wharf (and put into a warehouse).

I assume that the discharged cargo was placed in a nearby warehouse pursuant to arrangements made by the owners of the ship.

In Japan, a shipowner's custody of cargo will usually be extended to the cargo in a warehouse if it is the shipowner who asked the warehouse to keep a proper watch over it for the shipowner.[8] The shipowner can instruct a warehouse not to deliver the goods to a consignee without the shipowner's prior consent. This enables the shipowner to exercise its possessory lien rights without undertaking court proceedings.

By contrast, in the GONOSAN decision, from the fact that Ocean Shipping Lines applied to the Court for an order to attach the discharged cargo to secure its right to receive the remaining hire, it appears that such a judicial step was necessary.

My **fifth** question concerns whether a lien right can be created by means of contract under Chinese law.

In the Chinese decision, the charterparty as incorporated by the B/L contains a clause that appears to entitle the owners to claim a lien right against the cargo

on the basis not only of unpaid hire, but also on the basis of the ship's detention and the hull damage related to the cargo.

Japanese law does not state clearly whether a cargo lien right includes the ship master's claims for hull damage arising from the cargo, although it does allow a lien for detention (demurrage) and other miscellaneous charges, as well as unpaid freight, etc.[9]

My **sixth** point is a hypothetical one considering the application of the Chinese decision. What would the result be if the freight were prepaid by the shippers to the charterers at the port of loading, but the charterers did not pay the hire to the owners?

Japan's Commercial Code §753 indicates that regardless of whether freight was prepaid to a charterer by any cargo interest, a carrier (a shipowner represented by the ship's master) is still entitled to detain the cargo until his own hire has been paid.

The Chinese case does not seem to have addressed this issue.

My **seventh** point concerns whether the owners would be able to take steps to have the cargo sold to satisfy their claim, should the charterers fail to submit the US$185,000 in cash or a bank guarantee in that amount within a period of time after the Court's decision.

Under Japanese law, a shipowner may proceed with auction of the goods before a court to obtain satisfaction of its claim.[10]

Eighth, the position of the consignees (i.e., the B/L holder) is of concern in the circumstances of the Chinese decision.

The original dispute was between the owners and the charterers as to the payment of hire, etc. However, if the Court recognizes the owners' lien right against the cargo, this would surely adversely affect the consignees' right to receive the cargo in exchange for the B/L.

The consignees would also be concerned to know the extent of the damages (such as detention) sustained by the owners, pursuant to the ship master's exercise of their lien right on the cargo. In the case of the charterers not being able to pay the owners their claims in full, the consignees should perhaps establish a

fund for such payment to the owners (on behalf of the charterers).

Under Japanese law, a consignee is given an opportunity to monitor and participate in the auction proceedings before the court to protect his own interests.

Citations to Authority for Part II:

1. The Commercial Code of Japan, 1899, as amended, §713.
2. Japan's Code of Civil Procedure, 1890, as amended, §79.
3. Ibid., §175. Japan is also a signatory of the 1954 and 1965 Hague Conventions.
4. Ibid., §178.1 and §180.2.
5. The Commercial Code of Japan, 1899, as amended, §261.
6. Japan's Horei .Act., 1898, as amended, §7.1.
7. Ibid., §7.2.
8. The Civil Code of Japan, 1896, as amended, §181.
9. The Commercial Code of Japan, 1899, as amended, §753.
10. Ibid., §757.

Introduction for

'KAIUN' (Shipping)

(No.751 April ~ No.756 September)

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

The 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, from April in 1990 to September 1990 edition.

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

If you would like to read any of the articles, translation services are available.

Please contact the Editorial Dept: (03) 3279-1655

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Under a current newbuilding boom, export newbuilding contracts during April and June in 1990 amounted to 73 ships, 3,445,050 grt. 54

Management

* Nippo Kisen Co. and Nippon Steel shipping Co. will merge on an equal footing on December 1.

* Mitsui OS.K. Lines will put Kansai Kisen Kaisha under its wing by acquiring a partial stake from Kurushima Kosan. 55

[September]

Management

SEA-COM (former Nisshin Kisen) agreeds acquisition of Nippon Car Ferry and proceeds a positive management. 50

Shipbuilding

* Sasebo Heavy Industries' shares held by Kurushima Kosan were transferred to nine companies and banks.

* Hakodate dock signed the first newbuilding contract of a bulk carrier of 26,400 tons deadweight, with Mitsubishi Corporation after resumption of newbuilding. 51

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MOT submitted the fiscal 1991 budget request including ¥66 billion for the promotion of oceangoing shipping industry. 52

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* Reflection of the government-newbuilding programme for fiscal 1989-The first step taken toward the new era of shipping.
by Tsuneo Ohashi 28
* Current situation of marine leisure and prospect of marina development
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* Problems left after this spring labour offensive of oceangoing seamen's union.
Although the wage hike of live figures was high in the eight years since 1982, the traditional bargaining method shows its limits.
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* Current Japanese Oceangoing Shipping—It enters into a new era—
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* Kunikichi Sato, chairman of Japan Federation of Coastal Shipping Association.
Adjustments of tonnage of fleet of ships owned and operated by members of Association are necessary for the industry. 11

* Tokiso Takeshita, managing director of The Japan Iron and Steel Federation. Coastal Shipping is expected to play a partial role for strengthening international competitiveness of the Japanese shipping. 14
* Touru Satou, assistant general manager of petroleum Association of Japan The abolition of Adjustments system is wanted. 16

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* JAL and ANA compete for the setup of their domestic air cargo lines.
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The tasks are managerial stabilization and financial strengthening.
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* Tokyo/Kushiro operated by two newbuildings, SABRINA and BLUE-ZEPHYR-Kinkai Yusen Kaisha, Ltd. 58
* Challenge toward the 21st century.—Japan Coastal Ferry Co., Ltd. 60
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* Several events planed for the anniversary of twenty-year operation. —Shin Nipponkai Ferry Co., Ltd. 64
* Restructuring of its services on transferring to Shin-Moji.—Hankyu Ferry Co., Ltd. 66
* Three ferries under construction.—Taiheiyo Ferry K.K. 68
* Completed replacement of five vessels.—Kawasaki Kinkai Kisen Kaisha Ltd. 70
* Newly built Ro-Ro starts portcall at Sendai. —Kuribayashi Steamship Co., Ltd. 72

SHIPBUILDING

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Medium-sized shipbuilders are willing to build larger vessels with a recovery of business performance in background.

* Sanoyas expands a ratio of on-shore sections for a preparation of future recession. 50
* Namura implies possibilities of expansion of its capacity. 51
* Naikai shows its positive attitude for sweeping away of accumulated debts. 52
* Interview with Hasegawa, president of Sasebo Heavy Industries.
  The company aims at No.1 position on the world repairing market. 54

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* Recent situation of newbuilding order from Japanese yards. 30
  The newbuilding volume for fiscal 1989 increase greatly to 207 ships, 8.04mil. gt due to recovery of Japan's shipbuilders' competitiveness against S. Korea, the strong world economy we have never experienced and strong freight rate and so on.
* Crystal Harmony to be delivered on June 21. 68
  She will leave the port of Nagasaki the next day of delivery for Kobe, Osaka, Nagoya, Tokyo and Yokohama for her debut ceremony and make a maiden voyage for Honolulu on July 5.

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* Each oceangoing shipping companys business result for fiscal 1989 improved greatly due to a recovery of line, tramper and tanker markets.
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—Structural change of demand for natural resources and energy which support market—
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* Major restructuring of the Ministry of Transport to be scheduled for next year.
  The policy-promoting function of four bureaus-Transport Policy, International Transport and Tourism, Regional and Distribution-will be integrated and concentrated in the Transport Policy Bureau.

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* Mr. Masaji Shinagawa, chairman of The Nippon Fire & Marine Insurance Company Ltd.
  "Shipping has been too relied on the government policy. Shipping also is suffering from a rapid growth of Japanese industries." (Interview) 24
* A drastic revision of Hull insurance clauses for the first time in 57 years.
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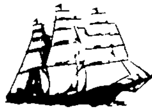

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