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[This is translated tentatively
from Judgment in Japanese.]

M.S. "JASMIN", CLAIM FOR DAMAGES

Where, in respect of a time-chartered vessel, the bills of lading are signed by the ship's agents expressly "For the Master", the shipowner, but not the time-charterer, is the carrier.

Tokyo District Court Civil Affairs Division No. 28
Showa 63rd Year (1988)(wa)No. 3117
Judgment rendered on March 19th, 1991 (Heisei 3rd Year)

JUDGMENT

Plaintiff P-1: (The Oriental Fire & Marine Insurance Co., Ltd.)
Plaintiff P-2: (Pan Korea Insurance Co., Ltd.)
Plaintiff P-3: (Daehan Fire & Marine Insurance Co., Ltd.)
Plaintiff P-4: (Ankuk Fire & Marine Insurance Co., Ltd.)
Defendant D-1: (Kansai Steamship Co., Ltd.)
Defendant D-2: (Ebisu Marina S.A.)

IN RESPECT OF THE CAPTIONED CASE OF CLAIM PLEADED BY THE PLAINTIFFS, THIS COURT HEREBY RENDERS THE JUDGMENT AS FOLLOWS:

Formal Adjudication

1. The claims made by the plaintiffs are dismissed.
2. The plaintiffs are to bear the costs of the trial.

Facts and Reasons for Judgment

I. Claim by the Plaintiffs

(Against D-1, as a claim for damages in respect of a breach of the contract of carriage by sea, and against D-2, as a claim for damages in respect of either breach of the contract of carriage by sea or tort.)

The defendants ought jointly to pay out the following sum of money. In addition, the defendant, D-1, should pay, as the dommage moratoire, the interest calculated at the rate of 6 per cent per annum for the period from June 10th, Showa 63rd year(1988) to the date of actual payment of the awarded sum, and the defendant, D-2, should pay that calculated at the rate of 5 per cent per annum for the period from November 22nd, Showa 63rd year (1988) to the date of actual payment of the awarded sum.

Korean Won 142,910,778 to the plaintiff P-1
Korean Won 9,961,247 to the plaintiff P-2
Korean Won 26,633,954 to the plaintiff P-3
Korean Won 19,934,484 to the plaintiff P-4

II. The summary of the case in dispute

1. The case in dispute

This case is that, in respect of damage to a cargo of rice bran extraction pellets (the cargo concerned) carried by the motorship "Jasmin" (the ship) from Indonesia to Korea, the plaintiffs, asserting rights of suit acquired from the holders of the Bills of Lading by way of subrogation, demand payments of damages from the defendant, D-1, for breach of their obligations under the contracts of carriage by sea, and from the defendant, D-2, for breach of their obligations under the contract of carriage by sea or in tort.

2. The facts not in dispute

(1) (Shipowner and time-charterer)

The defendant, D-2, is the owner of the carrying vessel (the shipowner) and the defendant, D-1, has been the time-charterer of it.

(2) (Issuance of Bills of Lading and the descriptions thereon)

KARIMATA, agents for the ship at Tjirebon, Indonesia, signed the Bills of Lading in respect of the cargo concerned (Bills of Lading concerned) on 26th and 27th April, 1986 (Showa 61st year). The signatures were made under the indication of "For the Master".

KANSAI STEAMSHIP COMPANY(D-1) BILL OF LADING is printed at the top of the Bills of Lading.

(3) (Governing law)

Japanese law is designated as the governing law under Article 2. of the back clauses of the Bills of Lading concerned.

(4) (Navigation of the ship)

After the Master took 3,300 metric tons of the cargo concerned into the ship in bulk, the ship set sail from the port of Tjirebon on 27th April and entered the port of Incheon on 8th May, 1986 (Showa 61st year).

(5) (Lining along the inside of the side shell plates)

The Master did not effect any lining along the inside of the side shell plates prior to stowing the cargo concerned.

(6) (Fumigation prior to unloading)

The consignees had fumigation operators fumigate the cargo concerned with cooled gas, closing down the holds of the ship during the period prior to its unloading from 1600 hours 8th to 1600 hours 10th May, 1986 (Showa 61st year).

(7) (Discovery of the damage to the cargo)

It was discovered prior to discharging after completion of fumigation that a part of the cargo stowed along the inside of the side shell plates, and the surface of the cargo stowed on top of the cargo stowed in the holds, were wet, solidified, discoloured and moldy.

(8) (Occurrence of damage after discharge)

After discharge of the cargo concerned, that part of the cargo considered to be sound, having been separated from the damaged part, was stored in a warehouse ashore, but this part also turned out to be unusable because of mold.

3. Points at issue

(1) (The identity of the carrier on the Bills of Lading)

Whether the defendant, D-1, was the party (carrier) to the contract of carriage by sea (that is, the carrier) as evidenced by the Bills of Lading.

(2) (The cause of damage to the cargo stowed along the inside of the shell plates)

‹1› (Latent defect of the cargo-1 · high temperature of the cargo (Assertion by the defendants of applicability of the Article 4.2.9 of the International Carriage of Goods by Sea Act, 1957 of Japan))

(i) Whether the cargo concerned had been of the high temperature of 40 Celsius since before the loading operation commenced.

(ii) If the latter had a temperature of 40 Celsius, whether the cargo could become rotten having been wet due to dew along the shell plates caused by the difference of temperatures of cooler sea water and cargo.

(iii) Whether the defence of latent defect would be available in that the seamen engaged in the loading operation did not notice the temperature being high for the following reasons:

(a) No shimmer of heated air was seen.

(b) A breeze of wind-force 2 or 3 was blowing and thus the heat would have been given out.

(c) The difference of temperatures between the air and the cargo was less than 10 Celsius.

(d) The temperature of the deck where the loading operation had been effected rose to approximately 50 Celsius and under such circumstances the seamen could not notice that the cargo had a high temperature.

(e) The shippers' staff in charge of the loading operation who had been on the spot had never complained of any unusual situation.

‹2› (Latent defect of the cargo-2 · corruption of the cargo (Assertion by the defendants of applicability of the Article 4.2.9. of the International Carriage of Goods by Sea Act, 1957 of Japan.))

(i) Whether the cargo concerned was about to ferment or rot prior to being taken into the ship.

(ii) Whether it was recognised that any latent defect existed under the

situation where no such abnormal sign as discolouration, mold or rot was found.

(iii) Provided that there had been fermentation or rot, whether it is unreasonable to anticipate such a situation that the cargo should discolour or mold should gather as in this case.

‹3› (Obligation to prevent loss of or damage to the cargo.
Installation of dunnages along the inside of the shell plates (Assertion by the plaintiffs relying on Article 4.2. Proviso of the International Carriage of Goods by Sea Act, 1957 of Japan.))

(i) Whether it is usual that the cargo of this type carried from a port near the equator such as Tjirebon to a cool-weathered place such as Incheon sweats due to the ship's hull being cooled by sea water.

(ii) Whether the carrier was under an obligation to prevent the dew which formed on the hull from coming into contact with the cargo by securing space between the shell plates and cargo in order to enable the moisture of formed dew to be drained, and further, to install linings with the wooden plates along the inside of the shell plates in order to maintain ventilation through the space between the shell plates and linings.

(iii) Whether the damage to the cargo would not have occurred if such dunnages had been fitted despite a latent defect being found in the cargo.

‹4› (Obligation to prevent loss of or damage to the cargo.
Ventilation (Assertion by the plaintiffs relying on Article 4.2. Proviso of the International Carriage of Goods by Sea Act, 1957 of Japan.))

(i) Had the Master an obligation to ventilate whenever the dew point outside was below that in the ship's cargo holds.

(ii) Did he fail to do so.

(iii) Whether the damage to the cargo would have occurred without breach of the duty of care notwithstanding a latent defect being found in the cargo.

‹5› (Obligation to prevent loss of or damage to the cargo.
Others (Assertion by the plaintiffs relying on the Article 4.2. Proviso of the International Carriage of Goods by Sea Act, 1957 of Japan.))

(i) Whether the Master owed a duty of care to prevent the damage, by cleaning the inside cargo holds, pitching a tarpaulin above the deck, restricting the cargo access to places of high temperature, refraining from such stowage as to obstruct ventilation and covering the cargo with mats.
(Assertion by the plaintiffs' preliminary pleading 2(4) of 25th December, 1989 (Heisei first year))

(ii) Whether he failed to do so.

(iii) Whether the cargo damage would not have occurred unless there had been a breach of the duties of care just mentioned notwithstanding a latent defect in the cargo having been found.

(3) (The cause of the wet damage to the top surface of the cargo)
(The latent defects of the cargo 1. High temperature of the cargo (Assertion by the defendants resorting to Article 4.2.9. of the International Carriage of Goods by Sea Act, 1957 of Japan) and the acts of the employees of the cargo owner (Assertion by the defendants citing Article 4.2.6. of the International Carriage of Goods by Sea Act, 1957 of Japan.))
Whether the wet damage on the bag surface of the cargo was caused by the cargo having been of a high temperature well before loading, and whether the formation of dew was caused by the difference between the temperatures of the cargo and the cool gas used for disinfecting which was carried out by means of fumigation operators who closed down the ship's holds at the consignees' instructions.

(4) (The cause of the damage to the cargo after discharge (Assertion by the plaintiffs relying upon Article 3.1. of the International Carriage of Goods by Sea Act, 1957 of Japan.))
Whether the cause of the damage to the cargo after discharge was attributable to the breach of duty of care. (Whether the cause could be found

in the high temperature of the cargo and the manner of custody in the warehouse.)

(In addition to the above, there are such points at issue as the extent of the damage, the effect of subrogation by the insurer, etc.)

III.Judgment on points at issue.

1. In respect of the Point at Issue No.1 (Carrier on the Bills of Lading), the following facts could be found on the evidence:

   (1) The expression "For the Master" on the Bills of Lading, below which the agents for the ship, KARIMATA, affixed their signatures, is generally understood to be a description that the shipowner is the party himself to the contract of carriage of goods by sea (that is, he is the carrier).
   Evidence (omitted)

   (2) The Master gets a comprehensive power of representation from the shipowner and becomes legal representative for him by being elected master by him under the law (in case of the Japanese law, Article 713.1. of the Commercial Code).

   (3) There is the following stipulation in the time charter concerned:
   "It was agreed that the Master authorises the Charterer or his agents to sign bills of lading on behalf of the Master always in conformity with mate's or tally clerk's receipts, or the time charter concerned."
   Evidence (omitted)

   (4) The defendant and time-charterer concerned, D-1, has given the voyage-charterer, Peter Kramer or his agents (the ship agents; KARIMATA are in this class) the authority to sign bills of lading on behalf of the Master under the grain voyage charter (to the effect that the cargo concerned was to be carried from Tjirebon to Incheon) concluded between the defendant, D-1, and Peter Kramer.
   Evidence (omitted)

   (5) There are signatures, acknowledging the receipt of the freight, and being affixed by the ship agents, KARIMATA, acting for shipowner/master, on the Bills of Lading concerned.

Evidence (omitted)

(6) The Bills of Lading contain the so-called demise clause which provides: "If the Vessel is not owned by, or chartered by demise to D-1 (as the case may be notwithstanding anything that appears to the contrary), this Bill of Lading shall have effect only as a contract with the owner or demise charterer, as principal, as the case may be, made through the agency of D-1, who acts as agent only and shall be under no liability whatsoever in respect thereof."

Evidence (omitted)

(7) Even in the case under which a time charter is concluded, the power to instruct and supervise the captain and seamen is retained in the hands of the shipowner who employs them.

Evidence (omitted)

(8) On the Bills of Lading concerned, a Bank (an Indonesian bank) was described as Consignee and the Korean fodder company, buyer of the cargo concerned (and to whom the plaintiffs have paid out the sum payable under the policies), was described as Notify Party.

Based upon a finding of the facts abovementioned, it is to be held that the expression of KANSAI STEAMSHIP COMPANY (D-1) on the top of the Bills of Lading is only to show it as the time-charterer reflecting the descriptions of the Bills of Lading, and that it is not the time-charterer but the shipowner that is indicated thereon as being responsible in the capacity of carrier.

There are found in shipping practices a great number of bills of lading which provide that the only party to be liable as the carrier thereunder is the shipowner, notwithstanding the descriptions thereon of the names of time-charterers in the same manner as that concerned in this case.

Accordingly, it is inconceivable that the merchant, who is not a member of the general public not versed in shipping business, who takes such a bill of lading, mistakes the "carrier" on the Bill of Lading to be any party but the shipowner.

Therefore, it should be said that there is no need to apply the principle of

the apparent representation on the presumption that the time-charterer is apparently shown as the carrier on the surface of the Bills of Lading.

And, the terms of the time charter as described in the abovementioned (3) are to be interpreted as having the effect of granting the time charterer etc. the power to issue the bills of lading under which the shipowner holds himself as the responsible party. Consequently, there is as well no need to consider the question of the matter of the abuse that the time-charterer places the responsibility of the carrier on the shipowner contrary to the latter's will.

And, in a time charter, a time-charterer has the power of instructing a captain in respect of so-called commercial matters and the power of assigning the vessel to whichever line he opts for, but, the conclusion that the time-charterer assumes, as a matter of course, the responsibility of the carrier as evidenced by the bill of lading may not be drawn from the fact that such powers rest with the time charterer.

Any time charter is a contract for the exploitation of the services offered based on expertise and experience in respect of maritime affairs, and such matters as to be mandated to those with expertise and experience are to be dealt with as being the responsibility of the shipowner who possesses the ship as a whole and manages it, as the time-charterer never participates subjectively in these matters.

These findings are applicable to not only the so-called navigational affairs such as the navigation itself and the management of the ship (cf. Article 3.2. of the International Carriage of Goods by Sea Act, 1957 of Japan, according to which the liability arising from collisions is to be borne by the shipowner) but also the matters generally deemed as commercial such as loading, stowage, safe-keeping, discharge etc.

Apart from the situation under which it is agreed in the time charter that the charterer performs part of these commercial matters (loading, stowage and discharge), the time-charterer gives instructions to the master and other seamen only in respect of the commercial side of the business of such divisions as loading, stowage, safe-keeping, discharge of the cargo etc. which require expertise

and experience, and, in respect of the specialised and technical activities, the time-charterer neither has, as a rule, a power to direct and supervise nor is required to have such a capacity.

However, there may emerge a situation where it is required fairly to divide the burden of the liability between the shipowner and the time-charterer in case of the damage to cargo being found in the field belonging to the commercial matters and an agreement in respect of sharing the liability has been entered into between both parties.(A9)

However, such an agreement providing for ultimately sharing liability for the damage shall remain an internal arrangement and the time-charterer shall not be held, as a matter of course, responsible to the cargo owners directly as a result of his relationship with the shipowner without formation of contractual agreement with the cargo owners, even if, according to the internal agreement, the time-charterer may meet the claim by the shipowner for the amount he has made good against the cargo owners.

And, further, the responsibilities of the carrier under Article 3.1. of the International Carriage of Goods by Sea Act, 1957 of Japan shall be founded on the condition that there be a master-servant relationship between the carrier and the mariner starting with the captain, and it may be argued that the relationship established between the time-charterer and the mariner starting with the captain, in respect of the so-called commercial matters under the time charter, is not that based on the contract of employment but the master-servant relationship.

However, the legal status of the carrier shown on the bill of lading shall be decided based on the interpretation of the bill of lading descriptions, and Article 3. of the International Carriage of Goods by Sea Act, 1957 of Japan shall have no power to deem the time-charterer, not specified as carrier on the bill of lading, as the responsible party thereof.

Accordingly, meanwhile Article 3. of the International Carriage of Goods by Sea Act, 1957 of Japan is applicable to the responsibility of the carrier on the bill of lading signed in the name of the time-charterer as carrier, and also that of the carrier under the voyage charter (a sort of contract of carriage by sea) hav-

ing been concluded by the time-charterer, it shall be unenforceable to place the responsibilities arising from the bill of lading upon the time-charterer on the basis of the provisions of the Article.

And further, the shipowner has the maritime property, such as hull and appurtenances, which constitutes the security for the shipowner's responsibility as carrier on the bill of lading.

However, the hull and appurtenances are not owned but possessed by the time-charterer, and those things neither stand for the security for the time-charterer's responsibility in case of his assuming it in the capacity of the carrier, nor constitute the so-called pledged property on which the "preferential right on ship" allowed under Article 842 of the Commercial Code of Japan can be exercised in respect of the responsibility to be borne by the carrier. Therefore, unlike the result should the time-charterer be held as the carrier under the bill of lading, it may not be concluded that there is failure to protect the creditor if the shipowner be deemed to be the carrier on the bill of lading. (If the time-charterer be held as carrier, it will be impossible for the debtor to recover the claim by seizing the ship in the case of the carrier having no property at all and the former will be placed at a disadvantage.)

Reviewing the pertinent situations as such, there could be found no ground to invalidate the effect of the Bills of Lading concerned defining the shipowner as carrier and, therefore, it should be concluded that the Bills of Lading concerned are to be those defining the defendant shipowner, D-2, as the carrier, and the defendant time-charterer, D-1, as not the carrier on the Bills of Lading concerned.

Moreover, the bill of lading clause confining the carrier to the shipowner such as the demise clause in this case neither makes the responsibility of the carrier on the bill of lading ambiguous nor makes invalid the provisions enumerated in Article 15.1. of the International Carriage of Goods by Sea Act of 1957, of Japan by restricting the carrier's responsibility, and, therefore, it shall not infringe the regulation of Article 15. of the Act providing for the prohibition of the special agreement.

Consequently, the demise clause just mentioned shall have the effect it purports to have.

2. In respect of the Point at issue No.2 (the cause of damage to the cargo stowed along the inside of the shell plates)

   (1) To examine, at first, whether the cargo concerned had been in high temperature of 40 Celsius.

   ‹1› Around 8 o'clock in the morning of 28th April, 1986(Showa 61st year), the following day of the ship's departure from the loading port, the ship's chief officer, suspecting unusually high temperatures inside the holds, went into them with the third officer accompanying and made a measure of the temperature of the cargo concerned by thrusting a 1m-long thermometre into the goods by 1m to 50cm in depth.

   The cargo was as high as 40.5 Celsius, far beyond the atmospheric temperature of 30 Celsius.

   Evidence (omitted)

   ‹2› In that when the abovementioned measurement was carried out, only about 20 hours had elapsed since departure, it must be considered improbable that the cargo was heated up from outside.

   Furthermore, in order for the temperature of the cargo to rise internally due to the proliferation of bacteria therein, both high temperature and some moisture are required. Since the moisture content of this cargo was only about 11.5%, and as it is inconceivable in the light of experience that bacteria would proliferate in such low levels of moisture, it could not be inferred that the change of temperature was caused by the proliferation of bacteria.

   Evidence (omitted).

   ‹3› During the whole of the voyage, the Master kept the hatches open at daytime, except during rough weather, to prevent the cargo concerned from heating up and it was observed that the cargo's temperature had fluctuated in the range of 37 to 41.3 Celsius over the period of carriage. (The measure of temperatures was made at different spots each time.)

When measuring was arranged at the time of discharge of the cargo, a considerable quantity of cargo showed the maximum temperature of 41 Celsius.

Evidence (omitted)

Upon a finding of the facts abovementioned, it may be considered that a part of the cargo concerned had been heated well before the loading operation was commenced.

The plaintiffs denied the fact that the cargo was heated, asserting that cargo of an ordinary temperature (as high as 30 Celsius, which was the atmospheric temperature at the loading port) was found inside the cargo concerned upon its discharge.

However, it is not improbable that the lot of high temperature and that of lower temperature can remain with their temperatures unchanged among the cargo loaded into the ship in a great amount, and, therefore, the finding just mentioned shall not be prejudiced only by the fact the plaintiffs referred to.

(2) And, it is apparent that the cargo was wet damaged by the dew along the shell plates having been cooled down by the sea water (the temperature of the sea water ranging from 29 Celsius to 12 Celsius), provided that the cargo concerned of pellets in bulk was of such a high temperature as 40 Celsius.

(3) Then, the court must consider whether the fact that the cargo became heated without being noticed by the crew engaged in the loading operation makes it such that it falls under the description of latent defect.

On the evidence, the situation at the time of loading the cargo was found to be as follows:

‹1› No shimmer of the heated air went up out of the cargo and there was no situation where the cargo proved to be of the higher temperature.
Evidence (omitted)

‹2› The heat was given out as a breeze of wind-force 2 or 3 was blowing.
Evidence (omitted).

‹3› The temperature at the port of Tjirebon ranged from 31 to 35 Celsius whereas that in the ship's holds was in the region of the first half of the 40s Celsius, and it was very hot therein.
Evidence (omitted)

‹4› As the deck where the cargo work was carried out was heated up to the range of 50 to 60 Celsius, the crew working in the open air could not notice the cargo being hot.
Evidence (omitted)

‹5› The shippers' staff in charge who had been on the spot of the loading operation had never complained of any abnormal fact.
Evidence (omitted)

Upon the findings of the situations just mentioned, it could not be concluded that the crew was at fault in being unaware of the high temperature of the cargo concerned, and, therefore, it should be said that the defect in the cargo concerned fell under that of latent nature.

(4) Then next, the court is to judge whether it was obligatory or not to install dunnages along the inside of the shell plates.

The plaintiffs asserted that the carrier had a duty of care to install linings (dunnages) by fixing wooden boards to the inside of the shell plates in order to secure space between the shell plates and cargo thereby to prevent the dew formed on the hull from coming into contact with the cargo and to allow moisture of the dew to be drained, and the expert, Mr. Koga, as well as A17, stated views to the same effect.

However, the following facts could be found on the evidence:

‹1› The shippers had never demanded the installation of linings along the ship's inside. And, in the voyage charter concerned, the clause requiring the provision of dunnages had been purposely deleted.
Evidence (omitted)

‹2› In the Report made out by the expert commissioned by the plaintiff P-4, there was no indication that the fact of non-installation of dunnages was attributable as the cause of the damage.

Evidence (omitted)

‹3› The installation of dunnages such as implementation of lining as suggested would have been costly and added time to the cargo operation, and in such a case the aim of the parties to the sales contract, who opted for the shipment in bulk in order to save expenses and time required for the cargo operation, could not be said to have been achieved.

Evidence (omitted)

‹4› Once, there were several cases where the damage to the cargo was caused by perspiration on the hull in the case of the carriage of grain in bulk. However, the shippers having arranged the shipment of the cargo, and as its temperature as well as its moisuture are kept at a low level through stricter custody at the pre-shipment stage, such damage as caused by sweating on the hull in transit has substantially decreased. Consequently, it is no longer required of the carrier that he installs dunnages such as wooden boards along the inside of the shell plates in the carriage of grain in bulk.

Evidence (omitted)

Having found the abovementioned facts, and based upon them, it cannot be concluded that the carrier has had the obligation to install dunnages as the plaintiffs asserted.

Meanwhile the expert, Mr. Koga, maintained that the space between the cargo and the ship's shell plates should have been secured by stacking the bags containing grain up the ship's side without debagging partly the bagged grain. However, the shippers required the carriage in bulk, not in such a special mode.

Further, as judged above, it can be established that the sweat damage would have never occurred even if the cargo shipped in bulk was stowed along the inside of the shell plates without securing space between each other provided the shippers had appropriately controlled the pre-shipment cargo.

Therefore, the expert's views are unacceptable.

(5) Then, this court is to judge in respect of the ventilation.

The plaintiffs asserted that the damage had occurred due to the Master's failure in performing his obligation to ventilate whenever the dew point in the atmosphere fell down compared with that in the ship's holds.

However, as found above, during the voyage the Master had arranged the ventilation inside the holds by opening the hatches at the daytime whenever the weather permitted, and, therefore, it may not be said that such an arrangement of the ventilation had been inappropriate.

And, it can hardly be concluded that the damage had been caused by insufficient ventilation in view of the fact that the temperatures of the cargo had remained at higher levels despite such special arrangements of ventilation.

(6) And finally, this court is to decide whether there were any other Master's responsibilities regarding prevention of damage.

To study the points of the plaintiffs' claim.

‹1› The ship's holds were, prior to loading, in such a clean condition inside as suitable for accommodating the cargo.

Evidence (omitted)

‹2› There was found no evidence of the fact that the cargo operation was carried out in rainy weather.

‹3› The fact of the ship' crew placing the cargo adjacent to the heated spot was not confirmed as well.

‹4› As the damage to the cargo is rather more likely to occur in case of the cargo being covered with wooden boards or mats, the shippers do not require in general for the master to take such a measure.

Evidence (omitted)

Having found the situations as above, the facts of the infringement by the Master of the other responsibilities of preventing damage were never established.

In addition, when the cargo is to be carried in bulk, the greater part of it

is to be stowed under conditions not allowing ventilation.

There is a statement regarding how to prevent sweating on the hull and others in the case of carriage of grain in bulk in the "Stowage of the Cargo on board" referred to.

However, the description may not be applicable to this case because it appeared to have been given well before the time when it became popular that the shippers carry out the abovementioned measures in respect of preventing sweating in the carriage of grain in bulk.

And, on the following evidence, under the present situation where the safe carriage of grain in bulk has become common, it should be inferred that the cargo damage never occurs even if it be carried in the condition where ventilation cannot be expected effective subject to the restriction within the term of a voyage. In addition, in most cases, grain is carried in bulk by ships which are similar to the ship concerned in having natural ventilations only, with the cargo stowed close to the shell plates, and, therefore, the assertions by the plaintiffs in this regard are unacceptable.

Evidence (omitted)

3. In respect of the Point at issue No.3 (the cause of the damage to the top surface of the cargo).

   The following facts were admitted based on the evidence in respect of the situations before and after the fumigation:

   (1) It is required to remove the damp on the surface of the cargo prior to fumigation by gas.

   Therefore, it is improbable for fumigation to be effected immediately after the ship's arrival at the port of discharge with the recognition of the cargo being damaged.

   Evidence (omitted)

   (2) On arrival of the ship concerned at Incheon, the cargo inspection was carried out keeping the hatches open, and no damage to the cargo concerned was found.

   The cargo surveyor appointed by the consignees also had been on board

and looked into the cargo inside the ship's holds.

However, he did not give any notice of claims for damage.

As the result of discovery of harmful insects by the plant quarantine officers, it had become necessary to effect fumigation.

(The plaintiffs testified that nobody on the cargo owners' side ever observed the condition of the cargo. However, unless harmful insects were discovered, there would be no requirement of effecting the fumigation, and, it was unthinkable to presume the situation under which such several damage proved to have existed as wet, moldy or caking damage was never found out despite the fact that the harmful insects were in fact discovered. Consequently, the assertion by the plaintiffs may not be adopted.)

Evidence (omitted)

(3) The cargo concerned has remained in a heated condition since before loading.

Evidence (omitted)

(4) The Master recognised plenty of waterdrops beneath the sections of the steel structures of the ship's holds while the gas had been extracted therefrom after the completion of the fumigation. It was confirmed that the top surface of the cargo stowed under such steel structures as hatch openings and hatch coamings was considerably wet.

Evidence (omitted)

Judging from the above facts, it may be inferred that the wet damage occurred on the surface of the cargo on account of the waterdrops which were suspected to have been generated through the fumigating operation of using methylbromide gas closing down the hatches of the ship.

If so, it may be concluded that the damage found on the top surface of the cargo was caused by the inherent defect of the cargo and the act of the cargo owners' servants, i.e. fumigation.

4. In respect of the Point at issue No.4 (the cause of the damage to the cargo after discharge)

With regard to the condition of the cargo after discharge, the following facts may be established:

(1) In the warehouses, the cargo appraised as sound had been stored and the portion of it had remained in the heated condition since before loading.
Evidence (omitted)

(2) In the warehouses, the cargo had been piled up nearly onto the ceiling and such cooling down operations as spreading out the cargo thus stacked or making it exposed to fresh air had never been carried out.
Evidence (omitted)

(3) The dew was formed on the surface of the cargo exposed to fresh air and that part gathered mold.
Evidence (omitted)

Judging from the facts just mentioned, it may be recognised that the mold found in the warehouses after discharge gathered due to the series of the facts that the cargo had been in high temperature, no cooling-down measures had been taken, the dew was formed on the surface of the cargo and thereafter it rapidly absorbed moisture.

On the assumption of the above, it may be judged that this damage was caused by not only the latent defect of the cargo having been in high temperature and but also the act of cargo owners' servants in respect of the control of the cargo after discharge and, therefore, causation may not be found between the carrier's acts and the cargo damage.

5. Conclusion

In that the defendant, D-1, is not to be called the carrier on the Bills of Lading, the claim against it shall be declared wrong.

Furthermore, the claims against the defendant as well as the carrier, D-2, may not be allowed because the damage concerned could not be attributable to the acts of the seafarers employed by the defendant, D-2, and accordingly there is lacking any reason to justify the claims.

THE TOKYO DISTRICT COURT NO.28 CIVIL AFFAIRS SECTION

PRESIDING JUDGE JUDGE, SHIGEKI ASAO
JUDGE, YOSHIJI IWATA
JUDGE, HIDEAKI MORI

Who should represent parties in arbitration in Japan?

Kazuo IWASAKI*

Introduction
I. Governing Law of International Arbitration Procedure in Japan
II. Where Governing Law is Japanese Law: Discussion
III. Where Governing Law is Foreign Law: Discussion
Conclusion

Introduction

Dr. Wetter of Sweden pointed out that with exceedingly insignificant exceptions... the whole world has accepted the right for parties in international arbitration to be represented by advocates without subjecting them to any formal or material requirements as to their competence... In legal systems permeated by the monopoly of lawyers, this is nothing but a quiet revolution[1].

At the same time, Japan has been paid a significant attention as one of such exceedingly insignificant exceptions[2].

The purpose of this paper therefore is to discuss the issue of who can represent parties to an international arbitration held in Japan (hereinafter referred to as Representation Issue) and to make it clear that foreign lawyers can represent his or her client in an international arbitration process under the present Japanese legal system.

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This is a revised edition of the paper that was delivered at the 10th International Congress of Maritime Arbitrators at Vancouver in 1991.

I. Governing Law of International Arbitration Procedure in Japan

Where the Representation Issue is raised in a Japanese court, judges resolve it by applying its governing law that is determined by the conflict of laws of Japan.

Since Japanese conflict of laws has no specific statutory provision regarding the governing law of an international arbitration procedure held in Japan, this issue has to be left in the interpretation of Japanese conflict of laws.

However the Japanese court has not yet had such chance to show its interpretation on this issue, and commentators' interpretation is divided into the following two different camps.

The prevailing opinion of commentators[3] is that arbitration is fundamentally based on the parties' arbitration agreement which is governed by the parties' autonomy under Art.7(1)[4] of the Horei (the Japanese conflict of laws statute) and therefore the parties' choice of law should be applied for the governing law of an international arbitration procedure, provided that the application of the governing law determined by the parties' autonomy is not contrary to the public policy of Japan under Art.33[5] of the Horei.

The other[6] argues that since an arbitration procedure involves the public policy of the arbitration forum in the same way as a litigation procedure does, its governing law should be interpreted to be the lex fori, which is the Japanese law.

Such being the case it is necessary for us to discuss the Representation Issue not only under the parties' designated governing law but also under Japanese law (lex fori).

II. Discussion where Governing Law is Japanese Law

The Code of Civil Procedure (CCP; Law No.29 of 1890) has no specific provision for representation of the parties in an arbitration process, but does have some relevant provisions in relation to the Representation Issue.

1. CCP's Art. 794 (2)

Subsection 2 of CCP's Art. 794 provides that if the parties do not come to an agreement in respect of the arbitration procedure, the arbitrator may determine the issues on the arbitration procedure by his or her discretion.

In a practical application of CCP's Art. 794(2) the Representation Issue is determined as follows;

(1) by the parties' agreement if the parties' agreement expressly stipulates who can represent the parties in the arbitration process;

(2) by the applicable arbitration rules if the parties' agreement does not expressly stipulate who can represent the parties in the arbitration process, but the parties have agreed to settle their dispute according to an arbitration rules such as UNCITRAL Arbitration Rules or other recognized arbitral institution's arbitration rules;

(3) by the arbitrator's discretion if neither (1) and (2) above is applicable.

In reality, where there is a provision for international arbitration held in Japan within the parties' agreements, usually the terms do not stipulate who can represent the parties in the arbitration process. However most of such agreements stipulate that the parties will settle their dispute according to the arbitration rules of an arbitration institution such as the Japan Shipping Exchange (JSE), the Japan Commercial Arbitration Association (JCA) or the ICC.

In case of the JSE its Rules has no provision on the issue and therefore the arbitrator has to decide the issue. To date, there has been no record of the JSE's decision on the Representation Issue.

In case of the JCA, Rule 6 provides for that a party may be represented by a lawyer licensed under the Japanese law (Bengoshi) or such other person as shall be recognized to be justified in taking procedure under these Rules, and the JCA can determine whether a non-Bengoshi is justified in taking procedure under these Rules, since its Rule 3(3) stipulates that the arbitration tribunal shall be bound by the JCA's decision on the procedural matter.

In this connection a California lawyer reported that when the other party ob-

jected against his right to represent his client in the arbitration, he was not recognized by the JCA to be justified in taking procedure under these Rules[7].

In case of the ICC its Arbitration Rules' Art. 15 (5) provides "The parties may appear in person or through duly accredited agents. In addition, They may be assisted by advisers." Mr. Bond, Secretary General of the ICC Court of Arbitration, reported at the 75th Anniversary meeting of the Chartered Institute of Arbitrators held at London in 1990 that the ICC Court of Arbitration has applied this provision and admitted a non-Bengoshi to represent the party in the ICC's arbitration process held in Japan.

2. CCP's Art.801(1)

Subsection 1 of Art.801 of CCP which provides that where the parties to the arbitration process were not represented according to the provisions of law, a motion for cancellation of the arbitration award could be brought in a court by the parties.

Therefore if the determination of the Representation Issue by parties' agreement, the applicable arbitration rules or the arbitrator's discretion is not conformity with the provisions of the Japanese law, the arbitration award made from such arbitration process might be canceled by a Japanese court under the subsection 1 of Art.801 of CCP.

3. Lawyers Law Art. 72

Since CCP Art. 801(1) requires that the parties are represented according to the provisions of (the Japanese) law, we have to pay attention to Art. 72 of the Lawyers Law (Law No.205 of 1949).

This provision prohibits a non-Bengoshi from conducting repeatedly specific legal activities with the purpose of accepting remuneration unless such activities are admitted by the other system of law. Any legal activity that violates Art. 72 of the Lawyers Law is void under Art. 90 of the Civil Code.

It therefore is a serious question whether a non-Bengoshi including a lawyer licensed under a foreign law is prohibited by Art. 72 of the Lawyers Law to represent the parties in an arbitration process in Japan. If it is prohibited, not only such non-Bengoshi suffers criminal punishment, but also the arbitration award made from the arbitration process in which such non-Bengoshi takes part is canceled under CCP's Art. 801(1).

To form a conclusion on this question it is necessary for us to scrutinize Art.72 of the Lawyers Law narrowly. Unfortunately this provision is not well drafted but has some ambiguous expressions, which also have not been well interpreted by courts' decisions or discussed in details by commentators.

The followings are the commentators' opinions on the application of Art. 72 for the Representation Issue.

1) Prof. Taniguchi

Since a foreign lawyer is an unlicensed person (non-Bengoshi) in Japan, it seems logical that (under Art. 72 of the Lawyers Law) he or she may not represent a party, foreign or Japanese, in an arbitration in Japan unless it is clearly ex gratia or the person happens to be the representative officer of the party corporation[8].

2) Prof. Doi

It is an open question whether a foreign party to an arbitration of international nature, which is to be held in Japan, may hire a non-Japanese attorney (non-Bengoshi) to represent him in the arbitration proceedings[9].

4. Analysis of Lawyers Law Art. 72

The writer submits that more detailed analysis of Art. 72 of the Lawyers Law shows that it prohibits a non-Bengoshi from engaging repeatedly in following activities with the purpose to accept remuneration unless such activities are admitted by the other system of law;

1) offering to a client legal opinion on such litigation or non-litigation cases being raised or to be raised in a court, such cases being claimed or to be

claimed against the other administrative agencies or similar cases,

2) representing a client in such litigation or non-litigation cases being raised or to be raised in a court, such cases being claimed or to be claimed against the other administrative agencies or similar cases,
3) conducting an arbitration,
4) conducting an amicable settlement,
5) conducting the other legal affairs.

Since no Japanese law admits a non-Bengoshi to represent a party in an arbitration process held in Japan, a non-Bengoshi's representation of party in an arbitration process easily causes such misgiving that his or her activity might come under the above-mentioned 2). It however is submitted that his or her activity is not prohibited by Art. 72 unless such activity is conducted repeatedly.

It is still a question how many times per month or year means "repeatedly", but it is submitted that a non-Bengoshi's representation of a small number's parties in an arbitration process usually might not be deemed as "repeatedly" by Japanese courts since they have interpreted this requirement strictly.

For example, the Nagoya High Court held in its decision of 30 January 1973[10] that more than ten times per three years for four cases did not meet the requirement of "repeatedly".

III. Discussion where Governing Law is Foreign Law

Where a foreign law is designated by the parties as the governing law of the arbitration procedure, at first sight there seems no problem for the Representation Issue, since the whole world has accepted the right for parties in international arbitration to be presented by advocates without subjecting them to any formal or material requirements as to their competence.

However there still remains a question whether a non-Bengoshi's representation of the parties in an arbitration process held in Japan is contrary against the public policy of Japan that includes the above discussed Art.72 of the Lawyers Law, even if it is justified by the governing law of the arbitration procedure.

Regarding the public policy of Japan there is no reported case involving an international arbitration procedure, where the governing law was denied application on the ground that it violated the public policy of Japan. But the prevailing opinion of commentators is to the effect that public policy is not violated by the sole fact that the application of the governing law contravenes a mandatory provision of a Japanese statute (such as the Lawyers Law). The application of the governing law only violates the public policy if it seriously damages the legal order of Japanese society under its private law[11].

Accordingly it is necessary for us to discuss whether a non-Bengoshi's representation of the parties in an arbitration process held in Japan seriously damages the legal order of Japanese society under its private law even if it violates the Lawyers Law's Art. 72 by chance.

We have not yet had any court's decision in point, but it could be submitted that a non-Bengoshi's representation of the parties in an arbitration process held in Japan does not seriously damage the legal order of Japanese society under its private law and therefore does not violate the public policy of Japan since Art. 72 of the Lawyers Law itself is not in confirmity with an internationally approved principle of international arbitration.

Conclusion

The foregoing discussion of the Representation Issue could be concluded as follows;

1) The Representation Issue is determined by the governing law of the arbitration procedure.
2) If the governing law of the arbitration procedure is the Japanese law (lex fori), there is, of course, no problem for Bengoshi to represent the parties to international arbitration process held in Japan, and a non-Bengoshi's representation is not prohibited by Art. 72 of the Lawyers Law unless such representation is conducted "repeatedly" in its specific meaning in Art. 72.

3) If the parties to an international arbitration process designate a foreign law as the governing law of the arbitration procedure, a non-Bengoshi's representation has no problem since such representation does not violate the public policy of Japan and Art. 72 of the Lawyers Law is not applicable.

In addition, the following points are suggested to be considered at the drafting of an arbitration agreement or clause where the international arbitration process is anticipated to be held in Japan:

1) expressly designating a foreign arbitration law which clearly accepts a non-licensed lawyer's representation of the parties as the governing law of the arbitration procedure,
2) selecting an arbitration institute such as the ICC which supports a non-licensed lawyer's representation of the parties,
3) expressly providing that a non-licensed lawyer's representation of the parties is agreed by the parties.

[Notes]

1. Wetter, Review of Craig, Park & Paulsson, ICC Arbitration, 1984 Svensk juristtidning 156, 160
2. Polkinghorne, The Right of Representation in a Foreign Venue, 4 Arbitration International No.4, 333, 337 (1988); Ragan, Arbitration in Japan: Caveat Foreign Drafter and Other Lessons, 7 Arbitration International No. 2, 93, 105 (1991); McAbee, Commercial Arbitration: Japan Is Odd Man Out, East Asian Executive Reports March 1989 p.17
3. See, N.Koyama, Chuusaihou (Arbitration Law) (revised ed.) at 154; T. Sawaki,Chuusaitetsuzuki no Jyunkyohou (Governing Law of Arbitral Procedure) in Chuukai Chuusaihou (Commentary on Arbitration Law) (Kojima & Takakuwa ed.) at 226; K. Iwasaki, Chuusai no Jyunkyohou (Governing of Arbitration) at 14
4. Art.7(1)

   The intention of the parties shall determine which jurisdiction's law will gov-

ern the formation and effect of a juristic act.

5. Art.33

   Where a foreign jurisdiction's law is applicable and its application is contrary against the public policy and good moral, the foreign jurisdiction's law shall not be applied.
6. A. Takakuwa, UNCITRAL Chuusai Kisoku (UNCITRAL Arbitration Rules) at 11
7. Ragan, op cit p.106
8. Y. Taniguchi, Commercial Arbitration in Japan, ICCA Congress Series No.4, p.29, at 35 (1989)
9. T. Doi, "Japan", Yearbook Commercial Arbitration Vol.4, p.115,at 129 (1979)
10. Keiji Saiban Geppoh Vol.5, No.1, p.36
11. Pryles & Iwasaki, Dispute Resolution in Australia-Japan Transactions at 73 (1983)

OBTAINING SECURITY FOR MARITIME CLAIMS SURVEY OF JAPAN

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Arrest of ships is possible in Japan and the statutes governing its manner are mainly codified in various civil code provisions such as the Commercial Code, the Civil Execution Act and the Civil Affairs Protection Act. The following is a basic outline of the considerations involved in arresting ships in Japan.

I. Types of Arrest

In Japan, there are three types of arrest as explained below:

1) Provisional arrest

This procedure is used to arrest a ship in order to secure in advance a claimant's probable claim against a shipowner where the merit of a case is determined later either in Japan or in another country. This procedure gives the claimant the right to arrest a ship only temporarily and no auction will automatically follow.

It is only necessary to show the court the probability of a valid claim . Also, it should be shown that unless such an arrest is ordered, the enforcement of the claim might be endangered. Such documentary evidence should be prepared beforehand. Arrest of a vessel is possible in Japan in respect of claims to obtain security in a charter-party dispute where the charterparty provides that the dispute will be arbitrated in another jurisdiction.

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This was originally a contribution made by Mr. Hosoi at a session of the Maritime and Transport Committee of the Section on Business Law of the International Bar Association during the Biennial Conference in Hong Kong in October 1991.

Deposit must usually be put up which is refundable, with low interest and may be released upon the consent of the arrested shipowner or court decision. The deposit may be in the form of cash, negotiable instruments such as government bonds or the company's shares, or a letter of guarantee issued by a bank or insurance company (not a P. & I. Club) registered in Japan. The deposit should often be equivalent to roughly a third or a fifth of the claim amount, though the court has discretion in setting this amount. Such an amount should also cover court and bailiff costs which are statutorily tariffed, but not necessarily directly or straight-forwardly affected by the claim amount or the ship's tonnage.

An arrest can usually be obtained the same day or next day after application provided the necessary evidence is available and a bailiff can be arranged in time. If a security is put up by the opposing side, the vessel can be released. The security amount is fixed by the court to a maximum equal to the amount of the claim, with interest. The security must be in cash.

2) Compulsory execution

This procedure is used to execute one's firm claim which has already been admitted by a court against a ship as the debtor's property, allowing the claimant to recover his claim. This procedure naturally leads to the actual sale of the arrested ship unless the debtor puts up a security. The court should receive evidence of the full validity of a claim in the form of a court judgement, etc. before such an arrest may be made.

A foreign court judgement or arbitration award can also be executed in Japan against a ship when she calls at a Japanese port, subject to a Japanese court's recognition.

A deposit is only needed to cover statutory court and bailiff execution costs which are usually not a large amount and may be paid by cash. This deposit is normally refundable from the proceeds. Security to obtain the release of a ship arrested on a final judgement is equivalent to all the claims plus the court execution costs. The security can be in cash, negotiable instruments, or a letter of guarantee issued by a bank, an insurance company, or (unlike the case for de-

posits) a P. & I. Club recognized in Japan.

3) Foreclosure by means of public auction without a judgement

A mortgaged right, maritime lien or a possessory lien enable a claimant to arrest a concerned ship which will be subsequently sold by auction. The advantage of this procedure is that the claimant does not have to put up a deposit before he can initiate these proceedings. The validity of a claim such as by a mortgage certificate, etc. must be evidenced to the court. A security can be deposited just as in the case and in the form noted for compulsory execution above. No deposit except for statutory court and bailiff costs which are usually not a large amount, is needed.

II. Basis for Arrest

1. Maritime Liens

Maritime liens enable a claimant to arrest and sell a ship by court auction, the proceeds of which are paid into a monetary fund from which the claimant can receive the amount of his claims. Under Japanese law, maritime lien rights always supercede mortgage rights (and there is no distinction between mortgages such as preferred mortgages and others).

Under Japanese law the following claims are given maritime lien:

1) Expenses relating to the sale of the ship by public auction and expenses of preservation after commencement of proceedings.
2) Expenses of preservation of the ship at the last port.
3) All public dues levied on the ship in respect of the voyage.
4) Pilotage and towage.
5) Salvage award and the ship's contribution to general average.
6) Claims which have arisen from the necessity for the continuance of the voyage.
7) Claims of the master and other mariners which have arisen from their contracts of employment.

8) Claims which have arised from the commercial sale, construction, or equipment of the ship, in cases where the ship has not yet made any voyage after construction, and claims in respect of the equipment and food and bunkers of the ship for her last voyage.

9-a) Cargo claim rights provided by Article 19 of Japan's International Carriage of Goods by Sea Act 1957, the Japanese version of the Hague Rules 1924.

9-b) Claim rights which may be limited by Japan's Limitation of Shipowners Liability Act 1975, as amended in 1982, the Japanese version of the Limitation of Liability convention 1976.

Supply of bunkers could give rise to a maritime lien in either item 6 or 8. In 8, her last voyage means the last voyage of the ship either of the voyage itself or if such voyage is part of a series of voyage forming a commercial unit or cycle, such series.

Among the above maritime lien rights , superiority is in principle given in the above order except for 9-a and 9-b which are equal to each other. In practice, many of the above-listed maritime lien related items are initially paid by a ship's or a charterer's local agent. Such a local agent is now usually considered to be entitled to reimbursement from the ship's interests by virtue of the maritime lien. However, the fee for the agent's services is not always admitted by the court to give rise to a maritime lien.

Many of the above maritime lienable rights are time-barred after one year from the time that they arise, although the claims themselves may, depending on their circumstances, continue beyond the year without being accompanied by liens.

A claimant need not lodge any deposit with the court other than for court execution costs, revenue stamps, etc. which are usually not large amounts. This is one of the advantages of the maritime lien.

Maritime liens recognized by the law of the foreign country where the principal claim was created and simultaneously by the law of the flag of the vessel to be arrested is also likely to be recognized, even if Japanese substantive law does

not recognize such a lien. On one hand, this favors a claimant since he can arrest a ship even by virtue of a foreign originated claim which may not be admitted as a claim under Japanese law.

On the other hand, a principal claim which gives rise to a maritime claim in the country where the claim rose but is not recognized to be a maritime lienable right by the law of the country whose flag she carries, or vice versa.

2. Possessory Liens

A possessory lien may be attached in situations even where a maritime claim might not. For example, in the case of a dockyard, it may keep a ship until its repair or equipment charges are paid. If the shipowner is unable to settle the claim, the dockyard may proceed with a sale of the ship by public auction as supervised by the court. However, if the ship leaves the dockyard, the possessory lien based on the Civil Code, also disappears, though the possessory lien resulting from the Commercial Code may survive to a certain extent.

3. Mortgage

Both Japanese and foreign mortgages on a foreign flag ship can be executed in Japan. However, a mortgagee may not arrest sister ships but only seek arrest upon the ship upon which he has the mortgage right.

4. Other Claims

A ship may be arrested for any type of monetary claim whether it is maritime or not, against the owner, including those for payments due, claims subject to a condition precedent. A surety's right of future possible indemnification against the principal obligor, etc. are in advance allowed as claims for the purposes of provisional arrest (as long as it is clearly shown that unless an arrest is ordered at this point, future enforcement of their claim is endangered).

III. Authority & Jurisdiction

The Japanese District Court in the district where the vessel is berthed or at anchor is usually the competent court. (Japan has not ratified the Brussels Arrest Convention of 1952 nor the 1926 and the 1967 Conventions on Maritime Liens and Mortgages.)

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

Upon arrangement by the court, an arrest of a Japanese-registered ship is to be registered in the Japanese Registry of Ships. While Japan has not ratified the 1926 Convention on Immunity of State-owned Ships, usually public ships are not arrested.

IV. Arrest Procedure

1. Form of Application

The application claim requires the following information:

i) the cliamant's full name and registered (or principal) address and if the claimant is a corporate entity, the full name of one of the directors authorized to represent it in litigation;

ii) the registered name of the vessel and identification number, and other information needed for identification such as nationality, gross tonnage, type and number of engines, time of launch, location, etc.;

iii) the full name of the master and whereabouts, if known;

iv) the full name and address of the registered owner of the vessel and if the registered shipowner is a corporate entity, the full name of one of its rep-representative directors.

If either applying party is a corporate entity, it should also present certified copies of the company's registration. A foreign corporate entity needs to have

an affidavit prepared by the claimant´s clerk or secretary or one who reasonably knows the defendant. It should preferably be notarized but no authentication of a Notary Public by the Japanese Consulate to that locality is necessary. The court occasionally accepts a certified photocopy of Lloyd's Register of Ships, Lloyd´s List of Shipowners, or Blue Book, listing the existence of the ship to be arrested and of her ownership. Likewise, the master´s name may possibly be proved by quoting some shipping documents.

2. Power of Attorney

It is usually necessary to give counsel a written power of attorney to enable him to represent the claimant. A general power of attorney statutorily includes action in arrest proceedings but other items such as compromise, appointment of sub-counsel, etc. must be explicitly written into the power of attorney. Foreign applicants are recommended to have their execution notices notarized, though Consulate legalization is not necessary. Telex authorization is occasionally acceptable but formal documentation should follow as soon as reasonably possible.

V. Defenses

An application for the arrest of a ship by a claimant may often be accepted and admitted by the court without hearing any defenses from the shipowner or her charterers and a certain amount of time could be needed for the shipowner to have her released by putting up a security with the court, etc.

If a ship-owner is worried that his ship will probably be arrested in Japanese territorial waters without being given a reasonable time in advance to check and inspect the accuracy and genuineness of such claim vouchers (this is more likely to occur when a ship is time-charterered in which case the shipowner has no immediate or direct access to the contents of the claim as the claim is often made on the order of the time charterer through its local agent towards the supplier

on shore), the ship owner is able to apply for a special court order to re strain such a claimant from arresting a ship by submitting a sufficient reason and security to the court beforehand.

Alternatively, or prior to the application for the special court order, the ship owner would, as a matter of fact, be able to give an unofficial warning to the court that it should be particularly prudent and cautious in examining the forthcoming application for arrest. This will perhaps cause the court to require the claimant to definitely put up a deposit or higher amount of deposit then otherwise, as a sort of counter-security in case of later determination of false arrest.

A false arrest, e.g. the claimant was wrong in identifying the debtor´s asset, if so concluded upon evidence of negligence or a malicious intent or to injure by the claimant, can leave the claimant open to applicable civil and criminal sanctions and remedies.

VI. Enforcement

The claimant must go the the bailiff (executory authorities or court marshal) and apply for enforcement of the order. Usually, it is sufficient to serve the order of arrest on the master, whether the vessel is Japanese or foreign. The court bailiff must "take the ship's nationality certificate from the ship". This requirement occasionally causes peculiar problems in practice.

In any arrest procedure, a writ can be served on a vessel's master as he is considered to be the statutory authoritative agent for the owners when she is away from her registered port. As a precaution, it is recommended that the claimant notify the harbor authorities of the arrest of the ship to prevent her from sailing without authority.

VII. Maintaining Arrest.

In the case of a provisional arrest, upon application by a claimant, the court may order a quard to watch and preserve the arrested ship. If maintaining arrest

renders some extra costs, the court may require the claimant to put up additional deposit. The arrestor does not have to take any further steps in principle. However, the court may, upon application by the shipowner, order the arrestor to file a substantial lawsuit in terms of the claim upon a ship provisionally arrested.

In the case of a compulsory execution or public auction without a judgement, the court, upon application may order a guard as well. The costs shall be advanced by the claimant to the court. If a Japanese flag ship has been arrested, entry of the application for the enforced ship's sale is made in the register. After such registration, third parties cannot effectively obtain any right thereafter on the ship which would prejudice the claimant.

VIII. Sale

While the arrest may be handled quickly, there is no definite provision for the period during which the enforced sale shall be concluded. It usually takes a few months from the time of arrest until the time of auction.

1. Appraisal

In the case of a compulsory execution or a public auction without a judgement, the court shall appoint an expert, often a professional surveyor (not a sale's broker),to evaluate the ship. The court may order further evaluations if it deems the valuation improper. A minimum price is set taking into account the expert's appraisal. If no bids meet the minimum, the court may propose a lower minimum price.

2. Sale

The commencement of the enforced sale proceedings is notified by the court to the arrestor, registered mortgagees, tax authorities, etc. The auction notice

should be given at least two weeks prior and the date of determination of the successful bidder shall be fixed within a week after the date of auction.

The bailiff carries out the public auction. The court may however, order sale by sealed tender instead of public auction. Two-tenths of the offered price shall usually be deposited in cash, negotiable instruments, bank guarantee or cashier's check. The deposit is refundable once the successful bidder has been determined. The successful bidder must put up the remaining bid in cash within a certain amount of time. When a Japanese ship is sold through the court, the successful bidder will obtain the ownership of the ship free from any encumbrances (except that the bidder must pay for a claim giving rise to the possessory lien, etc.)

3. Sale Proceeds

The proceeds shall be distributed by the court at a date fixed by the court at which time all creditors are heard. The claims are prioritized as follows:

i. Costs of sale and vessel preservation
ii. Maritime lien
iii. Ship's mortgage
iv. Ordinary national and local taxes and dues

4. Appeal proceedings

For provisional arrests, upon motion by the debtor (shipowner), a hearing is held and the court may reverse its decree of arrest. A speedier way to release arrested vessels is to put up a security with the relevant authority and leave the dispute for a later stage. Thereafter, appeal may be made to the Higher Court.

An objection to a sale may be made at any stage until distribution. However, such objection does not automatically stay the sale and distribution of proceeds unless the court orders a stay upon security.

IX. Other Considerations

1. Alternative means of obtaining security

Alternative means of security may be obtained through freezing bank accounts, arrest of bunkers, etc. though the practicality of such other means may depend on the circumstances. MAREVA injunctions are also possible though in Japan to some extent, the claimant must present sufficient and clear evidence for a reasonable basis to admit Japanese jurisdiction.

2. Sister ships

A sister ship may also be arrested, except in the case of an application for arrest based on a maritime lien. Mortgate rights do not extend in this regard in that the mortgage rights are tied to a specific ship. Whether or not associated or alternative ships may be arrested is subject to circumstances, in particular a claimant's presentation of evidence such as piercing a corporate veil, etc.

3. Voyage

No vessel having completed the preparations for commencing a voyage can usually be arrested unless the claimant's claim arises from the preparation for the commencement of such a voyage. If the voyage has been stopped in its course by arrest, the court may, under certain circumstances, permit the ship to resume her voyage. An arrest of a ship does not legally affect loading or discharge of cargo on board her.

Developments of Japanese Maritime Law in 1980s (3)

Takashi AIHARA*

The final part of this article covers some arbitral awards which were made in 1980s under the Rules of Maritime Arbitration of The Japan Shipping Exchange, Inc (JSE). The total number of the awards in 1980s which have been already published is 32. The numbers of them per year and per type of contact are as the graphs indicate. One of the reasons why the total number is not large is that there were many conciliations or amicable settlements during the arbitral procedures. In response of this tendency, the Committee of Maritime Arbitration of JSE is planning to enact the Rules for Conciliation.

The awards on voyage C/P whose total number is 12 are divided into 3 awards on GENCON, 5 NANYOZAI (established by JSE for import of Southeast Asian logs and/or lumber), 1 BEIZAI (established by JSE for American logs and/or lumber), 1 STB VOY, 2 unknown. Both NANYOZAI C/P and BEIZAI C/P state in their arbitration clauses that any dispute shall be submitted to arbitration held in Tokyo under the Rules of Maritime Arbitration of JSE. 4 of 5 awards on sale of ship are on NIPPONSALE which was established by JSE as English version of its contract form of sale of ship and has the same arbitration clause as NANYOZAI and BEIZAI C/Ps.

As for the nationalities of the parties, among 32 awards, there are 15 awards both of whose parties were Japanese, 14 awards either of whose parties was not a Japanese and 3 awards both of whose parties were not Japanese. The parties who were not Japanese came not only form Asian countries like Korea, Taiwan, China, Hong Kong, Philippines, Singapore and Indonesia, but also from United States, Holland and Denmark. This fact shows that maritime arbitrations held in Tokyo have strongly international character.

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Below are summaries of the reasons attached to some of the awards on voyage and time C/Ps. They are generally literal translations from the Japanese texts, but including to considerable extent free translations. Each award is specified by the name of ship / date of award / form of contract, if known.

Number of Published Awards 1980-1989

Year	Awards
1980	6
81	2
82	2
83	5
84	3
85	5
86	3
87	2
88	2
89	2
Total	32

Type of Contract	Awards
Bareboat C/P	3
Voyage C/P	12
Time C/P	5
Sale of Ship	5
Towage	2
Others	5
Total	32

III. Arbitral Awards

1. Voyage Charter Party

(a) Existence of Charter Party

[1] The "ZB OWL NO.7" / 11th June, 1985 / NANYOZAI

Whether the person who signed the C/P was duly authorized by the Charterer.

The Owner (the Claimant) made a claim for demurrage against the Charterer (the Respondent). On the other hand, the Charterer insisted that this charter party was null and therefore he had no obligation to pay the demurrage arising

thereby. He said, "Mr. U who signed the C/P is not his employee and is not duly authorized. When any contract with high value is concluded, it is I myself who signs it. This charter party is null because I did not sign it."

<Holding> The object of this charter party was to carry the cargo. The carriage has been completed and the freight has been paid on the terms of this charter party. Therefore, it is seemed that the insistence of the Charterer has not any objectivity and meaning. Since it is admitted that in this case Mr. U negotiated with the Owner as the agent in Manila of the Charterer as he had done before, it is not unnatural that the Owner had no question on Mr. U's authority as agent when he signed the charter party. It was a failure of the Owner, however, not to confirm Mr. U's qualification because an ordinary person engaged in the shipping industry should confirm the authority of agent with whom he is going to make a contract. Only if the Owner did so, this case would be solved clearly. In conclusion we think it is reasonable that the Owner is to some extent liable for this failure and hold that the amount of the Owner's claim should be somewhat reduced.

[2] The "Le Chang Ling " / 14th August, 1985 / NANYOZAI

Whether an agreement for voyage charter existed although no actual charter party was signed.

According to the allegation by the Owner (the Claimant), as the result of negotiations, the both parties came to an agreement for voyage charter on 30th August, 1984. The Owner made the final draft on it although no actual charter party was signed. The agreement consisted two letters. One dated 29th August, 1984 proposed the Owner's final offer, the other dated 30th August, 1984 tendered the Owner's final counter-offer as regards the freight rate, and both of which were directly delivered by a broker to the Charterer (the Respondent) on 30th August, 1984. The Owner made a claim for dead freight, while the Charterer did not appear before the Arbitrators.

<Holding> The Arbitrators acknowledge in the letter dated 30th August, 1984 the phrase "If interested, please signify your signature before 1200 Hours

today on the space provided below" and the Charterer's signature in the space between the lines of "CONFORME" and the Charterer' name. Taking into consideration the fact that the Charterer did not take objection to the final draft sent for him and the contents of telexes exchanged between the parties, Arbitrators also recognize that the agreement was concluded through sufficient exchange of offers and negotiations. The Arbitrators judge and hold that there did exist an agreement between the both parties concerning the voyage charter which incorporates the terms and conditions of NANYOZAI C/P even though no actual charter party was made.

[3] The "Ocean Venus 1 "/ 10th Feb., 1987 / BEIZAI

Whether the Charterer could cancel the voyage charter party because of the Owner's anticipatory breach of contract.

The charter party was duly concluded between the Owner (the Claimant) and the Charterer (the Respondent) on 5th August, 1984. This contract is a voyage charter party carrying logs and/or lumber from Longview, Oregon, U.S.A. to one safe port in North China.

On 20th August, when the Vessel was in the course of her voyage to Longview, the Owner's broker in Hong Kong sent the telex to the Charterer, stating that the Vessel might have been chartered by another party and that the Charterer was asked to confirm the ultimate charterer by referring to the Owner's agent in Longview. The Charterer replied on 22th August by the telex to the Owner's broker that he cancelled the contract because he had been informed that his name was not in the record as the charterer of the Vessel. On 23th August the Owner's broker sent the telex that his telex dated 20th August was only an enquiry of what the Charterer had heard from the Owner's agent and the telex had nothing to do with the validity of the charter party.

The Vessel arrived at Longview on 21th August and stayed there until 2nd September as expected. But the Charterer did not load any cargo in spite of the request from the Owner's agent. The Owner made a claim for damage against the Charterer.

<Holding> By the Charterer's telex of 22th August, he declared the cancellation of the charter party since the Owner had broken his promise before the period to perform the Charterer' obligation came. The problem is whether the telex from the Owner's broker constitutes anticipatory breach of the contract. In English law, anticipatory breach of contract means that a party to a contract, before the period to perform his obligation comes, expresses his intention to break it or takes an action which may lead a reasonable person to the conclusion that he does not intend to fulfill his obligation or is disabled from doing so.

The telex of 20th August from the Owner's broker and the telex of 22th August from the charterer are rather strange. It is difficult for a reasonable man to understand why the broker asked the Charterer to confirm by referring to the agent in Longview whether or not the Vessel had been chartered by another party. Furthermore, it is difficult to understand why the Charterer declared the cancellation of the charter party and then did not look for another vessel for loading his cargo... . But, after three days, the Owner's broker sent another telex stating that the telex of 20th August was only an enquiry and it had nothing to do with the validity of the charter party, and that he would have to hold the Charterer responsible for any delay if the cargo was not ready for loading ... and he had authorized the agent in Longview to tender notice of readiness on arrival of the Vessel and informed the master of it... .

From these conducts of the parties, we are hesitant to say that the Owner's broker and the Charterer acted with a sense of reasonable businessmen in this case. From the legal point of view, however, it cannot be said that the telexes of the Owner's broker constitute the anticipatory breach of contract ... . Therefore, the Charterer is liable for the lack of his cargo between 22th August and 2nd September, 1984 at the port of Longview.

(b) Breach of Charter Party by Owner

[4] The "Dong Woon" / 7th May, 1980

Whether late arrival of the Vessel at the port of loading constituted a breach of charter party -"Expected ready to load about"

<Holding> The Clause 9 of this charter party stated "Expected ready to load (abt.) : July 17, 1978 ". As the interpretation of this clause, it is considered that the Owner expected honestly that the Vessel would complete readiness to load on about July 17, 1978 and guaranteed that this expectancy was with reasonable grounds. That is to say, the Owner thereby did not undertake to make the Vessel arrive at the port of loading and complete readiness to load on time, but did guarantee that the expectancy had rationality when the charter party was concluded. In addition, because the expected date was stated as "about " July 17, it is reasonable to consider that this date was not strict and given some allowance. We reviewed the statements and documentary evidences presented by the parties on the circumstances of the conclusion of this charter party and could not find the fact that the expectancy of the Owner was not done honestly and had not reasonable grounds when the contract was made.

It is recognized that it usually takes about three days for the preparatory voyage form Inchon, Korea to Kaohsiung, Taiwan, the port of loading of this charter party and that the Vessel sailed from Inchon at 1030 hours on July 15 and into Kaohsiung at 0725 hours on July 18. Consequently, the Owner is admitted to have made the Vessel sail from Inchon and into Kaohsiung so as to keep "about July 17 ", the date honestly and reasonably expected by him at the time of the conclusion of the charter party. We can not accept the argument of the Charterer that the Owner made a breach of the contract with respect to the delay of the Vessel's arrival at the port of loading and completion of readiness to load.

[5] The "Ube" / 25th August , 1980

Whether the Owner is liable for damage arising from the considerable delay of the Vessel's arrival at the loading port because of an additional call in the previous voyage

<Holding> In this charter party the movement of the Vessel was stated as only "now trading " . … Generally , it is an usage in the shipping industry that parties of a voyage charter party do not determine ports of call in the previous

voyage of the Vessel when they make a contract. If the determination of ports of call was an important matter, it had to be noted in the charter party.

The expected date of arrival of the Vessel at the port of loading stated in the contract was 30th March, 1979. According to the documentary evidences presented by parties, the Owner determined such date after he estimated that the date of arrival of the Vessel at the port of call in China would be 10th March, 1979 and she would stay there for 15 or 25 days. The question is whether the Owner reasonably expected the days of stay of the Vessel at Shanghai, China, the additional port of call. The Owner estimated that the Vessel would stay there for 4 or 5 days, while in fact she stayed for more than 3 weeks. The broker testified that the expectancy of the Owner was seemed to be almost reasonable because then other shipping companies had completed their discharges without delay, and that the Vessel would have been in time for lay/can at the port of loading under this charter party. As there are no evidence to the contrary, we do not acknowledge that the expectancy of the Owner which was done when the charter party was made was without honesty and reasonable grounds.

(C) Laytime

[6] The "T-Maru" / 12th March, 1982 / GENCON

Whether the appointment of agent by the Owner under the agent clause affected the calculation of laytime when it was contrary to the previous agreement of the parties

After the Owner telexed the Charterer that to his agent at the port of discharge he appointed A who was recommended by the Charterer, he appointed another agent, B under the agent clause of the charter party ("owners agent at both ends "). As for the demurrage having arisen at the port of discharge, the Charterer (the Respondent) contended that the cause was that the Owner (the Claimant) had not employed A in response to his recommendation. On the appointment of agent, the Arbitrators gave the priority to the terms stated in the telex. And then they considered whether some causality was found between the Owner's appointing B in place of A and the demurrage having arisen.

<Holding> At every port in Saba state, Indonesia, one agency operates as agents of both the owner and the charterer of the same vessel. Accordingly, an agent in Saba appointed by owner, namely an owner's agent there conducts operations beyond the extent of those of an usual owner's agent. Charterers expect proper performance of an agent and owners have to appoint an adequate agent with their careful consideration. By the way, as to B, the agent in question, depending on the investigation the Arbitrators did ex officio, it is recognized that he is an agency having an ability of reasonable standard there and that there are generally no problems on his aptitude for agent. There is a question, however, whether B gave careful consideration to the application to the port authority on the arrangement for stevedores and to the communication with the consignee, that is to say, whether B properly conducted his operations so as to satisfy the Charterer.

As admitted by the parties, at this port of discharge, arrangements for stevedores are made by the port authority on the application of the agent. ... In this case, it is considered that, because B made an error in perceiving the preparations of the consignee to receive cargo and therefore applied for only a small number of the gangs, there arose the shortage of stevedores which partially caused the delay of the operations of discharge and the departure of the Vessel. This is supported by the records of the port authority. ... Therefore, among the days which exceeded the laytime of the Vessel, the Owner shall be liable for 3 days because of his mistake in appointing the agent. For the remaining days, the Charterer shall be liable because of the incompletion of preparations to receive cargo which mainly caused the delay of the operations of discharge and the departure of the Vessel, as shown by the records of the port authority.

[7] The "Sun River" / 8th July, 1983 / GENCON

Whether the remark noted in the statement of fact interrupted the progress of laytime -"NO WORK AT NIGHT... , DUE TO WAR BLACK OUT"

<Holding> The Charterer (the Respondent) contended that the remark in question interrupted the progress of laytime on the grounds (1) that the fact of

the impossibility of stevedoring at night was specified in the statement of fact which was signed by the Master for confirmation ; (2) that the impossibility was due to the outbreak of the Iran-Iraq war, which constituted an act of God ; (3) and that the Owner must have taken out an insurance against any damage or delay arising from such cause. Below these arguments of the Charterer will be discussed in order.

(1) The statement of fact is a basic material on which the laytime is calculated and a record that the parties confirmed only the facts that stevedoring was done or was not done. The laytime is calculated on the statement of fact under the terms of the charter party. Although the fact which the Charterer depends on is specified in the statement of fact, it does not justify the Charterer for itself. The calculation of the laytime has to be done under the terms of the contract with taking into consideration the fact in question.

(2) Laytime is the period for loading or discharging which is defined by the charter party. When the loading or discharging is not completed within such period, the charterer has to pay the demurrage corresponding to the period of delay unless the delay is caused by any fault of the owner or his employee or agent or unless the cause of delay come under one of the causes of exemption provided in the contract. In this case, it is not proved that the impossibility of stevedoring at night was arisen from any fault of the Owner or his employee or agent. On the other hand, the laytime clause of this contract stated "Cargo to be discharged at receivers expense and risk at the average rate of 750 metric tons net weight Weather Working day of 24 consecutive hours. Fridays and Holidays excepted". Since only Weather, Fridays and Holidays are defined as the causes interrupting the progress of laytime, it is clear that the Charterer can not be discharged by this clause. The Charterer bears an absolute obligation to complete the loading within the period defined in this clause and only Weather, Fridays and Holidays interrupts the progress of laytime. ... The Charterer submitted that he was discharged from payment of the demurrage on the ground that the impossibility of stevedoring at night was due to the outbreak of the war, which constituted an act of God. Although the impossibility of stevedoring constituted

an act of God, this charter party has not any clauses stating that the act of God discharges the Charterer from the absolute obligation mentioned above. In addition, although the Charterer contended that the act of God made the stevedoring at night illegal, the act of God or illegality was the cause which took place only at night and did not disturb operations in the daytime. Therefore, the position of the Charterer is not accepted.

(3) In this contract there are no clauses stating that the Owner shall be liable for the damage or delay arising from the impossibility of stevedoring at night and shall be compensated by the insurance he took out or that the Owner shall take out an insurance for the Charterer. In the light of commercial usages, it is not admitted that the Owner shall effect such insurance.

(d) Cancelling clause

[8] The "Minerva " / 11th March, 1986 / STB VOY

Whether the Charterer could claim the balance between the freight calculated for the Vessel and that paied for the substituted vessel under the cancelling clause when he cancelled the charter party

As it became clear that the Vessel could not arrive at the port of loading before the cancelling date, the Charterer arranged for the substituted vessel. Under the cancelling clause of the charter party, the Charterer claimed against the Owner the balance between the freight calculated for the Vessel and that paid for the substituted vessel. This contract was terminated by the agreement of the parties before the cancelling date. It was the common intent of the parties, however, that the agreed termination had the same effect as the cancellation by the Charterer under the cancelling clause.

<Clause concerned> Clause 5 of STB VOY : ... If the Vessel has not given notice of readiness to load, by 1600 hours local time on the Cancelling date specified in Part 1 (B), Charterer shall have the option of cancelling this Charter Party within 24 hours. Cancellation or failure to cancel shall be without prejudice to any claims for damages Charterer may have for late tender of the Vessel's services.

<Holding> In general the meaning of the cancelling clause is that, when the owner can not provide the vessel stipulated by the cancelling date, the charterer can exercise the option of cancelling the charter party regardless of cause of the delay. This construction is well established. Accordingly, even if the owner misses the cancelling date and in consequence the charterer suffers any damage, the latter will not naturally get any claims. The reason is that it is not understood that any obligation of the owner to keep the cancelling date certainly is stated in the cancelling clause itself and that such obligation is agreed by the parties. The cause of claim for damage by the charterer is to be a breach of any obligation of the owner under the charter party (a breach of an obligation to make an effort to bring out the vessel with reasonable speed, to state movements of the vessel without any errors and so on). The cancelling clause does not become the cause of claim by itself.

By the way, in the cancelling clause of the STB VOY form used in this case, there is strange additional terms as follows. "Cancellation or failure to cancel shall be without prejudice to any claims for damages Charterer may have for late tender of the Vessel's services". It may be seemed that there is a room for considering that a new right of the Charterer is created by the cancelling clause itself as a result of adding those terms to it. The position of the Charterer is seemed to depend on this construction but we cannot accept it on the following grounds.

(1) Generally, the term "without prejudice to ..." is not construed to the effect that it creates a new right. The meaning of the term is that it does not impair any existing relations in fact or in law. It is unreasonable to give the term the meaning that it creates a new right, unless there are special grounds for it. The construction of the ordinary cancelling clause without the additional terms above quoted is well established, as mentioned above. Therefore, in order to add such unusual meaning to the cancelling clause, it is necessary to use remarkable and precise terms and expressions.

(2) As a result of a breach of charter party made by the owner, the charterer may have a claim for damage against him. On the other hand, whether such

breach is made or not, the cancelling clause gives the charterer an option to cancel the charter party when the owner misses the cancelling date. So it is useful and meaningful to provide the relation between the claim and the option in way of precaution. Namely, the additional terms in the cancelling clause of STB VOY means that there are no relations between the charterer's exercise or failure to exercise the option under the cancelling clause and the maintenance or survival of the charterer's claim for damage resulting from a breach of the contract by the Owner. This interpretation is seemed to be agreed with the intent of drafters, to be it is harmonized with the expression of the additional terms and well-established meaning of the cancelling clause, and therefore to be reasonable and natural.

(e) Demurrage

[9] The "Cuctus" / 16 May, 1983 / NANYOZAI

The claim for demurrage lapsed by 1 year prescription

<Holding> The term of prescription applied to the claim for demurrage is one year under Art. 756 of the Commercial Code, Art. 20 of the Kokusai Kaijo Buppin Unso Ho (the Japanese COGSA). The Owner claimed the payment against the Owner and started the arbitral procedure after after one year passed from the time when his claim for demurrage arose.

(f) Stevedore Damage

[10] The "Bougainvill" / 15 March, 1983 / NANYOZAI

Whether the stevedore damage in the port of loading came under the "proved damage" the Charterer was to be liable for, when there were no signatures of the consignor and stevedore on the damage report

<Clause concerned> Clause 12 of NANYOZAI : Charterers are to be responsible for proved loss of or damage (beyond ordinary wear and tear) to any part of the vessel caused by stevedore at both ends.

<Holding> According to the Clause 12 of NANYOZAI C/P incorporated into this contract, the stevedore damage the charterer is to be responsible for is

"proved loss of or damage ... to any part of the vessel caused by stevedore at both ends." Therefore, the damage is to be a proved damage, in other words, it must be proved that stevedore caused damage to the vessel. As an actual way of proof, on NANYOZAI C/P, it is usual for the master and the stevedore causing damage to prepare an certificate. In this case, the damage report which the Owner presented as a evidence has signatures of the Master, first mate and Owner's agent, but it does not have those of the stevedore, consignor or Charterer's agent. That is to say, there are signatures of the persons concerned on the Owner's side, while there are no signatures of those on the Charterer's side. The Owner argued that the signature of his agent was to be considered as the signature for confirmation and that there were no problems in the light of the text of the Clause 12 if the damage report lacked a signature of the consignor. It is without objectivity and not permitted, however, to say that the damage in question is the proved damage according to the damage report which only the persons on the Owner's side signed.

2. Time Charter Party

(a) Off Hire

[11] The "Alexander Venture" / 22 Oct., 1982 / BALTIME

Whether the Charterer continued to use the Vessel for the hours corresponding to the period of off-hire after the charter party expired

<Clause concerned> Clause 42 : Any time the Vessel is off-hire to be included in the Charter period.

<Holding> Though the Charterer (the Claimant) contended that "included" used in the Clause 42 of this charter party had the same meaning as "added", it is thought that the meaning of "included" in general usage is solely "included", without including "added", as the Owner(the Respondent) argued. While this clause was inserted in the charter party as a special clause, the Arbitrators can not find in the hearings of the parties the fact that there was a special understanding between the parties sufficient to support the Charterer's argument that "included" was to be construed as "added".

(b) Remittance Charge

[11] The "Alexander Venture" / as above

Who should pay the charges for remittance of the freights, the Owner or the Charterer

<Clause concerned> Clause 64 : The Charterers pay hire...in Copenhagen for transfer to The Bank of Tokyo, Hibiya branch··· .

<Holding> The Owner submitted that the term "in Copenhagen for transfer to the Bank of Tokyo ···" was inserted in the Clause 64 so as to make the remittance charges borne by the Charterer, while the latter contended that it was to be borne by the Owner because the place of payment of the freight was clearly stated in the same Clause to be Copenhagen. The question who should pay the charges has been disputed since the time of the first payment. Hearing the opinion of an authoritative bank of foreign exchange, however, we consider that according to only the text of the Clause 64 it is not clear who should bear them, the Owner or the Charterer. This dispute arose because the parties failed to negotiate fully and agree without any vagueness on the method of remitting the freight and meaning of the Clause 64. Therefore, it is not seemed to be reasonable to make the charges borne by either of the parties at this time. We hold that the charges for remittance is to be equally borne by the both parties.

(c) Mixed Charter Party

[12] The "Regent Button" / 16 Sept., 1980 / N.Y.P.E.

Whether the long waiting of the Vessel under the Charterer's instructions was beyond the extent of the charter party - Whether the Charterer shall be responsible for damages and expenses arising from the long waiting

This charter party was concluded in the form of time charter party and to the effect that the Charterer hired the Vessel from the Owner "for one Time Charter trip". The Vessel wandered, sailed and moored in response of the instructions of the Charterer to wait for the solution of dispute between the Charterer and the sub-charterer, from the moment when the Charterer ordered the Master to stop putting the Vessel into the port of Wari, Nigeria after she arrived off

Wari on 29th Jan.,1978, to the time when she arrived at the port on 15 June in the same year. The Owner (the Claimant) argued that such prolonged waiting of the Vessel under the Charterer's instruction was in conflict with the effect of this contract and therefore the latter shall be responsible for damages and expenses caused by it.

<Holding> Referring to the term " for One Time Charter trip via safe port(s) Japan to West Africa" stated in the Preamble, it is recognized that this contract was the charter party for a one-way voyage from Japan to West Africa. This contract was concluded in the New York Produce form, but the period of charter was fixed not in the form of a definite or approximate period of time, but in the form of the specified voyage. This is, though the coverage of the contract is one specified voyage, the contract which uses the clauses of time charter party about the way of arrangement of freight, share of expenses an so on, mainly in order to make the Charterer bear the risk of prolongation of the period of voyage. This "mixed charter party" is the type of charter recently coming to be widely used.… In the mixed charter party, the specific voyage stipulated has definitive importance to determine the geographical extent of the contract. In the light of such nature, the use of the Vessel covered by the contract is limited to the extent of the specific voyage which is the main factor of the contract as stated above. Consequently, it can be said that the Charterer does not have the right to use the Vessel beyond the extent of the specific voyage on both the geographical extent and the period of time.

… It is clear that unavoidable periods of waiting due to congestions of the ports concerned are included within the specific voyage stipulated by the parties, but the use of the Vessel other than operations necessary to load, carriage and discharge the cargo to be loaded in the voyage is not include there.… On the other hand, the Clause 8 of this charter party stated "the Captain shall prosecute his voyages with the utmost despatch." and imposed on the Captain the obligation to perform the voyage without delay. As mentioned above, however, this contract is different from an usual time charter party in that it covers the specified voyage. Accordingly, in this contract, as it is the intent of both the parties

to complete specified voyage with speed, it is seemed that not only the Captain but also the Charterer shall have the obligation and he has to cooperate the Captain to complete the voyage with dispatch.

In conclusion, the instruction of the Charterer in question, which was beyond the extent of this contract and made the completion of the specified voyage considerably delayed, came under a breach of the contract on the grounds that this contract was the particular charter party covering the specified voyage, that the parties concerned have the obligations to cooperate each other to complete the voyage with dispatch, and that the circumstances of this voyage is to be taken into consideration.

Notes :

1) Under the Rules of Maritime Arbitration of JSE, the arbitral award is generally published and the reason is attached to almost every award. Exceptionally, when the dispute is settled amicably during the procedure of arbitration and the parties wish the arbitral award for the possible enforcement, the award without reason is made on the agreement of the parties. It is usual for the parties to withdraw the arbitral procedure when the amicable settlement is reached.
2) Published in the Kaijiho-Kenkyukaisi, no.76.
3) Published in the Kaijiho-Kenkyukaisi, no.77.
4) Published in the Kaijiho-Kenkyukaisi, no.84.
5) Published in the Nihon-Kaijichusai-Handan-Zenshu, vol 3, p.1013
6) Published in the Nihon-Kaijichusai-Handan-Zenshu, vol 3, p.1071
7) Published in the Kaijiho-kenkyukaisi, no.49.
8) Published in the Kaijiho-kenkyukaisi, no.61.
9) Published in the Kaijiho-kenkyukaisi, no.83.
10) Published in the Kaijiho-kenkyukaisi, no.61.
11) Published in the Kaijiho-kenkyukaisi, no.55.
12) Published in the Kaijiho-kenkyukaisi, no.52.
13) Published in the Nihon-kaijichusai-Handan-Zenshu, vol. 3, p.1086

＊For further information or details please contact the author c/o the Japan Shipping Exchange, Inc.

Maritime Law Seminar in Tokyo

The followings are the full texts presented by the speakers at the Maritime Law Seminar held in Tokyo on 25 June, 1991, organized by the Japan Shipping Exchange, Inc. Both of the Speakers, John D. Kimball, Esq. and Robert G. Shaw, Esq. are partners in the Law firm of Healy & Baillie of New York. The presentations were excellent and attractive ones to all of the attendants.

SOME CURRENT TOPICS OF INTEREST IN NEW YORK ARBITRATION

John D. KIMBALL

Every shipowner or charterer in the audience today knows that even though we can wish it were otherwise (1) there is no such thing as a dispute free charterparty and (2) there is no such thing as a perfect judicial or arbitral forum to have disputes resolved. We have all participated in the never-ending debate about whether New York or London is the best place to arbitrate; in recent years, other cities, including Tokyo, and Vancouver, or Hamburg, have made claims of being the best place to have disputes arbitrated. The reality is that there is no "best" place. Arbitration and litigation are like the highways all around the world, there seems to be more congestion and larger traffic jams every year. And like automobiles, the cost seems to be always increasing beyond anything we would have imagined possible even a few years ago. The arbitration process everywhere has become slower, more complex and more expensive than most shipowners or charterers thought possible. To a large extent, the reason for this is that arbitration often involves large sums of money and disputes which require careful preparation and testimony from numerous fact witnesses and experts. It has been my own experience, however, that in the usual mari-

time case, arbitration works quite effectively to achieve commercially sensible decisions.

I know that many of you are either now or in the past have been involved in New York arbitrations. No doubt you will have cases in the future which require arbitration in New York. I hope you will find it worthwhile, therefore, if I speak to you today about some topics of current interest in New York arbitration. I have selected only a few topics and there are others I might have included but for lack of time. I will gladly entertain questions at the end of my talk about the subjects I will discuss or any other topic of current interest you may wish to ask about. (But please do not ask me to express an opinion about any actual case which may be ongoing or about to go to arbitration.)

II

Security in Aid of Enforcing Awards

Normally, the purpose of submitting a claim to arbitrators is to recover money. Arbitration awards are not enforceable on their own, however, and unless payment is made voluntarily, have to be converted to judgment to be enforced. Once a judgment is in hand, that is of no value whatever again unless the judgment debtor pays voluntarily or there are sufficient assets to execute against. Getting a judgment that cannot be converted into money in your own bank is the classic example of winning the battle, but losing the war. Unfortunately, it has happened far too often in the shipping industry in the past 15 years.

The ability to procure security for a claim is, therefore, always a topic of great importance. This is especially true in a time when even many major and well known companies have cash flow problems or other financial strains. If your opponent has assets in the United States, it is often possible to obtain pre-award security by one or more of several procedures. It is clearly a strength of maritime arbitration in New York that a relatively efficient judicial system is available to enable the claimant to obtain security for

its claim.

The right to obtain security is provided for by statute in Section 8 of the Federal Arbitration Act. The Federal Arbitration Act contains, among other things, provisions to enable parties to enforce arbitration agreements, to appoint arbitrators, and to confirm or vacate awards. Section 8 of the Act permits a claimant to obtain security for his claim by arresting or attaching the vessel, cargo, bank accounts, orother property of the defendant. Even though the underlying claim may be subject to arbitration, the full range of maritime security devices is available to the claimant. In addition, non-maritime state law attachment remedies may also be used under Section 8 of the Arbitration Act. I should note that Section 8 can be invoked to obtain security even if the arbitration clause in the charter provides for arbitration in London, Tokyo or some other jurisdiction outside the United States. Thus, it is possible to bring an action in the U.S. solely to obtain security for a claim that will be arbitrated here in Tokyo.

In a recent case decided by the District Court of Connecticut,for example, Connecticut state law attachments were permitted in aid of claims which are subject to London arbitration under the charterparty.*Bergeson v. Lexmar.*

While the arrest or attachment remedies available pursuant to Section 8 are quite valuable, what of the situation in which the defending party has no assets in the United States which can be seized? Seizing assets in a foreign jurisdiction in aid of the New York arbitration may be possible depending on the law of the country where assets are located. In addition, although this procedure has not been invoked often, it seems clear that New York arbitrators themselves have the power to direct a party to post security whenever they consider it appropriate to do so. There is little case authority on this subject, but it seems to me to be entirely consistent with the broad latitude normally allowed arbitrators that they should be empowered to require the posting of security where appropriate. Several of the most influential arbitrators in New York have stated that they agree they have this pow-

er. It certainly cannot be said that arbitrators will consider that there is an automatic right to security in every case which comes before them. At the same time, it is also fair to say that arbitrators have this power, and, in appropriate circumstances, should exercise it.

III
Partial Final Awards

It is not uncommon to have numerous different disputes arise under the same charter. Sometimes a party considers that one of its claims is urgent in nature and should be decided on an expedited basis, without being tied to a resolution of other disputes which may have come up under the same charterparty. Indeed, it is not entirely unheard of for a party to "invent" counterclaims for the purpose of merely dragging out and delaying the arbitration process in order to put off the day when he will have to pay up. It is well settled in the United States that arbitrators have the power to issue partial final awards when they consider it appropriate to do so. Thus, arbitrators are empowered to issue partial final awards on discrete issues even while the arbitration as to other disputes under the same charterparty continues. Our courts have held that such partial final awards can be converted into judgments which can be executed.

The most frequent use of the partial final award is in the common situation where freight has been withheld under a voyage charter in connection with a cargo loss or shortage claim. Unless the charterparty provides otherwise by virtue of a freight retention clause or other provision, the general rule in New York is that there is no right to withhold freight as security for a cargo loss or damage claim. There have been numerous cases where arbitrators have entered partial final awards directing a party who has withheld freight to secure a cargo claim to make immediate payment with interest from the date the funds should have been paid. There are several awards in which arbitrators have felt it was appropriate to award attorneys' fees to the prevailing party in this situation. *See, e.g., The Caribou,* SMA

2695 (Arb. at N.Y. 1990).

Thus, the availability of partial final awards makes it possible for a claimant in New York arbitration to obtain a relatively quick and expeditious award which can be converted into an enforceable judgment even though there are other ongoing disputes between the parties.

IV
Vouching In and Consolidation

It is not uncommon for a dispute to arise between an owner and charterer in which one or both of the parties consider that the ultimate responsibility for the claim rests with a third party. For example, suppose a case where cargo has been damaged during loading or discharge as the result of negligence on the part of the stevedore. As between owner and charterer, responsibility for the cargo damage will be allocated pursuant to the division of responsibilities among them in the charterparty. Whichever party is liable under the charter, however, it will want to seek indemnity or contribution from the stevedore because of its negligence. But pursuing the indemnity or contribution claim might mean commencing a whole new legal action against the stevedore in which the entire claim might have to be proved again.

Fortunately, the law has developed a procedure which can short circuit this process of shifting liability to the stevedore or any other third party. This procedure is known as "vouching in." While vouching in is commonly used in litigation, the ability to use it in connection with arbitrations was not well settled until 1988 when the Court of Appeals for the Second Circuit (which sits in New York City) issued its decision in *SCAC Transport (USA) Inc. v. S.S. Danaos,* 845 F.2d 1157 (2d Cir. 1988). In that case, the court held that a stevedore was bound by the result of a London arbitration between owner and charterer after the stevedore had been properly vouched into the proceeding. The vouching in procedure involved the sending of a letter in which defense of the claim was tendered to the stevedore, who de-

clined to accept it . The letter said words to the effect that "A claim has been made against us for stevedore damage on which we hold you ultimately liable. We hereby tender defense of the claim to you and demand that you defend the claim and hold us harmless from this liability." The arbitration then proceeded in the stevedore's absence and an award was eventually entered in favor of owner and against the charterer. The charterer then sued the stevedore for indemnity in New York and the court held that the stevedore was bound by the finding of the London arbitrators because of the vouching in notice. The rule appears to be that a proper vouching in notice will bind a third party to the outcome of an arbitration, unless he can show some form of prejudice.

The vouching in process, of course, is not limited only to situations in which stevedores are involved. The process can be used in an arbitration in which any third party might be deemed to be ultimately liable to indemnify owner or charterer with respect to the liability it has incurred under the charterparty to the other party. Of course, this process is only effective in cases where you are able to sue the third-party in a jurisdiction which recognises the validity of the vouching in process. The U.S. courts do so.

The vouching in procedure is effective and useful when there is no arbitration agreement which can be invoked as against the third party. But what of the situation where there is a chain of charterparties, all of which contain arbitration clauses or perhaps bills of lading which also incorporate the arbitration clause of the charter? It is well settled in New York that disputes under two or more charterparties which involve common issues of fact and law can be consolidated into a single proceeding. There is nothing in the Federal Arbitration Act which confers this power. Instead, this is a judicially created doctrine.

I should hasten to mention that other courts in the United States are not unanimous in their support of consolidation or arbitrations. Indeed, while the position in New York appears to be well settled in favor of consolidation, courts in several other circuits in the United States have ruled

otherwise. See, for example, *Weyerhauser Co. v. Western Seas Shipping Co.,* 745 F.2d 635 (9th Cir. 1984). There is merit in both positions. Arbitration is a creature of conduct and parties can be compelled to arbitrate only those disputes they have agreed to resolve by that process. Courts which do not favor consolidation have said that it is contrary to the whole idea of arbitration to force party A who has a claim against party B to consolidate that arbitration with another arbitration between B and C. These courts say that consistent with the whole concept of arbitration, consolidation is proper only when all the parties have consented.

The courts in New York take the view, however, that consolidation can be compelled even against unwilling parties where the claims involved concern common issues of fact or law in order to promote efficiently and save on costs. Thus, the contracts at issue call for NewYork arbitration, if disputes under different charters involve common issues of fact and law, it is reasonably certain that the courts would order consolidation of the arbitrations if one or more of the parties so desired, even if another party refuses.

The classic example of a situation where consolidation is helpful is where there is a chain of charters for the vessel and a dispute arises which effects parties under all of the charters. For example, suppose the vessel is time chartered by A to B, and voyage chartered by B to C. The stevedores damage the vessel during loading and A demands payment from B as the responsible party under the time charter. As middle charterer, however, B will look to C to pay. In reality, the dispute is between A and C, with B in the middle in a pass-through situation bacause there is no contract between A and C. It makes great sense to consolidate what would otherwise be agreeable arbitrations between A and B and B and C in this situation. If it prevails, its award will be against B, while B getting a separate award against C. Consolidation does not mean that it can get an award against C directly.

The procedure generally followed in New York is for the parties to agree on a consolidation before a panel of three arbitrators.Various

approaches have been developed to selecting the arbitrators. Normally, owner and, in an appropriate situation, subcharterer will each select an arbitrator and the two so chosen will designate a third. Following this approach, the middle charterer will effectively waive its right to appoint an arbitrator. An alternative procedure sometimes followed is for all three parties involved to appoint one arbitrator. Of course, this procedure will not work where there are more than three parties involved. There have been cases where five person arbitration panels have been formed by court order when the parties could not agree among themselves how to proceed. The five person panel has invariably been demonstrated to be a highly cumbersome and delay prone procedure which is better to avoid if at all possible.

Some unusual types of consolidations have taken place by court order. Indeed, the Court in New York has even attempted to consolidate a London and New York arbitration. *See Elmarina, Inc. v. Comexas,* 679 F.2d 388 (S.D.N.Y. 1988). The court found in the circumstances of that particular case that there were common issues of fact and law and that consolidation would be very helpful, despite the fact that one of the arbitration clauses provided for London arbitration. The court noted, however, that it had no jurisdiction over the London arbitration and the court could only urge the parties to abandon the London arbitration and dispose of all of the claims in a consolidated New York proceeding.

V

Awarding Attorneys' Fees

One significant point of difference between New York and London arbitration concerns awards of attorneys' fees. Whereas the usual rule in England is to award costs, including a large percentage of attorneys' fees incurred, to the prevailing party, the general practice in the United States is the opposite. The usual practice in the United States is that each party to a litigation or arbitration will bear its own costs and attorneys' fees. As a general principle, New York arbitrators have also followed this approach.

There has long been a question as to the power of arbitrators to award attorneys' fees to the prevailing party if the charter does not explicitly confer this power. There are several case decisions which hold that unless the arbitration clause expressly provides that the arbitrators have this power, they do not. Thus, under the standard New York Produce Exchange arbitration clause, for example,arbitrators do not have power to award attorneys' fees because no provision is made in that clause which gives them this power. On the other hand, virtually all of the arbitration clauses used in tanker forms expressly provide that arbitrators will have power to award attorneys' fees. Courts will certainly enforce the latter type of clause.

There have been some recent decisions in New York which have expanded the power of arbitrators in this area. It is fairly standard practice in New York arbitration for both sides to demand an award of attorneys' fees and this often occurs even where the arbitration clause makes no provision for such an award. It has been held that if both parties claim attorneys' fees, this has the effect of creating an agreement between them that the arbitrators have power to award such fees. *(Sammi Line Co. Ltd. v. Altamar Navegacion S.A.,* 1985 AMC 1790 (S.D.N.Y. 1985). Recently in *U.S. Offshore v. Seabolt Offshore,* 1991 AMC 616 (S.D.N.Y. 1990), the court held that arbitrators did not exceed their authority in awarding attorneys' fees because both parties sought an award of such fees.

There appears to be an increasing trend in New York arbitration to award attorneys' fees in cases where it appears that no good faith basis existed for opposing a claim; where a frivolous claim was asserted; or where the conduct of one of the parties was wrongful or in bad faith. In one recent case, attorneys' fees of about $137,000 were awarded to the prevailing party where the panel found that the vessel owner had engaged in a pattern of cargo theft of oil cargoes and had used the stolen cargo as fuel. *The Lauberhorn,* SMA 2195 (Arb.at N.Y. 1990). Attorneys' fees have also been awarded where one side had to engage attorneys to compel the other to appoint an arbitrator where no good faith basis existed for opposing the

arbitration demand. *E.G., The Gulf Grain,* SMA 2692 (Arb. at N.Y. 1990) (owner awarded $3,000 to cover costs of compelling charterer to arbitrate); *The Hafaia,*SMA 2721 (Arb. at N.Y. 1990) (owned awarded $5,000 for legal fees for petition to compel arbitration). Attorneys' fees are also likely to be awarded where freight has been wrongfully withheld and owner has incurred legal expenses in obtaining security or obtaining an award. *E.G., The Arosa,* SMA 2725 (Arb. at N.Y. 1990).

VI
Vacating Awards

There is no right of appeal from a maritime arbitration award in the United States. The lack of a right of appeal is a major difference between arbitration and court litigation and is consistent with the overall purposes of commercial arbitration. Nonetheless, the lack of a right of appeal does not mean that arbitration awards are entirely immune from legal attack. Under the Federal Arbitration Act and most state laws, statutory grounds exist for attempting to have an arbitration award vacated or set aside. This is actually a large topic and I do not intend to attempt to present any comprehensive discussion of the several possible grounds which exist for attempting to have an award set aside.

One of the fundamental concerns any party to an arbitration has is that the arbitrators be objective and disinterested persons with no financial or other direct personal interest in the outcome of the arbitration. The question of bias has fortunately rarely been a problem in New York arbitration where we have a relatively large pool of highly experienced commercial arbitrators to choose from. One of the important grounds which exist in the United States to have an arbitration award set aside is bias or, to use the statutory phrase, "evident partiality." In order to have an award set aside on this ground, the moving party must prove that there was actual bias on the part of the arbitrator. Since it would be the very rare case where an arbitrator admitted to being biased without recusing himself from the Panel,

actual bias is always difficult to prove. In those few cases where it has been found to exist, it is usually based on circumstantial evidence from which any reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration.

The arbitration process in New York is designed to screen out any existence of evident partiality or bias. Arbitrators are required to make detailed disclosures of their business and personal relationships with the parties to the arbitration, including counsel. The arbitrators are open to question about these relationships. If a party considers that one of the arbitrators is biased against it, the appropriate procedure is to make an immediate protest and request that the arbitrator step aside and withdraw from the proceedings. The decision whether to do so, however, rests entirely with the arbitrator. The court has no power to intervene in the arbitration process to require that an arbitrator recuse himself. Thus, if there is bias, the only remedy available is to have the award set aside after the proceedings have been concluded.

There is a recent decision in New York where an arbitration award was set aside on grounds of evident partiality which may be of interest to you in showing how this process works. The case is called *The Statheros,* 1991 AMC 1874 (S.D.N.Y. 1991) and involved an alleged shortage of a cargo of fuel oil. The claim of evident partiality concerned the chairman of the arbitration panel who had been selected by the two party appointed arbitrators. At the time he was appointed chairman of the panel, the arbitrator was the president of the New York agent of a shipowning group. That owner, however, was engaged in a separate arbitration with the same charterer. As soon as charterer became aware of the appointment of the chairman, it protested. The chairman had participated in the other case as a witness and in effect as a party by virtue of his capacity as president of the shipowning group's agent. At the first hearing, the chairman was asked by charterer to resign from the panel because of his involvement in the other dispute. The chairman refused on the grounds that he had no personal financial interest

or stake in the outcome of the other arbitration and considered that he could decide the case objectively. The arbitration then proceeded and charterer made only a partial recovery granted by two of the arbitrators, including the chairman, over the dissent of the third arbitrator who had been appointed by the charterer. In reviewing the case to determine whether there was sufficient evidence of evident partiality on the part of the chairman, the court particularly focused on the fact that the majority of the arbitrators had set their own fees at amounts very substantially higher than the dissenting arbitrator and had allocated 60% of that cost to charterer. The court concluded that this was indicative of a general bias against the charterer and that, by virtue of his participation in the other pending arbitration, the chairman was guilty of bias. On this footing, the court set the award aside. The case is presently on appeal to the Second Circuit.

I mention this decision not because it advances any new points of law or because I think it is correct. Indeed, for what is worth, I think this particular decision is incorrect. I mention it, however, because it is indicative of a clear policy in the United States to attempt to ensure to the maximum extent possible that the arbitration process be free of bias which would not only prejudice a party to particular arbitration but can leave a black mark in the process as a whole.

VII

Small Claims Procedure

Arbitration is often most effective in resolving relatively small claims. Several years ago, a procedure was devised in New York by the Society of Maritime Arbitrators to formalize the resolution of small claims quickly and inexpensively. The procedure can be used for claims of $15,000 or less and involves the submission of the claim on documents only to a sole arbitrator selected by them or, in the absence of agreement, by the secretary of the SMA from a list of candidates. One hearing is held (if either of the parties wish) and written briefs can be submitted. The arbitrator is then required to

issue his decision within 4 weeks. The arbitrators' fees cannot exceed $800.

The procedure has been used effectively. Indeed we are seeing charters with arbitration clauses which specifically provide for use of this procedure for claims under $15,000 and in my opinion, this is quite sensible.

VIII

Turbulence in the Safe Port Doctrine

Let me turn now from the arbitration process to a substantive area of law, namely, the safe port doctrine. For many years, the law concerning safe ports had found a rather secure berth in maritime law and it was well settled that a safe port clause in a time or voyage charter constituted a warranty given by charterer to owner. Recently, however, the settled waters of the safe port warranty have been disturbed by the decision of the Court of Appeals for the Fifth Circuit (which encompasses Louisiana, Mississippi and Texas) in *Orduna S.A. v. Zen-Noh Grain Corp.*, 913 F.2d 1149, 1991 AMC 346 (5th Cir. 1990). The Court of Appeals for the Second Circuit (including New York, Connecticut and Vermont) and the vast majority of New York arbitration panels who have decided safe port cases have long followed the basic proposition set down in (*The Eastern City*), that a safe port clause provides a warranty that the port nominated by the charterer will be completely safe for the particular vessel so that she can proceed there and leave in the normal course of operations without being exposed to risks of physical damage. (*See, e.g., Venore Transportation Co. v. Oswego Shipping Corp.*, 498 F.2d 469, 1974 AMC 827 (2d Cir. 1974), *cert. denied* 419 U.S. 998.) This rule has been followed in a large number of court decisions and New York arbitrations. Under this rule, there is a duty on charterer to ensure the safety of the port or berth, the breach of which imposes liability on it for any damage or resulting financial loss suffered by the vessel or owner.

In *Orduna,* the Fifth Circuit declined to follow this standard. According to the Court:

> …no legitimate legal or social policy is furthered by

> making the charterer warrant the safety of the berth it selects. Such a warranty could discourage the master on the scene from using his best judgment in determining the safety of the berth. Moreover, avoiding strict liability does not increase risks because the safe berth clause itself gives the master the freedom not to take his vessel into an unsafe port.
>
> In conclusion, we hold that a charter party's safe berth clause does not make a charterer the warrantor of the safety of a berth. Instead the safe berth clause imposes upon the charterer a duty of due diligence to select a safe berth.

1991 AMC at 356.

At this writing, it is not possible to predict whether the Supreme Court will resolve the conflict between the Second and Fifth Circuits. It will not do so in *Orduna* because no appeal was taken to the Supreme Court. I disagree with the Fifth Circuit, particularly in its emphasis on "legal or social policy." The charterer's undertaking to provide a safe port or berth is a matter of contract and has long been widely accepted in the shipping industry as a custom of the trade. It is difficult to comprehend what policies are offended by the safe port warranty since, based as it is on the commercial reality that it is charterer rather than owner who is selecting the port or berth, it can hardly be said to have arisen from other than arms length bargaining. The warranty can be and often is modified by contract either by the inclusion of language which reduces it to a due diligence standard or by owner's acceptance of a named port which has the effect of waiving the warranty entirely. Moreover, courts and arbitrators have consistently held that the safe port/safe berth warranty does not relieve the master of his duty to exercise due care in navigating the vessel. *See, e.g., The Mercandian Queen,* SMA 2713 (Arb. at N.Y. 1990), discussed below.

The Fifth Circuit's analysis of prior case law is also flawed in my view, although this would not seem to be the most appropriate forum to discuss at

any length the court's legal analysis and, in my view, the court's reliance on other case precedent.

It is entirely unclear what practical effect, if any, *Orduna* will have. Certainly the decision is binding precedent in cases decided in the states which comprise the Fifth Circuit, but the issue arises there on a relatively infrequent basis. New York courts and arbitrators are unlikely to follow *Orduna.* If you are involved in a charter, however, where the safe port warranty is considered important, it would be appropriate to draft express wording to convey the intention of the parties that there be a warranty on the part of charterer. In the absence of such a clear expression of intent, there is a risk the court or arbitrators will follow *Orduna* and hold that there is no warranty, but only a duty on charterer not to act negligently in designating a port or berth.

What is the difference between the safe port warranty and the due diligence standard set out in *Orduna*? A recent arbitration award illustrates the difference. *See The Mercandian Queen,* SMA 2713 (Arb. at N.Y. 1990). The charter was on the NYPE form. The vessel discharged a cargo of railway trailers at Ilo, Peru, at a new RO/RO berth which had not previously been used by a ship her size. During discharge, the vessel struck a large rock on the bottom which holed the vessel's hull. The rock was not noted on any chart and prior to this occurrence was unknown to the local pilots and port authority. The panel held that charterer was liable for the damage by virtue of the safe berth warranty. The panel stated that it was convinced that neither charterer, nor owner, nor the local pilot were aware of the uncharted rock and that charterer had "quite innocently designated an unsafe berth." While the panel imposed liability on charterer because of its safe port warranty, it is readily apparent that under *Orduna,* charterer would not have been liable. Charterer was not neligent in designating the berth and, indeed, the panel specifically found that charterer had acted "innocently" in designating what turned out to be an unsafe berth.

ENFORCING LIENS ON CARGO AND SUBFREIGHTS IN THE UNITED STATES

Robert G. SHAW

The United States Supreme Court established the main principles of American law concerning the lien on cargo in the second half of the 19th century.[1]

Like all other liens recognized by the general maritime law of the United States the lien on cargo is enforceable by process *in* rem pursuant to Rule C of the Supplemental Admiralty Rules of the Federal Rules of Civil Procedure. Unlike all other maritime liens, the lien is however, in some degree possessory. This does not mean that a shipowner can only enforce the lien by never giving up possession of cargo, but it cannot unconditionally release cargo without losing the lien. The shipowner must either discharge the cargo into a facility under its control or deliver the cargo with an adequate reservation of the lien.

1. Major Differences Between American and English Law

By contrast, English law does not grant a lien on cargo nearly as extensive as the American lien. The English "common law" lien, as it is called, is so narrow in scope that it can rarely, if ever, be relied on by shipowner.

The English common law lien is described in detail in Scrutton.[2] It does not secure hire or demurrage. It only secures freight if freight is payable contemporaneous with discharge. Under modern voyage charters freight is not payable contemporaneous with discharge. In addition to the English common law lien, under English law the parties to a contract of affreightment can create by agreement a more extensive possessory lien. Charter forms regularly in use today expressly grant an owner a lien on cargo for freight and demurrage or if a time charter, for hire.

Although the shipowner's lien on cargo under American law is much broader than the English common law lien, there are many cases either where the American lien does not exist or cannot, for various reasons, be enforced.

2. Pre-Paid Bills of Lading

This happens most clearly where the shipowner in a charter authorizes the charterer to issue bills of lading for the vessel or agrees that the master will sign bills of lading as presented. If bills of lading are issued bearing the words "Freight Prepaid", no cargo lien can be enforced.

The issuance of "freight prepaid bills of lading can be disastrous, particularly for a shipowner already experiencing cashflow problems. If a vessel is on a time charter trip, bills of lading are often issued after only the first installment of hire has been paid. If a vessel is on a voyage charter bills of lading are often issued before freight becomes payable. After freight prepaid bills are issued the shipowner is obliged in either case to the holder of the bills, if not the same person as the charterer, to complete the voyage or risk a claim for damages and the arrest of its vessel. In either case the shipowner has no lien for hire or freight and demurrage.

Where freight prepaid bills of lading are issued on liner terms, the shipowner is obliged to complete the voyage without any security for the unpaid freight or hire. It is also exposed to the risk of an arrest of its vessel if it does not pay loading or discharging costs.

There is very little a shipowner's lawyer can do after a problem like this arises except to caution against the shipowner doing something hasty which may lead to a big claim and an arrest of the vessel. The most useful advice can only be given before a fixture is agreed. If the trading record or financial strength of a charterer is doubtful, an owner should either not fix or if this is commercially unrealistic, should insist that the charter specify that prepaid bills will not be issued. Owners should also check that the lien on cargo can be enforced at the discharge port or range of ports specified in the charter.

3. Cargoes on Which Freight Has Been Paid

The lien on cargo also does not exist under American law where the cargo is owned by a third party who is not a party to the charter but is a party to some other contract governing the cargo and has paid all freight due under that contract. To give a simple example: although the lien can be enforced on cargo covered by freight collect bills of lading, it can only be enforced to the extent of the unpaid amount of freight due on the bills of lading.[3]

Bills of lading are often issued which do not state a rate of freight. For example, most bills of lading for oil cargoes discharged in New York harbor do not specify a freight rate. The cargo often has been loaded on the vessel chartered by the chartering arm of an oil company or oil trader. By the time of the vessel's arrival at New York, the cargo often has been sold by the oil trader to a third party, under a contract which typically does not specify that a particular portion of the purchase price is allocable to transportation of the cargo to New York.

In such a case, even if all the other pre-conditions exist for the proper assertion of the lien, it is at least open to question whether the cargo be liened to the extent of a freight portion to be allocated to the purchase price in the cargo sales contract.

4. Obstacles To Enforcement

Problems enforcing the lien often arise at foreign discharge ports. Although the charter may be governed by American law and although the necessary conditions may exist under American law for the lien to be enforced, often local law or practice prevent the lien's enforcement at the discharge port. The laws at many discharge ports around the world do not recognize a lien on cargo or if they recognize such a lien the legal machinery often does not exist there for effective enforcement. This may be because of the way in which the courts or the legal system operate at the country in question. It may also be because the

consignee is a government entity and that at the particular port legal actions cannot be taken against government entities either as a matter of law or practice.

Problems may also arise because under the law of the particular place for the lien to be exercised the cargo has to be discharged into a special bonded warehouse. There may however be no available storage space at the warehouse in question in which to effect the discharge.

Fortunately there are some cases where the lien can be enforced. The ideal pre-conditions for the enforcement of the lien are as follows: First, the bills of lading are not marked freight prepaid or do not otherwise negate the existence of the lien. Second, the discharge port is in the United States or at a place where the law not only recognizes the lien but also enforces it in a prompt and predictable fashion. Third, the cargo is owned by the charterer and not by some third party, or if it is owned by some third party, subfreight or sub-charterhire or the identifiable freight portion of a C&F contract is still due from that party in respect of the cargo. Fourth, the owner discharges the cargo in a way does not amount to an unconditional delivery. That is the owner discharges the cargo subject to an adequate reservation of its lien.

If all of these circumstances apply, the lien is enforceable. In most cases, not all of these conditions exist.

Assuming, that the first three preconditions are satisfied i.e. (a) that the bills of lading are not marked freight prepaid; (b) that the discharge port is not in an unsuitable jurisdiction and (c) that some subfreight or subcharter hire or the freight portion of a C&F contract is owed in respect of the cargo, the question remains whether there has been an unconditional delivery of the cargo.

A large number of nineteenth and early twentieth century cases indicate quite clearly that providing the shipowner does not release the cargo unconditionally but does so only with an adequate reservation of his lien at the time of delivery, the lien survives even against a third party to the extent of any unpaid freight due from that third party on the cargo.[4]

This principle — that a qualified delivery saves the lien as opposed to a con-

tractual provision with the third party — is consistent with the notion that the American maritime lien on cargo arises by operation of law and unlike the lien usually relied on by shipowners under English law does not depend on a contract provision for its existence. By way of distinction, a lien on subfreights does have to be expressly stated in a contract of affreightment.[5]

In the last 20 years, however the 2d Circuit and 5th Circuit have stated in confusing dicta that for a third party to be bound by the lien on cargo, notice of the lien has to be given to the third party in a contract between the shipowner and the third party.

Oceanic Trading against the Vessel "Diana",[6] involved a disputed lien on subfreights, not on cargo. The Second Circuit nevertheless stated that not only a lien on subfreights but also a lien on cargo has to be the subject of a contract to be enforceable against a third party consignee. The Second Circuit as support for its dicta referred to a footnote at page 517 of Gilmore & Black which makes the same over-broad statement itself without citing any supporting authority.

In *Goodpasture v. M/V "Pollux"*,[7] the Fifth Circuit held that a shipowner could not exercise a lien on a cargo against a seller of the cargo at the load port who retained title to the cargo, where the seller had not chartered the vessel and no bills of lading had been issued. The Fifth Circuit reasoned that because the shipowner had no contract with the seller of the cargo it followed that it had no lien on the cargo.

This reasoning appears to be imperfect. While it was true that the shipowner had no *in personam* claim against the seller, this did not mean that a lien could not arise on the cargo. The correct reason no lien existed was because no freight had yet become due under any contract and no bill of lading had been issued for the cargo. Neither the *Oceanic* case nor the *Pollux* case can safely be relied on as overthrowing the principles established by the Supreme Court in the 19th century which do not require a lien on cargo to be incorporated into a bill of lading to be binding on a consignee, to the extent of any unpaid freights due in respect of the cargo.

5. Avoiding An Unconditional Delivery And Preserving The Lien On Discharge

Various problems can arise which make it difficult to avoid an unconditional delivery. First there may be no separate storage space for the cargo at the discharge port into which the shipowner may discharge the cargo subject to its claim of lien. In such circumstances the shipowner may risk being held, if he discharges the cargo to the consignee's possession, to have effected an unconditional delivery thus waiving his lien. Second the charter, as is typical in tanker voyage charters, may state that freight is payable only after delivery. If the shipowner does not deliver the cargo to the consignee but to a separate facility, he may be met with the argument that no freight is due and therefore no lien exists. On the other hand, if the cargo is delivered to the consignee, the shipowner risks losing the lien by unconditionally giving up possession. This is particularly a risk where the cargo is discharged into a facility under the control of consignee, where it is mixed with other cargo thereby causing it to lose its character. It is well established that if the cargo is mixed in this way with another commodity the lien is lost. An admixture of this kind may often happen with oil cargo discharged into shore tanks.

The older cases suggest that best way an owner can at least attempt to overcome these problems is to have the master of a carrying vessel issue a notice at the time of discharging informing the consignee that by delivering the cargo, the shipowner is not waiving its lien. Attached as Appendix 1 is the text of such a proposed notice. The owner should then follow up as quickly as possible with an arrest of the cargo.[8]

There is authority which supports the view that such a discharge based on a conditional notice does not give rise to a waiver of the lien provided following the delivery the shipowner promptly arrests the cargo.

While there are no cases in point, it is at least arguable that where the cargo does not lose its character but is merely mixed with other cargo of the same type, for example, No. 6 fuel oil mixed in a shore tank with other No. 6 fuel oil,

the fact that the total amount of product is of the same grade and is fungible in nature, should not cause a lien to be lost. At least a quantity of the product equivalent to the cargo discharged is arguably subject to the lien at the time of discharge. This is provided that the cargo was discharged subject to a notice that the delivery was conditional.

Moreover if the cargo is discharged subject to a conditional notice of the kind described above, it is also at least arguable that an admixture by the consignee of the cargo which otherwise causes the lien to be lost, can give rise to a claim *in personam* against the consignee for wrongfully interfering with the shipowner's lien right. While there is no reported case law to support such a proposition, it seems that at least a *colorable* cause of action in support of such a claim could be made.

6. Enforcing The Lien On Sub-Freights

The lien on sub-freights can be enforced by sending a notice of the lien to a sub-charterer or consignee from whom sub-freight or sub-charterhire is due.

The notice should direct the sub-charterer or consignee in question not to pay over any such sub-freight or sub-charterhire to the charterer to the extent of the amount due under the head charter which should be specified. The notice should also warn the sub-charterer or consignee in question of its risk of having to pay twice if the notice is ignored.

Attached as Appendix 2 is the text of such a notice sent successfully in *Tarstar Shipping* (see Note 5). The bill of lading holder ignored the notice, paid over sub-freights to the time charterer and was held liable to pay the shipowner the amount covered by the notice.

After serving the notice of lien, a shipowner should enforce its lien claim in the sub-freights by obtaining an *in rem* arrest of the sub-freights pursuant to the appropriate process issued by the United States District Court in the district where the sub-charterer or bill of lading holder is located. If such entity is not located in the United States, the law of its location will govern questions

whether and how the lien can be enforced.

Appendix 3 attached is a list of major U.S. authorities concerning the principles stated above.

APPENDIX 1

We are the Owners of the vessel "XX". Owner are prepared to discharge cargo from the vessel, reserving any right they may have to exercise a lien on the cargo to the extent of any amounts you may owe the charterers of the vessel in respect of freight for the carriage of the cargo. You are hereby requested not to pay any such amounts over to Charterer and to respect Owner's rights of lien in the cargo and any such freights.

APPENDIX 2

NOTICE OF LIEN

Please take notice that we represent Tarstar Shipping Co. Ltd., Owners of the M/V "Akili I.P.", under time Charter to Century Ship Lines Agencies, Inc. The vessel picked up your cargo in Louisiana, sailing on February 25, 1976 for Algiers.

Charterers, Century Ship Lines Agencies, Inc., owe the Owners Charter hire in the amount of $65,812.50 and a bunker payment in the amount of $19,259.05. Therefore this will notify you that owners hereby exercise their lien granted under the terms of the Charter Party on any freights or sub-freights owed from you to Century Ship Lines Agencies up to the above amounts and such freights can be paid only to us.

You are cautioned that if you pay to Century Ship Lines Agencies, Inc. despite this Notice of Lien you will have to pay twice.

APPENDIX 3

Enforcing Liens On Cargo And Sub-Freights

1. *LEADING SUPREME COURT CASES:*
   The Bird of Paradise, 72 U.S. 545 (5 Wall), 18 L.Ed. 662 (1866)
   The 4885 Bags of Linseed, 66 U.S. 108 (1 Black), 17 L.Ed. 35 (1861)
   THE EDDY, 72 U.S. 486 (5 Wall), 18 L.Ed. 486 (1867)
2. *THE LIEN EXISTS BY LAW UNLESS WAIVED BY AGREEMENT:*
   Atlantic Richfield Co. v. Good Hope Refineries, 604 F.2d 865(5th Cir. 1979)
   Beverly Hills Nat. Bank v. Cia de Nav. Almirante, 437 F.2d 301 (9th cir. 1971)
3. *THE LIEN ON CARGO UNDER ENGLISH LAW:*
   Scrutton on Charterparties and Bills of Lading, 19th Edition at pp. 386-391
4. *THE LIEN ON CARGO IS ONLY ENFORCEABLE TO EXTENT OF UNPAID SUB-FREIGHTS OR SUB-CHARTERHIRE*
   Carib Alba Ltd. v. 26 Units of Amusement Equipment, 1987 AMC 560 (ED VA 1985)
   American Steel Barge Co. v. Chesapeake & C Coal Agency, 115 F. 669, 672 (1st Cir. 1902)
   Jebsens v. Cargo of Hemp, 228 F. 143, 147-148 (DCD Ma 1915)
   The Albert F. Dumois, 54 F. 529 (EDNY 1893)
5. *WHETHER THE LIEN IS ENFORCEABLE AGAINST HOLDERS OF BILLS OF LADING WITHOUT SOME REFERENCE OF INCORPORATION OF THE LIEN IN THE BILLS OF LADING*
   Allen, Liens: Liabilities Arising From Delay or Failure in Performance, 49 Tulane Law Review 970, 972 (1975)
   Tarstar Shipping Co. v. Century Shipline, Ltd., 451 F.Supp. 317,327 (SDNY 1978)
   Oceanic Trading Corp, v. The Freights of the Vessel "Diana", 423 F.2d 1,5 (2d Cir, 1970)

Good Pasture v. M/V "Pollux", 602 F.2d 84 (5th Cir. 1979)

Dowar v. Mowinckel, 179 F 355,363 (9th Cir. 1910), citing English law

6. *THE LIEN ON CARGO IS LOST BY AN UNCONDITIONAL DELIVERY TO THE CONSIGNEE*

See all of the leading Supreme Court cases cited above, and:

Atlantic Richfield Co. v. Good Hope Refineries, cited in 2 above.

Beverly Hills Nat. Bank v. Cia de Nav. Almirante, cited in 2 above.

N.H. Shipping Corp. v. Freights of the S/S Jackie Hause, 181 F. Supp. 165 (SDNY 1960)

California & Eastern S.S. Co. v. 138,000 Feet of Lumber, 23 F.2d 95 (DC MD 1927)

In re 9,889 Bags of Malt, 292 F.946 (1st Cir. 1919)

Costello v. 734,700 Laths, 44 F.105 (EDNY 1890)

Egan v. A Cargo of Spruce, 41 F.830 (SDNY 1890) *affirmed* 43 F. 480

The Giulio, 34 F. 909 (SDNY 1888)

Six Hundred Tons of Iron Ore, 9 F. 595 (DCNJ 1881)

(Note)

[1] *The Bird of Paradise*, 72 U.S. (5 Wall.) 545, 18 L.Ed. 662 (1866); *4885 Bags of Linseed*, 66 U.S. (1 Black) 108, 17 L.Ed, 35 (1861); *The Eddy*, 72 U.S. (5 Wall.)486, 18 L.Ed. 486 (1867).

[2] Scrutton on Charterparties and Bills of Lading (19th Ed.) at 386-391.

[3] *Carib Alba Ltd. v. 26 Units of Amusement Equipment*, 1987 AMC 560 (ED Va. 1985); *American Steel Barge Co. v. Chesapeake & C. Coal Agency*, 115 F.669, 672 (1st Cir. 1902); Jebsen v. A Cargo of Hemp, 228 F. 143, 147-148 (D. Mass. 1915); *The Albert F. Dumois*, 54 F. 529 (EDNY 1893).

[4] *4, 885 Bags of Linseed*, cited in Note 1 above; *Costello v. 734,700 Laths*, 44 F.105 (EDNY 1890); *Egan v. A Cargo of spruce*, 41 F.830 (SDNY 1890) *aff'd, 43* F.480 (2d Cir. 1890).

[5] *Tarstar Shipping Co. v. Century Shipline, Ltd.*, 451 F.Supp. 317, 328 (SDNY 1978); *The Solhaug,* 2 F. Supp. 294, 299 (SDNY 1931).

[6] *Oceanic Trading Corp. v. The Freights of the Vessel "Diana",* 423 F.2d 1 (2d Cir, 1970).

[7] *Goodpasture v. M/V "Pollux"*, 602 F.2d 84 (5th Cir. 1979).

[8] *The Giulio*, 34 F. 909 (SDNY 1888); *Six Hundred Tons of Iron Ore*, 9 F. 595 (D. NJ 1881), and *Costello v. 734, 700 Laths*, cited in Note 4 above.

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