THE BULLETIN OF
THE JAPAN SHIPPING EXCHANGE, INC.

No. 25

March 1993

CONTENTS

Revision of Japanese COGSA

– Adoption of the Hague-Visby Rules –

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Introduction

The Japanese present Carriage of Goods by Sea Act (COGSA) was enacted in 1957 when Japan ratified the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading of 1924 (the Hague Rules).

Since then the Hague Rules have been revised twice first by the 1968 Protocol to Amend the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading of 1924 (the Visby Rules) and by the 1979 Protocol Amending the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, 25 August 1924 as amended by the 1968 Protocol(the SDR Protocol). The Hague Rules amended by the Visby Rules and the 1979 Protocol are called the Hague-Visby Rules.

The revised Japanese COGSA (Law No.69 of 1992) was therefore enacted on 3 June 1992 to incorporate both the Visby Rules and the 1979 Protocol into the

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Japanese present COGSA and to adopt thereby the Hague-Visby Rules.

This paper's main purpose is to make clear the revised points of Japanese COGSA and the correspondence among the revised Japanese COGSA, the Visby Rules, the 1979 Protocol and the Hague-Visby Rules. Some comments or explantions on them are added for foreign lawyers.

1. Effective date of revision

Supplementary Provisions 1) of the revised Japanese COGSA stipulates that it will come into force from the date when the 1979 Protocol will come into force for Japan. The instrument of accession of the 1979 Protocol is scheduled to be deposited by the Japanese Government on 1 March 1993 and will come into force for Japan on 1 June 1993 under Article 8 (2) of the Protocol.

This means that the revised Japanese COGSA will become effective on 1 June 1993 and that the Japanese present COGSA is still applicable until the date the revision comes into force.

2. Adopting procedure of the Hague-Visby Rules

1) Denounciation of the Hague Rules

The Japanese Government has notified the denounciation of the Hague Rules to the Belgian Government on 1 June 1992 and the denounciation of the Hague Rules will become effective on 1 June 1993 under its Article 15.

2) Accession to the Visby Rules through accession to the 1979 Protocol

The instrument of accession to the 1979 Protocol is scheduled to be deposited by the Japanese Government on 1 March 1993 and Japanese accession will be effective on 1 June 1993 under Article VIII (1) of the 1979 Protocol.

Japanese accession to the 1979 Protocol will also have the effect of accession to the Visby Rules under Article VII (2) of the 1979 Protocol.

3) Adoption of the Hague-Visby Rules

Japanese accession to both the 1979 Protocol and the Visby Rules means that the Hague-Visby Rules will become effective for Japan on 1 June 1993 and simultaneously the revised Japanese COGSA will start its operation.

3. Main points of revision

1) Article 1 (Scope of Act)

The first part and the second part of this Article correspond respectively to Article 5 and Article 3 of the Visby Rules and therefore to Article 10 and Article 4bis of the Hague-Visby Rules.

However, a commentator has pointed out that the scope covered by the first part of this Article is narrower than that covered by Article 10 of the Hague-Visby Rules, since Article 10 (b) and some part of Article 10 (c) of the Hague-Visby Rules were covered by the first part of Article 1 of the revised Japanese COGSA but Article 10 (a) and a part of Article 10 (c) were not so covered[1].

The commentator submitted that this discrepancy should be resolved by construing Article 10 of the Hague-Visby Rules to prevail over Article 1 of the revised Japanese COGSA, thereby expanding the scope of the revised Japanese COGSA up to that of the Hague-Visby Rules, since Article 98 (2) of the Japanese Constitution stipulated that the treaties concluded by Japan should be faithfully observed[2].

2) Article 2 (4) (Definition of One Unit of Account)

This provision corresponds to the part applicable to IMF member countries of part (d) of the Visby Rules' Article 2 amended by the 1st paragraph of the 1979 Protocol's Article II and therefore to Article 4 (5)(d) of the Hague-Visby Rules.

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1. See, Ohotori, Revision of Japan's COGSA, The Report of the Japanese Maritime Law Association No.36, p.24 (1992)
2. See, Ohotori,op. cit. p.26

3) Article 9 (Misrepresentation in a bill of lading)

This provision corresponds to part 1. of the Visby Rules' Article 1 and therefore to Article 3 (4) of the Hague-Visby Rules, although its wording is not exactly the same as that of Article 3 (4) of the Hague-Visby Rules.

The prevailing opinion of commentators is that this Article 9 should be understood to have a wider meaning than Article 3 (4) of the Hague-Visby Rules[3].

Accordingly it is submitted that the wording "any item inserted into a bill of lading" of Article 9 includes not only items specified under Article 3 (4) of the Hague-Visby Rules but also all items inserted into a bill of lading under Article 7 (1) of the revised Japanese COGSA[4].

The prevailing opinion of commentators is also that an "unkonwn" clause inserted into a bill of lading under Article 8 (2) is valid and can exclude the effect of Article 9[5].

4) Article 12bis (Amount of damages)

This provision corresponds to part (b) of the Visby Rules' Article 2 and therefore to Article 4 (5)(b) of the Hague-Visby Rules.

Although it is not clear whether the carrier shall be responsible for the delayed arrival of the goods under the Hague-Visby Rules, it is clear that the carrier is responsible for the delayed arrival of the goods under Article 3 (1) of the revised Japanese COGSA. Article 12bis of the revised Japanese COGSA provides for such carrier's responsibility.

5) Article 13 (1) (Limitation of Carrier's Liability)

This provision corresponds to part (a) of the Visby Rules's Article 2 amended by 1. of the 1979 Protocol's Article II and therefore to Article 4 (5)(a) of the

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3. See, Ohtori, op. cit., p.9
4. See, Yamashita, The Conclusive Effect of Bills of Lading, The Report of the Japanese Maritime Law Association No.36, p.44 (1992)
5. See, Yamashita, op. cit. p.47; Tanigawa, Revision of Japanese COGSA, Songai Hoken Kenkyuu Vol.54, No.2, p.164 (1992)

Hague-Visby Rules.

In this connection, a commentator has pointed out that there is a discrepancy between Article 13 (1) 1) and Article 4 (5)(a) of the Hague-Visby Rules since Article 13 (1) 1) lacked the phrase of "per package or unit" at its end[6].

In spite of the above drafting error the prevailing opinion of commentators is that this Article 13 (1) should be understood to have the same meaning as Article 3 (5)(a) of the Hague-Visby Rules[7].

6) Article 13 (2) (Definition of SDR)

This provision corresponds to part (d) of the Visby Rules's Article 2 amended by the 1st paragraph of the 1979 Protocol's Article II 2 and to Article 4 (5)(e) of the Hague-Visby Rules.

In spite of this provision it is still not clear at what time the carrier's liability expressed in SDRs is to be converted into Japanese yen.

7) Article 13 (3) (Package Limitation)

Although there is some difference of wording between this provision and part (c) of Article 2 of the Visby Rules, it is the prevailing opinion of commentators that this provision corresponds to Article 4 (5)(c) of the Hague-Visby Rules[8].

8) Article 13 (4) and Article 20bis (4)

Together these two provisions correspond to part 3. of the Visby Rules' Article 3 and therefore to Article 4bis 3. of the Hague-Visby Rules.

9) Article 13 (5)

This provision corresponds to part (a) of the Visby Rules' Article 2 amended by 1. of the 1979 Protocol's Article II and therefore to Article 4 (5)(a) of the

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6. See, Ohtori, opcit p.11
7. See, Ohtori, opcit p.12
8. See, Ohtori, opcit p.16

Hague-Visby Rules.

10) Article 13 (6)

This provisions corresponds to part (h) of the Visby Rules' Article 2 and therefore to Article 4 (5)(h) of the Hague-Visby Rules.

11) Article 13bis

This provision's part in respect of the exception to limitation of liability corresponds to part (e) of the Visby Rules' Article 2 and therefore to Article 4 (5)(e) of the Hague-Visby Rules. However, the other part in respect of the exception to the amount of damages, has no corresponding part in the Hague-Visby Rules.

12) Article 14 (1) and (2)

Sub-section (1) and (2) correspond respectively to the 1st sentence and to the 2nd sentence of sub-section 2 of the Visby Rules' Article 1 and therefore to sub-paragraph 4 of Article 3 (6) of the Hague-Visby Rules.

13) Article 14 (3)

This provision corresponds to sub-section 3 of the Visby Rules' Article 1 and therefore to Article 3 (6bis) of the Hague-Visby Rules.

14) Article 20bis (1) (Tort liability of carrier)

The first half of this provision corresponds to parts 1. and 3. of the Visby Rules' Article 3 and therefore to Article 4bis 1. and 3. of the Hague-Visby Rules.

This provision is important for maritime practice in Japan, since the Japanese Supreme Court has decided that the carrier's discharge from liability under Article 14 is not applicable in the case of tort liability of the carrier and others[9].

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9. See, Supreme Court's decision of 17 October 1969, Hanrei Jiho No.575, p.71

15) Article 20bis (2)

This provisions corresponds to part 2. of the Visby Rules' Article 3 and therefore to Article 4bis 2. of the Hague-Visby Rules.

In this connection, it is a common understanding among commentators that "the carrier's servant" of this provision does not include an independent contractor.

16) Article 20bis (5)

This provision corresponds to part 4. of the Visby Rules' Article 3 and therefore to Article 4bis 4. of the Hague-Visby Rules.

4. Correspondence among the revised Japanese COGSA, the Visby Rules, the 1979 Protocol and the Hague-Visby Rules

Japanese COGSA	Visby Rules	1979 Protocol	Hague-Visby Rules
Art.1	Art.1Arts.5 & 3		Arts.10 & 4bis
Art.2(4)	Art.2 (d)	Art.II 2. 1st para.	Art.4 (5) (d)
Art.9	Art.1 1		Art.3 (4)
Art.12bis (1)	Art.2 (b)		Art.4 (5) (b)
Art.13(1)	Art.2 (a)	Art.II 1.	Art.4 (5) (a)
(2)	(d)	2. 1st para.	Art.4 (5) (d)
(3)	(c)		Art.4 (5) (c)
(4)	Art.3 3.		Art.4bis (3)
(5)	Art.2 (a)	Art.II 1.	Art.4 (5) (a)
(6)	(h)		Art.4 (5) (h)
Art.13bis	Art.2 (e)		Art.4 (5) (e)

Japanese COGSA	Visby Rules	1979 Protocol	Hague-Visby Rules
Art.14(1)	Art.1 2.		Art.3 (6) 4th para.
(2)	Art.1 2.		Art.3 (6) 4th para.
(3)	Art.1 3.		Art.3 (6bis)
Art.20bis(1)	Art.3 1. & 3.		Art.4bis 1. & 3.
(2)	2.		Art.4bis 2.
(3)	2.		Art.4bis 2.
(4)	3.		Art.4bis 3.
(5)	4.		Art.4bis 4.

The full text of the revised Japanese COGSA has been translated into English by the author and is appended to this paper.

Appendix

The Japanese Carriage of Goods by Sea Act, 1992

Translated into English by Prof. Kazuo Iwasaki

Article 1 (Scope of Act)

The provisions of this Act (except Article 20bis) shall apply to the carriage of goods by ship from a loading port or to a discharging port, either of which is located outside Japan, and Article 20bis shall apply to the carrier's and his servant's liability for damage to goods caused by their tort.

Article 2 (Definitions)

(1) As used in this Act the term "ship" means any vessel which is defined in Paragraph (1) of Article 684 of the Commercial Code but excludes those defined in Paragraph (2) of the same Article.

(2) As used in this Act the term "carrier" means the owner, lessee and charterer of a ship who is engaged in the carriage of goods by ship as specified in the preceding Article.

(3) As used in this Act the term "shipper" means a charterer or one who consigns to a carrier the carriage of goods by ship as stipulated in the preceding Article.

(4) As used in this Act the term "one unit of account" means the amount equivalent to one Special Drawing Right as defined in Paragraph (1) of Article 3 of the International Monetary Fund Agreement.

Article 3 (Carrier's duty to exercise care over the goods)

(1) The carrier shall be liable for the loss, damage or delayed arrival of the goods

which is caused by his own or his servant's negligence for the receipt, loading, stowage, carriage, custody, discharge and delivery of such goods.

(2) The preceding paragraph shall not apply to damage arising or resulting from an act of the master, mariner, pilot or servants of the carrier in the navigation or in the management of the ship, or arising from fire on board (unless the fire is caused with the privity or actual fault of the carrier).

Article 4

(1) The carrier shall not be relieved from the liabilities under the preceding Article unless he proves the exercise of due diligence under the same Article.

(2) Notwithstanding the provisions of the preceding paragraph the carrier shall be relieved from the liabilities under the preceding Article where he proves any one of the following facts and that the damage to the goods is the ordinary result of such facts, provided that such carrier's immunity is not applicable where it is proved that the damage could have been avoided if the carrier had exercised due diligence under the preceding Article and such due diligence has not been exercised:

1) Perils of the sea or other navigable waters;
2) Act of God;
3) Act of war, riots and civil commotions;
4) Act of public enemies;
5) Seizure under legal process, quarantine restrictions or other disposal by governmental authority;
6) Act of the shipper or the owner of the goods or their servants;
7) Strikes, sabotage, lockouts or other industrial disputes;
8) Saving life or property at sea, or any deviation for such purpose, or any other reasonable deviation;

9) Quality or inherent defect of the goods;
10) Insufficiency or inadequacy of packing or marks;
11) Latent defects of cranes or other similar facilities.

(3) The provisions of the preceding paragraph shall not preclude the application of the provisions of Article 9.

Article 5 (Duty to exercise due diligence to make the ship seaworthy)

(1) The carrier is liable for damages resulting from the loss, damage or delayed arrival of the goods which arise from the carrier's own or his servant's failure at the beginning of the voyage to exercise due diligence to:

1) Make the ship seaworthy;
2) Man, equip, and supply the ship;
3) Make the holds, refrigerating chamber, and other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation.

(2) The carrier shall not be relieved from the liabilities under the preceding paragraph unless he proves the exercise of due diligence under the same paragraph.

Article 6 (Duty to issue bill of lading)

(1) After loading the goods on the ship the carrier or the master or agent of the carrier shall, on demand of the shipper and without delay, issue to the shipper one or more copies of a bill of lading showing that the goods have been loaded on the ship (hereinafter referred to as a "shipped bill of lading"). Even before loading the goods on the ship but after receiving the goods into his charge, the carrier or the master or agent of the carrier shall, on demand of

the shipper, issue to the shipper one or more copies of a bill of lading showing that the goods have been received by them (herein-after referred to as a "received for shipment bill of lading").

(2) Where a received for shipment bill of lading has been issued, the shipper may not demand the carrier to issue the shipped bill of lading unless all the copies of the received for shipment bill of lading shall be surrendered in exchange for the shipped one.

Article 7 (Preparation of bill of lading)

(1) A bill of lading shall stipulate the following (except 7) and 8) in the case of a received for shipment bill of lading) and shall be signed by the carrier or the master or agent of the carrier or shall have their names with their seal affixed thereon:

1) The kind of goods;
2) The quantity or weight of the goods, the number of packages or pieces, and the marks of the goods;
3) The apparent order and condition of the goods;
4) The shipper's full name or trade name;
5) The receiver's full name or trade name;
6) The carrier's full name or trade name;
7) The ship's name and the country of registration;
8) The loading port and the date of loading;
9) The discharging port;
10) The freight;
11) If the bill of lading has been issued in two or more copies, their number;
12) The place and date of issue.

(2) Where a shipped bill of lading is demanded to be issued in exchange for the

received for shipment bill of lading, such received for shipment bill of lading with the statement inserted that the goods were shipped and signed by the carrier or the master or agent of the carrier or having affixed their names with their seal thereon may be substituted for the shipped bill of lading . In this case the items of 7) and 8) of the preceding paragraph also shall be inserted into it.

Article 8 (Shipper's notice)

(1) The items of 1) and 2) of Paragraph (1) of the preceding Article shall be inserted into the bill of lading in accordance with the shipper's notice if such notice is available in writing.

(2) The provisions of the preceding paragraph shall not be applicable where the carrier has reasonable grounds to believe that the notice under the preceding paragraph is not accurate, or where the carrier has no suitable means to confirm the accuracy of such notice.

(3) The shipper shall guarantee to the carrier the accuracy of the notice under Paragraph (1).

Article 9 (Misrepresentation in a bill of lading)

If any item inserted into a bill of lading is contrary to the truth, the carrier can not set up against the bona fide holder of the bill of lading such defence that the items inserted into the bill of lading are contrary to the truth unless he proves that he has exercised due diligence in respect of such items.

Article 10 (Provisions applicable mutatis mutandis)

The provisions of Articles 573 to 575, Article 584 and Articles 770 to 775 of

the Commercial Code shall apply mutatis mutandis to the bill of lading under this Act.

Article 11 (Disposal of dangerous goods)

(1) Goods of an inflammable, explosive or dangerous nature whereof the carrier, master or agent of the carrier has not known at the time of shipment, may at any time before discharge be landed at any place, or destroyed or rendered innocuous by the carrier.

(2) The preceding paragraph shall not bar the carrier's claim against the shipper for damages.

(3) Goods of an inflammable, explosive or dangerous nature whereof the carrier, master or agent of the carrier has known at the time of shipment, may be landed at any place, or destroyed or rendered innocuous by the carrier if the goods are likely to be dangerous to the ship or cargoes.

(4) The carrier shall not be liable for compensation of such goods' damage arising from his disposal under Paragraph (1) or the preceding paragraph.

Article 12 (Receiver's and others' duty of notice)

(1) The receiver of the goods and the holder of the bill of lading shall give notice in writing to the carrier of loss or damage and its general nature at the time of the receipt of the goods if a part of the goods was lost or damaged. However, if the loss or damage be not apparent and discoverable immediately, it shall be sufficient for them to give such notice within three days from the time of receipt.

(2) If such notice under the preceding paragraph has not been given, the goods

are presumed to have been delivered without loss or damage.

(3) The provisions of the preceding two paragraphs shall not apply if the state of the goods has, at the time of their delivery, been the subject of a joint survey or inspection of the parties.

(4) If it is likely that loss of or damage to the goods has occurred, the carrier, the receiver and the holder of the bill of lading shall give all necessary facilities to each other for inspecting the goods.

Article 12bis (Amount of damages)

(1) The amount of damages for the goods shall be fixed according to the current market price of the goods at the place and time at which the goods should have been discharged (or according to the commodity exchange price if such price is available). However, if such current market price is not available, the amount of damages for the goods shall be fixed by reference to the normal value of the goods of the same kind and quality at the place and time at which the goods should have been discharged.

(2) The provisions of Paragraph (3) of Article 580 of the Commercial Code shall be applicable mutatis mutandis to a situation under the preceding paragraph.

Article 13 (Limitation of liability)

(1) The carrier's liability for a package or unit of the goods shall be the higher of the following:

1) An amount equivalent to 666.67 units of account;
2) An amount equivalent to 2 units of account per kilo of gross weight of the goods lost, damaged or delayed.

(2) The unit of account used in each item of the preceding paragraph shall be the final publicized one at the date on which the carrier pays damages in respect of the goods.

(3) Where a container, pallet or similar article of transport (which are referred to as containers and etc. in this paragraph) is used for the transportation of the goods, the number of containers and etc. or units shall be deemed to be the number of the packages or units of the goods for the purpose of the preceding paragraph unless the goods' number or volume or weight is enumerated in the bill of lading.

(4) Where the liability of the carrier's servant is lessened under the provisions of Paragraph (2) of Article 20bis to the limit which the carrier's liability is lessened by the preceding three paragraphs which are applied by the provisions of Paragraph (1) of the same Article, if the carrier's servant has paid the damages, the carrier's liability for the goods under the preceding three paragraphs shall be further lessened up to the amount paid by the carrier's servant.

(5) The provisions of each of the preceding each paragraph shall not be applied where the kind and value of the goods has been declared by the shipper at the consignment of the goods for transport and inserted into the bill of lading if it is issued.

(6) In the case of the preceding paragraph, if the shipper knowingly has declared a value which is remarkably higher than the actual price, the carrier shall not be responsible for the damage in connection with the goods.

(7) In the case of Paragraph (5), if the shipper knowingly has declared a value which is remarkably lower than the actual price, the declared price shall be deemed to be the value of the goods for the purpose of assessing damages

in connection with the goods.

(8) The provisions of the preceding two paragraphs shall not be applicable if the carrier acted in bad faith.

Article 13bis (Exception to amount of damages and limitation of liability)

Notwithstanding the provisions of Article 12bis and of Paragraphs (1) to (4) of the preceding Article, if the damage to goods resulted from an act or omission of the carrier done with intent to cause damage, or recklessly and with knowledge that the damage would probably result, the carrier shall be responsible for any loss of or damage to the goods.

Article 14 (Discharge from liability)

(1) The carrier shall be discharged from his liability for the goods unless a legal suit is brought within one year from the date of delivery of the goods (or the date when the goods should have been delivered in the case of the total loss of the goods).

(2) The one year period under the preceding paragraph may be extended by mutual agreement of the parties only after the damage to the goods has occurred.

(3) Where the carrier has further consigned the transport of the goods to a third party, if the carrier has indemnified the damages or a legal suit has been brought against him within the period specified in Paragraph (1), the third party's liability for the goods shall not be discharged even after the expiration of the period specified in Paragraph (1) (or the extended period if the period specified in Paragraph (1) has been extended by the mutual agreement of the

carrier and the third party under the preceding paragraph), until the expiration of three months commencing from the day when the carrier has compensated the damages or a legal suit has been brought against him.

Article 15 (Prohibition of special agreement)

(1) Any special agreement which is contrary to the provisions of Articles 3 to 5, Article 8, Article 9 or Articles 12 to 14 and is not in favor of the shipper, receiver or holder of the bill of lading, shall be null and void. A benefit of insurance in favor of the carrier or similar agreement shall also be null and void.

(2) The preceding paragraph shall not prevent the carrier from making a special agreement which is unfavorable to him. In this case the shipper may demand that such special agreement be inserted into the bill of lading.

(3) The provisions of Paragraph (1) shall not apply in respect of damage to the goods which has resulted from facts asising before loading of the goods or after discharge of the goods.

(4) Where a special agreement under Paragraph (1) has been made but not inserted into the bill of lading, the carrier cannot set up such special agreement against a holder of the bill of lading.

Article 16 (Exception to prohibition of special agreement)

The provisions of Paragraph (1) of the preceding Article shall not apply to the case where a part or whole of a ship is the subject of a contract of carriage. However, the foregoing is not applicable to the relationship between the carrier and the holder of the bill of lading.

Article 17

The provisions of the preceding Article shall apply mutatis mutandis to a carriage where the special character or condition of the goods, or special circumstance under which the carriage is to be performed, justifies the relieving or lessening of the carrier's liability.

Article 18

(1) The provisions of Paragraph (1) of Article 15 shall not apply to carriage of live animals and cargo carried on deck.

(2) Where a special agreement under Paragraph (1) of Article 15 has been made but not inserted into the bill of lading, the carrier cannot set up such special agreement against a holder of the bill of lading. A comparable rule shall apply also in the case where the goods are carried on deck and the fact is not inserted into the bill of lading.

Article 19 (Preferential right against ship)

(1) Where a part or whole of a ship has been the object of a contract of carriage for the goods, and the charterer in turn has made a contract of carriage with a third party, those who may claim the compensation for damage to the goods arising within the scope of the master's duties may exercise a preferential right for his claim against the ship and her accessaries.

(2) Where there is conflict between the preferential rights under the preceding paragraph and under Article 842 of the Commercial Code, the former has the same precedence to one under Paragraph (9) of that Article.

(3) The provisions of Paragraph (2) and (3) of Article 844, Article 845, Article

846, Paragraph (1) of Article 847 and Article 849 of the Commercial Code shall apply mutatis mutandis to the preferential right under Paragraph (1).

Article 20 (Application of the Commercial Code, etc.)

(1) The provisions of the Commercial Code except Articles 738, 739, 759 and 766 to 776 shall apply to the carriage of goods by ship under Article 1 of this Act.

(2) The provisions of Articles 576, 578, 579, 582 and 583 of the Commercial Code shall apply mutatis mutandis to the carriage of goods by ship under Article 1 of this Act.

Article 20bis (Tort liability of carrier and others)

(1) The provisions of Paragraph (2) of Article 3, Paragraph (4) of Article 11, Articles 12bis to 14 and Paragraph (2) of the preceding Article shall apply mutatis mutandis to the carrier's liability for damage to the goods caused by his tort against the shipper, receiver or holder of the bill of lading. In this connection the phrase "the preceding paragraph" in Paragraph (2) of Article 3 shall be read to be the principle part of Paragraph (1) of Article 715 of the Civil Code (Law No.89 of 1896) and Article 690 of the Commercial Code (including such case where the lessee of a ship is deemed to have the same rights and owe the same obligations as a shipowner by the application of Paragraph (1) of Article 704).

(2) Where the carrier's liability for the goods is relieved or lessened, the tort liability of the carrier's servant to the shipper, receiver or holder of the bill of lading for damage to the goods shall also be relieved or lessened to the same extent as the carrier's liability is relieved or lessened.

(3) The provisions of Paragraph (2) and (3) of Article 4 shall apply mutatis mutandis to the case where the provisions of Article 705 of the Commercial Code is applicable to the tort liability of the master employed by the carrier to the shipper, receiver or holder of the bill of lading. In this connection the following word or phrases of "carrier", "the preceding paragraph" and "the preceding Article" in Paragraph (2) of Article 4 shall be read as "the master", "Article 705 of the Commercial Code" and "the same Article" respectively.

(4) The provisions of Paragraph (4) of Article 13 shall apply mutatis mutandis to the liability of the carrier's servant for the goods in such case where the carrier's liability for the goods is relieved by the provisions of Paragraphs (1) to (3) of the same Article (including the mutatais mutandis application under Paragraph (1)) and the carrier has compensated the damages.

(5) The provisions of the preceding three paragraphs shall not apply to the case where the damage to the goods has resulted from an act or omission of the carrier's servant done with intent to cause damage or recklessly and with knowledge that the damage would probably result.

Article 21 (Carriage of mail)

This Act shall not apply to the carriage of mail.

Supplementary Provisions:

1 This Act comes into force from the date when the protocol which amends the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading dated August 25, 1924 and amended by the Protocol of February, 1968 comes into force for Japan.

2 The former law and regulations shall still apply to the contracts of carriage

which have been made prior to the effective date of this Act and to the tort liability of the carrier and his servants to compensate for damage to the goods under the foregoing contracts of carriage.

TRENDS IN TOKYO MARITIME ARBITRATION AND THE LAUNCHING OF A CONCILIATION SYSTEM

Hironori TANIMOTO*

This is to introduce the paper of my speach of above-mentioned title in the "The Cairo – Alexandria Arbitration Conference" organized by The Cairo Regional Center for International Commercial Arbitration with the cooperation of "The UNCITRAL", The Arab Maritime Transport Academy "Established by the Arab League" and the Arab Association for International Arbitration, on October 11-15, 1992 in Cairo and Alexandria.

The Conference consists of two parts. The first part was held in Cairo during the period of October 11 to 13, and second part was held in Alexandria during the period of October 14 and 15. The first part of the Conference was devoted to the new Egyptian Draft Law which adopted the principles of the UNCITRAL Model Law and the different experiences of other countries which adopted the Model Law.

The second part of the Conference focussed on new trends in maritime arbitration and maritime disputes on the occasion of inaugurating the new branch of the Centre which is established in Alexandria. I was given the opprotunity of making this presentation. The Conference was quite successful gathering about 200 participants.

Arbitration Environment in Japan

It was around 1948 or 49 shortly after the Second World War, that the concept of using arbitration to resolve international disputes over commercial transaction was given serious thought in Japan.

For a country like Japan, with its huge population and very little natural

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resources, trade was the only recourse for restoring an economy that had been devastated by the war. Establishing a system of international arbitration was considered to be an advantageous way to resolve the disputes over international contracts that were bound to occur.

Incidentally, a system of arbitration for resolving domestic disputes similar to that in the Western society was first introduced in Japan about a century ago. The first case concerned a maritime dispute. But arbitration for general commercial disputes did not take root in Japan.

The successful introduction of a Western type arbitration system in the maritime field, particularly for domestic disputes, was due to several factors, among these being that Japan's maritime contracts for time charter, vessel purchase and sale, etc. were based on practices derived from English Common Laws, that little use was made of litigation because of the inadequacy of Japan's maritime commerce laws, and that shipping agents had long familiarized themselves with the system of arbitration through experience with London arbitrations.

Use of maritime arbitrations was spurred by the Kobe Shipbrokers Association, which started Institutional Arbitration in 1914 in Kobe, the centre of Japan's shipping at that time.

In 1921, the Kobe Shipping Exchange Ltd, (KSE), the Japan Shipping Exchange's former self, was established with contributions from various corporations operating in the field of shipping, shipbuilding, marine underwriting, trading, shipbroking, etc.

In 1925, the KSE took over the arbitrations then conducted by the Kobe Shipbrokers Association, thus extending its activities to maritime arbitration. Whereas the shipbrokers acted as arbitrators for the Shipbrokers Association and their arbitration was limited to disputes over time charters and bareboat charters, the KSE's activities extended to a variety of contracts including chartering contracts, vessel sale and purchase contracts, shipbuilding contracts, and salvage contracts, as it was incorporated with the extensive support of the entire range of maritime industries.

In 1933, the KSE was renamed the Japan Shipping Exchange, Inc. and reorganized as an entirely private arbitration institution supported only by private funds and its own business activities.

As you can see from its background, arbitration in Japan started in the maritime field and its main current has been institutional arbitration. Ad hoc arbitration do take place but they are extremely limited in number even today.

The major reasons why the JSE's arbitration took root in Japan are

(1) the JSE is supported not only by shipping firms but also by business concerns related to maritime affairs, which fact enhances its neutrality as a non-governmental organization;

(2) arbitration bases on practices derived from English Common Laws has more appeal in Japan than litigations under the Maritime Commerce Law based on Continental Laws and JSE arbitrations offer such arbitration by appointing as arbitrators people engaged in practical businesses; and

(3) the JSE has caused its Documentary Commission comprised of business people to draft many standard maritime contract forms and has succeeded in disseminating widely these contract forms, which meet practical needs in Japan and abroad. Including these adopting the foreign forms, there are 51 such forms offered today.

I would, however, like to point out that it took the JSE much longer than expected to encourage people to choose Tokyo as the venue for resolution of international disputes in the maritime field, perhaps because of the more firmly established reputation of arbitrations in London and New York. It was only after 1960 that international maritime arbitrations came to be opted for in Tokyo.

I will now consider the current situation as regards JSE arbitration. The JSE bears the costs for management and administration of the arbitration system, but the business per se is carried out by the Tokyo Maritime Arbitration Commission of the Japan Shipping Exchange (TOMAC). TOMAC consists of 180 businessmen representing maritime related businesses and having ample

experience and expertise in practical business, and 40 scholars and lawyers.

TOMAC is engaged in reviewing various systems, drafting and amending arbitration rules, public relations, and selecting candidates to act as arbitrators in each case. The 220 TOMAC committee members are concurrently registered on the list of arbitrators.

TOMAC participates in arbitration cases up to the time the panel of arbitrators is appointed. The panel then proceeds examination of the case independently.

On average, TOMAC receives 18 to 20 cases per year, only half of them being of an international charactor. However, it receives as many as 800 consultations seeking advice on claims and interpretation of contract provisions, and many disputes are settled amicably through our efforts.

In the background of a situation such as this, there is undeniably the fact that the Japanese do not like disputes and endeavor to settle the matter amicably through consultation. The underlying attitude of the Japanese is that they would like as much as possible to avoid damaging the friendly business relations which they have painstakingly built over time, which the opening of a full scale dispute whether it be litigation or arbitration might do; as well, they recognize that resorting to legal measures is not advantageous for the other party. Thus, their tendency is not only to try to resolve a dispute by discussion but also to try to deepen the mutual understanding and friendly relations through such discussion.

New Trends in Tokyo Arbitration

With Japan's economic development of recent years, an increasing number of foreign parties, who have in the past insisted on inserting London or New York arbitration clauses into contract forms, are begining to accept TOMAC arbitration clause.

TOMAC is extending its public relations efforts by publishing the arbitration awards with the approval of the parties concerned and informing the public of the fair and just character of TOMAC arbitrations.

The arbitration award describes the main text of award, the outline of the

dispute, and the reasons for award, thus giving opportunities to third parties to appreciate its fairness and justness and thereby improving the grobal reputation of TOMAC arbitration.

The Bulletin of the Japan Shipping Exchange, published in English, carries the above-mentioned arbitration awards and discussions of the judgements and laws of Japan.

We are pleased to note the changes in attitude shown by the contract parties and legal circles of foreign countries who had so far been indifferent to arbitration in Tokyo. They seem to be interested in the fact that TOMAC arbitration prepares an environment for conciliation even amid the arbitration proceedings if one of the parties indicates willingness for conciliation. They also seem to appreciate the Japanese attitude of avoiding confrontations and inclining toward amicable settlement by negotiation and consultation.

In a dispute with the prescription limit approaching and the discussion too time-consuming, applying for TOMAC arbitration can provide for interruption of the prescription period and opportunities for further negotiation between the parties. There are also many cases where application for arbitration is made and arbitrators are asked to mediate conciliation and amicable settlement.

Last year, there was a dispute over a charterparty between Japanese and U.S. shipping companies. The U.S. company applied for conciliation, not arbitration, with TOMAC, and three conciliators appointed by TOMAC succeeded in mediation within one month after weekly hearings, Two businessmen and a scholar were chosen in this case, the person experienced in vessel operation taking the chair. Conciliation was reached as the panel of conciliators presented a proposal for conciliation to both parties, and the parties stated their opinions on the proposal and accepted the amended proposal.

The impression I have formed by observing these series of incidents is that the public was beginning to ask if the time and expense spent in resolving a dispute were really worth their while and to appreciate the effectiveness of intervention by a fair-minded third party of expertise in resolving a dispute.

Toward Establishing and Diffusing Conciliation Rules

In view of the above mentioned trend, TOMAC and its office have studied the rules intended solely for conciliation, drafted "The Japan Shipping Exchange, Inc. Conciliation Rules", and started using them. Before drafting these rules, the UNCITRAL Conciliation Rules were studied. The final rules are based on our experiences and are unique and original.

These rules are discussed below.

Conciliation according to these rules presupposes operation and management by the JSE, not TOMAC. Therefore, these rules are not applicable to mediation by arbitrators during the time arbitration proceedings are in process. Such mediation is to be performed based on TOMAC Arbitration Rules. Our new conciliation rules are to be relied on only when conciliation is being sought from the start.

Prior to applying for arbitration, the parties should agree to go to arbitration, but conciliation under these rules dose not require an advance agreement between the parties.

A party wishing to resolve a dispute by conciliation through the JSE may merely file a written request for conciliation with preliminary investigation fee at the Office of the JSE.

If all the parties wish conciliation and have filed a written request, the conciliation procedure is started immediately. If only one party has made a request, the Office reviews the eligibility to settle the case by conciliation based on the request, and calls for participation by the other party in the conciliation procedure if it finds that there is eligibility. Upon acceptance by the other party, conciliation is commenced.

The parties agree to appoint a conciliator, and failing agreement, the JSE shall secure an independent and impartial conciliator.

The rules provide the role of conciliator to be as follows:

"The conciliator assists the parties in an independent and impartial manner in their attempt to reach an amicable settlement of their dispute"; and further that

"the conciliator shall be guided by principles of objectivity, fairness and justice, giving consideration to, among other things, the rights and obligations of the parties, the usages of the trade concerned and the circumstances surrounding the dispute, including any previous business practice between the parties.

Based on these guidelines, the conciliator attempt to draw from the parties concessions leading to an amicable settlement. In other words, the conciliator should consider the intents of all the parties, coordinate their assertions, and induce conditions for settlement, or present his conditions for settlement to the parties and persuade them to accept the same.

The rules provide that since the conciliator performs conciliation based on mutual trust with the parties, he shall not be responsible for any of the proceedings.

On the other hand, these rules provide that the role of the JSE is as follows: "In order to facilitate the conduct of the conciliation proceedings, JSE assists the conciliator in the administration of the conciliation proceedings." The JSE, as in the case of the conciliator, is exempted from responsibility for the result of the conciliation.

Another important point is that the conciliation proceedings are not open to third parties. Since "the parties may be represented or assisted by persons of their choice", a party residing in a foreign country can apply for conciliation by the JSE.

The rules further provide for confidentiality by the conciliator, the parties and the JSE regarding the conciliation proceedings and its result.

Since unlike an arbitration award, conciliation has no legal binding power, a party may possibly breach the settlement agreement reached by conciliation unilaterally. If such a possibility is apprehended, the parties may ask the conciliator to finalize the conciliation procedure by issuing an arbitral award instead of making a settlement agreement. In order to accomplish this as a matter of procedure, the parties, in the final stage of the conciliation procedure, have to conclude the arbitration agreement with the condition that no grounds for the award are to be attached. Under these conditions the conciliator, who has transformed himself into an arbitrator as a matter of form, signs the arbitration

award which is transcribed from the text of the putative settlement agreement.

The Role Played by Tokyo ADR System.

Tokyo is in the Far East, isolated from London, New York and other places in Europe and is undeniably lagging behind these places, where settlement by arbitration is far advanced. However, this lag can be turned into a possitive merit because we do not have to be restrained by precedents when introducing new and better things. The question of whether the time and expenses spent in trying to resolve a dispute justify themselves is being asked in Japan as well as in other countries of the Far East. As the developed countries are now turning their minds to this question, it may be important to contrive answers to it.

The Middle East and Africa are far from Japan in distance and time, but they appear to be much closer to Japan as they endeavor to diffuse the systems of arbitration and ADR.

The Training of Arbitrators in Hong Kong

Philip YANG*

It is my great honour and pleasure to be invited by the Japan Commercial Arbitration Association and the Japan Shipping Exchange to come and address you today.

I propose to talk to you on the subject of training and education in the law and practice of arbitration in Hong Kong.

Because I am now addressing the Japan Shipping Exchange, and I am, I believe, the only person here from the Hong Kong International Arbitration Centre (HKIAC) with a background in shipping, I shall speak with reference to the recent activities in the field of maritime arbitration in Hong Kong.

There is little doubt that arbitration is much favoured over court litigation in international commercial disputes. In shipping, this is definitely so. Virtually all contractual disputes in shipping end up in arbitration, with the courts only playing a subsidiary or supporting role such as when an arrest of vessel, an injunction or enforcement is necessary.

I don't think I need to expand on the benefits of commercial arbitration over court litigation. Other speakers have covered this ground and I am sure the benefits are all well known to you anyway.

But will arbitration remain forever popular? Certainly at the moment the pendulum in terms of sentiment and legislations swings to give the utmost support to arbitration. In Hong Kong, the recently enacted UNCITRAL Model Law gives an arbitrator a virtual free hand. His decision in form of an award is strictly final and binding.

In England, the great centre for maritime arbitration, it has become much more difficult for the losing party to appeal to the Court in the hope of overturning an award. This is a result of the Arbitration Act 1979.

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Such is not the case with a judgement from the Hong Kong High Court, handed down by a most respected and eminent judge. The judgement may be freely appealed against by the losing party to the Court of Appeal. It will be scrutinised by three equally experienced and eminent judges. Any serious mistakes and/or injustice for whatever reason may be put right.

And beyond the Court of Appeal, the appeal can be taken even further in certain situations — to the Privy Council in England before five or more Law Lords.

Thus, I think it is fair to say that the chance of an arbitration award going wrong is higher than a court judgement. This is probably so in other centres as well as Hong Kong.

Nevertheless, one may argue the benefits of arbitration, the flexibility and the probable economy of running an arbitration outweigh this danger.

In England, the High Court is not going to allow a dispute below Pds.50,000 to appear before it. In shipping, predominently in tramping, I suspect 80-90% of the disputes in today's miserable market will not exceed this sum. Thus, we in shipping simply cannot afford the luxury of a full-blown, extremely-thorough and ceremonial court litigation.

But we must be careful. Good times rarely last long. I certainly hope this is not to be the case with commercial arbitration. If the incidence of arbitration awards going wrong should increase and go unchecked, then one day the balance could be tipped and the pendulum will swing back.

Understand that I am not advocating a reversal of the "finality" of arbitration awards. Nor am I suggesting that the powers of the arbitrator be reduced.

I am in fact thinking along the lines of better education of would- be arbitrators, or even of the full and part-time arbitrators.

At the moment there is no certainty about the qualifications and/or abilities of arbitrators. Unlike judges in the High Court who are only appointed from the most eminent and experienced counsels/barristers, arbitrators need *no* qualification, established experience and known ability *whatsoever*.

True, it is often stated that an unknown and/or unqualified name will not be appointed as the arbitrator in the first place. For the claimants one can appreciate that. But how about the respondents who are the reluctant debtors? What is there to stop them from appointing some quite unsuitable character, when the arbitration agreement, with the venue being in London, does not called for the arbitrator to be a Member of London Maritime Arbitrators' Association (LMAA)? Same tactic goes for Hong Kong.

The situation is not helped by the attitude of the would-be or part-time arbitrators. They are usually from the commercial world and seduced by the glory and the extra income, they seldom turn down an appointment as an arbitrator.

The question of the immunity of arbitrators from suit for negligence by losing parties is a much discussed subject lately. As an arbitrator myself, I have a vested interest to see that there is "absolute" immunity to arbitrators. But sometimes I wonder if a suit against arbitrators for gross negligence and/or gross misconduct were allowed, would it provide an effective means to regulating arbitrators? Would it improve the arbitral service which has no self-policy body at the moment?

If regulation is not the answer, then training and education surely is. Would-be arbitrators need to be taught that they must have more than just expertise in their own field before they can competently handle a reference.

I am in no doubt at all that training and education is the single most important issue if we are to ensure that the popularity of arbitration is maintained. I am sure that my colleagues in HKIAC share the same conviction.

On the subject of education, I am proud of what Hong Kong has achieved in recent years. Hong Kong can now boast to being second only to London when it comes to education in the law and practice of arbitration.

The HKIAC does not concentrate only on education. However, it has staged a number of important seminars or conferences. I can cite one seminar on maritime arbitration back in June this year. It was jointly hosted with the London Maritime Arbitrators' Association in London. The forthcoming International Congress of Maritime Arbitrators (ICMA) in 1994, an important event cosponsored by the Japan Shipping Exchange, is another good example.

The main thrust in education is in fact left to the Chartered Institute of Arbitrators, Hong Kong Branch, in which Mr. Peter Caldwell is currently the Chairman.

The Chartered Institute in Hong Kong puts on numerous events for the Members and non-Members to learn about the law and practice of arbitration.

Activities scheduled for or being planned for the six months ahead include:

1) "Dispute Resolution Conference" on 20th + 21st October. Sir Thomas Bingham, M.R., will give the keynote speech.
2) "The Course in Arbitration Practice" on 24th October. This is for one full day. It is a course that will take the form of group discussions covering situations that might arise at appointment, before a hearing, during a hearing and in making an award.
3) The Part II Courses leading to the Part II examination of the Chartered Institute of Arbitrators, in order to become a Fellow. The Course with a series of lectures will start on 17th October. There will be a total of 38 hours of lecturing on Paper A, which is to cover legal concepts on contracts, torts and evidence. Then there follows a further 24 hours lecturing on Paper B, which is to cover law and practice of arbitration. Finally there will be 14 hours of lecturing on Paper C, which is to cover decision making and award writing.
4) The Entry Course on 14th/21st + 22nd November. Successful candidates will be able to become an Associate Member of the Chartered Institute.
5) The Special Fellowship Course for experienced litigation lawyers on 29th + 31st January 1993. Successful candidates will be able to become a Fellow of the Chartered Institute.
6) Evening Speeches planned or fixed for almost every month ahead on subjects such as on "Expert Evidence" (15th December); "Misconduct of Arbitrators"; "Recoverable Costs by Non-Lawyers", subject of own choice by Sir Michael Kerr (President of London Court of International Arbitration), etc.
7) Lunch-time talks such as the one in November 1992 and another one in

January 1993. The latter one is for Mr. Justice Kaplan to address the shipping community.

From these let me single out the Entry Course to say a bit more. It is the most important Course regularly run by the Chartered Institute in Hong Kong. So much work is involved that a Sub-Committee is now set up to deal with it. It is held twice a year. But the Course is "hot". There was never a problem to fill up the seats for about 100. The forthcoming one in November, for example, has already 70 names in the enrolment list even before any advertisement is put out. Therefore, it looks like there will not be the need to advertise again, like last time. The names in the waiting list are more than sufficient to fill up the Course.

There is already a request to hold the Course three times a year instead of twice. The rate that is going will make everybody in Hong Kong a "learned" arbitrator one day.

The Entry Course is normally the *only* way to become a Member (Associate) of the Chartered Institute. So far only England and Hong Kong are running the Course.

But to attend the Entry Course it is not necessary to become a Member of the Chartered Institute. One can always attend just for the sake of knowing about the law and practice of arbitration. Indeed, of the people who have passed the Entry Courses previously held, there is a good number who have never applied to be become Members.

I am fully convinced it is a good and interesting course. It is appropriate for anybody wanting to learn more about arbitration, especially as a starter.

The topics the Course covers are "Appointment & Jurisdiction of Arbitrator"; "Interlocutories & Preliminary Meetings"; "Costs and Interest"; "Oral Hearing"; "Essentials of an Award"; etc.

It is a two-days Course and it is too much to expect that everything about arbitration can be thoroughly taught within that time. But it gives a good start. It has the right emphasis. Experience shows that it normally will induce people who have attended to go for more studies. For instance, to take the Part II Course in

order to sit for the exmination leading to Fellowship. This is the most important success.

Law and practice of arbitration is not too difficult to grasp in my view. Certainly in maritime disputes, I would still regard the substantive law and/or the shipping practices involved are more difficult than the law (procedural) and practice of arbitration.

But a competent shipping man like most of us here simply must take the extra effort of learning the law and practice of arbitration. Only then, can he handle the reference in an arbitration and apply his own expertise. Without this extra knowledge, it is just impossible to press on properly with an arbitration in today's bitterly adversarial environment.

The Entry Course is based on English law and practice. But that is quite familiar to people in shipping. London is still the "big brother" in maritime arbitration. Some 70-80% of cases end up there.

All the educational activities in Hong Kong are open to other peoples in Asia. We in fact welcome friends from neighbouring countries or regions. I hope to see more in the events ahead. It is further the intention of the Chartered Institute in Hong Kong to bring some of the highly successful Courses (like the Entry Course) to other Asian countries or regions in the near future.

Maritime arbitrations:

It is said that shipping and construction disputes are the most prevalent in arbitration and this is the case in Hong Kong.

10 or 15 years ago, one could hardly find a charterparty stipulating Hong Kong arbitration. Charterparty disputes of course take up some 90% of all maritime arbitrations.

But then there was no HKIAC either.

Now, I am finding myself acting as arbitrator 1/3 or 1/4 of my time.

Charterparties with Hong Kong as a venue of arbitration being agreed in one

of the rider clauses are becoming quite common, especially in the Far East trade.

Although there is work coming from various sources, one regular customer of the HKIAC being a major liner conference, I would say more than 60-70% comes from mainland Chinese-related shipping companies and charterers.

What usually happens is a compromise. The China-related interests opt for Beijing arbitration. The foreign shipowners or charterers insist on London, Tokyo or New York arbitration. The compromise sometimes is Hong Kong.

For my part, I hope this trend will continue and grow. All I can do in a very small way is to offer economical and efficient service if I am the arbitrator. I hope people who have used Hong Kong arbitral service will return, even if they were the losing party.

Thank you!

CARRIAGE OF GOODS BY SEA ACT 1992

Ralph EVERS*

The Carriage of Goods by Sea Act 1992 has been enacted to simplify rights of suit in England insofar as concerns the carriage of goods by sea and has been generally welcomed by all those concerned, including cargo interests, carriers, insurers and banks.

The Act must not be confused with the 1924 or 1971 Carriage of Goods by Sea Acts. It does not implement the Hague, Hague Visby or Hamburg Rules or any other international convention.

Privity of Contract

The need for the Act stems from the generally accepted doctrine under English general or common law that one person can only sue another for breach of contract if they are both parties to that contract. Thus a shipper who has entered into a bill of lading contract for the carriage of goods by sea can sue the carrier under common law principles for loss or damage to his cargo, and the carrier can sue him for freight or damage to his ship. But in the ordinary case, the cargo receiver (who normally is the person who has suffered any cargo loss or damage) could not sue the carrier for breach of contract, nor could the carrier sue him.

Bills of Lading Act 1855

The Bills of Lading Act 1855 was enacted to remedy this shortcoming. The scheme of the Act was to transfer to a cargo purchaser rights to sue (and to be sued) when property in the cargo passed to him upon or by reason of the consignment or indorsement of the bill of lading. So, the doctrine of privity of

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contract was retained with the purchaser in relevant circumstances receiving a statutory assignment of the rights of suit; his acquisition of rights to sue and to be sued being linked to the passing of property in the cargo.

The 1855 Act was well suited to commercial requirements in 1855 and worked remarkably well for over 100 years. The changes which have been taking place in trade recently have, however, exposed various areas of weakness in the Act. A major weakness has been recognised to be the linking of property with the contractual right to sue (and to be sued), since the passing of property in cargo to the purchaser/receiver is, in modern trading practice, often unconnected with the negotiation of the bills of lading. In that event the 1855 Act does not apply.

There has as a consequence been an increasing call for change from all sections of the shipping community: from receivers and their insurers, who wish to be able to pursue claims against carriers in the receivers' name and to avoid having to conduct costly, complex and troublesome investigations to establish such right; from carriers and their P & I Clubs, who wish both to have simplified procedures for establishing claims against cargo receivers for outstanding freight and demurrage etc. and also to avoid exposure to claims in tort by receivers, banks and others interested in cargo where the carriers may be deprived of the protection of any exemption and limitation provisions in the contract of carriage; and from banks, who receive bills of lading as security but have not acquired any contractual rights under the bills.

Carriage of Goods by Sea Act 1992

The 1992 Act has been enacted in response to this pressure from the Community. It came into force on the 16th September 1992. It applies to all bills of lading, sea waybills and ship's delivery orders issued on or after the 16th September 1992. It does not have retrospective effect and will not apply to those bills of lading, etc. issued before the 16th September.

The 1992 Act (as with the 1855 Act) uses the mechanism of a statutory assignment to pass rights of suit to the relevant person. The Act continues,

therefore, to work within the framework of the doctrine of privity of contract. The privity of contract doctrine is currently being re-examined and it is possible that recommendations may in due course be made that it should be amended or abolished. It is, however, likely to be many years before this happens.

The primary change under the 1992 Act is that it abolishes the link between the passing of property and the passing of rights and liabilities. Under the new Act, rights and liabilities under the bill of lading are transferred to the "lawful holder" of the bill; the Act also covers sea waybills and ship's delivery orders; and it also contains mechanism for its extension to cover electronic data interchange (EDI) systems in due course.

Section 1 — Shipping Documents etc. to which the Act applies

1–(1) This Act applies to the following documents, that is to say—

(a) any bill of lading;

(b) any sea waybill; and

(c) any ship's delivery order.

This subsection is self-explanatory. Please note that the Act does not apply to charterparties.

1–(2) References in this Act to a bill of lading—

(a) do not include references to a document which is incapable of transfer either by indorsement or, as a bearer bill, by delivery without indorsement; but

(b) subject to that, do include references to a received for shipment bill of lading.

It can be seen that the Act does not contain an exhaustive definition of a bill of lading. The only requirement is that it should be a transferable or negotiable document.

It should be noted that the Act does specifically apply, however, to "received for shipment" bills of lading as well as "shipped" bills of lading. The position of "received for shipment" bills of lading had previously been regarded as uncertain under the old 1885 Act and the specific reference to these bills in the 1992 Act thus provides welcome clarification.

1–(3) References in this Act to a sea waybill are references to any document which is not a bill of lading but—

(a) is such a receipt for goods as contains or evidences a contract for the carriage of goods by sea; and

(b) identifies the person to whom delivery of the goods is to be made by the carrier in accordance with that contract.

Sea waybills are essentially non negotiable bills of lading. Sea waybills have the advantage that they do not need to be produced at the port of discharge in order to obtain delivery of the goods to which they relate. Delivery is made on sufficient proof of identity. However, like other contracts for the benefits of third parties, they have suffered under English, common law from the privity of contract problem. The consignee who has suffered the loss is normally a stranger to the sea waybill contract, whereas the person who would have had a cause of action (the shipper) has normally suffered no loss and therefore has no desire to sue. The application of the 1992 Act to sea waybills is a significant change from the old 1855 Act and is a recognition of their growing use in trade today.

The meaning of subsection (3)(b) is further explained in section 5(3).

1–(4) References in this Act to a ship's delivery order are references to any document which is neither a bill of lading nor a sea waybill but contains an undertaking which—

(a) is given under or for the purposes of a contract for the carriage by sea of the goods to which the document relates, or of goods which include those goods; and

(b) is an undertaking by the carrier to a person identified in the document to deliver the goods to which the document relates to that person.

The use of ship's delivery orders is most common when delivery is to be made to several buyers of parcels out of a single bulk cargo. Indeed, the reference in Section 1(4)(a) to "goods which include those goods" is a specific reference to cases where the goods to which the delivery order relates form part only of a bulk shipment.

The meaning of subsection (4)(b) is also further explained in section 5(3).

1–(5) The Secretary of State may by regulations make provision for the application of this Act to cases where a telecommunication system or any other information technology is used for effecting transactions corresponding to—

(a) the issue of a document to which this Act applies;

(b) the indorsement, delivery or other transfer of such a document; or

(c) the doing of anything else in relation to such a document.

1–(6) Regulations made under subsection (5) above may—

(a) make such modifications of the following provisions of this Act as the Secretary of State considers appropriate in connection with the application of this Act to any case mentioned in that subsection; and

(b) contain supplemental, incidental, consequential and transitional provision;

and the power to make regulations under that subsection shall be exercisable by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament.

Under these sections, any modification to the Act, including any provision for

its application to paperless transactions involving EDI, can be made by secondary legislation. This should enable any changes to be introduced much more easily and quickly.

Section 2 — Rights under shipping documents.

2–(1) Subject to the following provisions of this section, a person who becomes—

(a) the lawful holder of a bill of lading;

(b) the person who (without being an original party to the contract of carriage) is the person to whom delivery of the goods to which a sea waybill relates is to be made by the carrier in accordance with that contract; or

(c) the person to whom delivery of the goods to which a ship's delivery order relates is to be made in accordance with the undertaking contained in the order,

shall (by virtue of becoming the holder of the bill or, as the case may be, the person to whom delivery is to be made) have transferred to and vested in him all rights of suit under the contract of carriage as if he had been a party to that contract.

This is the key provision of the Act. It enables (a) the lawful holder of a bill of lading, (b) the consignee identified in a sea waybill and (c) the person entitled to delivery in accordance with an undertaking given in a ship's delivery order, to assert contractual rights of suit against the carrier of the goods.

Most important in the case of bills of lading, the section breaks the troublesome link between the transfer of contractual rights and the acquisition of property upon or by reason of the consignment or indorsement of the bills introduced under the old 1855 Act. Lawful possession of the bill of lading, rather than the passing of property in the goods, now becomes the key to the transfer of contractual rights to the holder.

The factors which determine whether a person is the lawful holder of the bill

of lading, or the person to whom delivery is to be made pursuant to a sea waybill or ship's delivery order, are set out in Section 5(2) and (3) of the Act and I will turn to these later.

In the meantime there are three particular points of note:

1. The range of persons who can now acquire contractual rights of suit is potentially much wider than before. Since the property link has been abandoned and it is no longer necessary for a person with a claim for cargo loss or damage to establish his ownership of the cargo, contractual rights of suit under bills of lading can, for example, now be acquired not only by purchasers of goods but also by banks and other finance organisations.
2. Rights of suit in tort are not affected by the Act. The owners of cargo should, therefore, still be entitled to sue in tort (if they themselves cannot sue in contract) for loss or damage which was incurred by their cargo at the time they owned it.
3. Similarly, rights of suit under a charterparty are not affected by the Act. Thus, when the lawful holder of the bill of lading is also the charterer under a charterparty with the bill of lading carrier, his claim against the carrier will lie under the charterparty, not under the bill of lading. When the lawful holder of the bill is the person to whom it has been indorsed by the charterer, he will of course have rights of suit under the bill of lading and not the charterparty.

2–(2) Where, when a person becomes the lawful holder of a bill of lading, possession of the bill no longer gives a right (as against the carrier) to possession of the goods to which the bill relates, that person shall not have any rights transferred to him by reason of subsection (1) above unless he becomes the holder of the bill—

(a) by virtue of a transaction effected in pursuance of any contractual or other arrangements made before the time when such a right to possession ceased to attach to possession of the bill; or

(b) as a result of the rejection to that person by another person of goods

or documents delivered to the other person in pursuance of any such arrangements.

This section is designed to deal with problems such as those which arose in the "DELFINI" [1988] 2 Lloyd's Rep.599 where receivers took delivery of goods at the port of discharge before they received the bills of lading; and it was, inter alia, contended that by the time the bills of lading eventually reached them the bills were exhausted and were thus not effective to pass any rights of property or rights of suit to the receivers.

Now, by section 2 (2), where the receiver (or an intermediate buyer or a bank) acquires the bill of lading after the goods have been delivered at the port of discharge, he can still sue on the bill of lading contract provided that he obtained the bill under arrangements made before delivery.

The reference in subsection (2)(a) to contractual *or other* arrangements is a reference inter alia to arrangements such as gifts or pledges.

Subsection (2)(b) covers the case where a person has become the holder of a bill of lading in pursuance of a re-indorsement of the bill back to him following rejection of goods or documents.

2–(3) The rights vested in any person by virtue of the operation of subsection (1) above in relation to a ship's delivery order—

(a) shall be so vested subject to the terms of the order; and

(b) where the goods to which the order relates form a part only of the goods to which the contract of carriage relates, shall be confined to rights in respect of the goods to which the order relates.

Subsection (3)(a) ensures that the holder of the ship's delivery order acquires rights on the terms of the undertaking contained in the delivery order.

As to subsection (3)(b), we will see that section 5(4) makes it clear that sub-buyers of parcels from a larger bulk cargo can still each obtain title to sue the carrier, even though none of them may be able to identify his parcel until after

discharge. Subsection 3(b) was thus necessary to make it clear that the rights of each sub-buyer against the carrier would be limited to rights relating to the parcel he himself had purchased (and not to the whole bulk quantity or any other parcel within the bulk).

2–(4) Where, in the case of any document to which this Act applies—

(a) a person with any interest or right in or in relation to goods to which the document relates sustains loss or damage in consequence of a breach of the contract of carriage; but

(b) subsection (1) above operates in relation to that document so that rights of suit in relation to that breach are vested in another person the other person shall be entitled to exercise those rights for the benefit of the person who sustained the loss or damage to the same extent as they could have been exercised if they had been vested in the person for whose benefit they are exercised.

This is an important provision. It may occasionally happen that a person who suffers loss is not the lawful holder of the bill of lading nor otherwise entitled to sue under section 2(1) of the Act. In such a case, the lawful holder of the bill (or the person otherwise entitled to sue under section 2(1)) may still exercise his own rights of suit for the benefit of the person who has suffered the loss. Thus, an action can be brought in the name of the bill of lading holder for losses which have been suffered under the bill of lading contract not only by the bill of lading holder but also by anyone else having an interest or right in or in relation to the goods.

This subsection thus gives statutory effect to a system which is in line with earlier decisions of the courts in cases such as the SANIX ACE [1987] 1 Lloyd's Rep. 465 where it was held that the owner of cargo who had himself suffered no loss (i.e. he had received full payment of the purchase price of the goods from his purchaser) was nevertheless entitled to sue the carrier in his own name (as goods owner) for damage to the goods and to recover damages for the benefit of

the end user.

The need for such a system is clear in view of the terms of the next subsection.

2–(5) Where rights are transferred by virtue of the operation of subsection (1) above in relation to any document, the transfer for which that subsection provides shall extinguish any entitlement to those rights which derives—

(a) where that document is a bill of lading, from a person's having been an original party to the contract of carriage; or

(b) in the case of any document to which this Act applies, from the previous operation of that subsection in relation to that document;

but the operation of that subsection shall be without prejudice to any rights which derive from a person's having been an original party to the contract contained in, or evidenced by, a sea waybill and, in relation to a ship's delivery order, shall be without prejudice to any rights deriving otherwise than from the previous operation of that subsection in relation to that order.

The effect of this subsection is to limit the range or class of persons who will have rights to sue the carrier at any one time under the bill of lading, sea waybill or ship's delivery order.

Bill of Lading Shipper

Under subsection (5)(a), the bill of lading shipper loses rights of suit under the bills of lading when someone else (e.g. an indorsee of the bill of lading) acquires such rights. There had been some debate during the preparatory stages of the Act whether the shipper should have been permitted to retain his rights of suit in cases where he had himself suffered loss in respect of the cargo, and whether for him to lose such rights would be unfair—especially since he remains exposed to claims by the carrier pursuant to section 3(3). It was, however, eventually

decided that the contrary arguments should prevail. In particular, it was considered that, under the simplified criteria of section 2(1), it should now be relatively easy for cargo interests to identify the lawful bill of lading holder with the rights of suit against the carrier; that the shipper who remains at risk of any loss or damage to the goods under the terms of his sale contract with his purchaser should be able to take steps to ensure that he is able to sue the carrier for any losses he may suffer by including appropriate terms in his sale contract—for example provision for an assignment to him by the purchaser of the latter's rights of suit; that the purchaser/bill of lading holder can instead always sue the carrier for such losses for the benefit of the shipper under section 2(4); and that in all the circumstances there is thus less need than before for anyone else than the bill of lading holder to retain contractual rights of suit. It was also considered that it would be more unfair to expose the carrier to the risk of claims under the bill of lading contract both by the bill of lading holder and also by the shipper, particularly when such claims might be brought in different jurisdictions.

A final point needs to be mentioned concerning the rights of a shipper who is also the charterer of the vessel from the bill of lading carrier. If the bill of lading is indorsed by the shipper to a person who becomes the lawful bill of lading holder with rights of suit against the carrier under the bill of lading contract, the shipper (in his capacity as charterer) will still retain his rights of suit under the charter. The transfer of rights pursuant to section 2(5) in the case of a bill of lading extinguishes the rights of an original party to the contract of carriage which, as defined by section 5(1), means only the contract contained in or evidenced by the bill of lading, not the contract contained in the charterparty.

Intermediate holders of the bill of lading

Intermediate bill of lading holders acquire rights of suit under section 2(1)(a) when they become the lawful holders of the bill of lading; but they subsequently lose such rights under section 2(5)(b) if and when they transfer the bills of lading to their purchaser or to someone else who receives the bills of lading as lawful

bill of lading holder.

Of course, if the intermediate bill of lading holder is also a charterer, his rights of suit under the charter will be unaffected by the Act.

Sea waybill shipper

The position of the sea waybill shipper under this subsection is markedly different from that of the bill of lading shipper. Whereas the bill of lading shipper will always lose his rights of suit under the bill at the time when the next bill of lading holder acquires his rights of suit, the sea waybill shipper will normally retain his rights of suit even after rights of suit have been acquired by the sea waybill consignee. The sea waybill shipper will only lose his rights of suit if an agreement to that effect has been made between him and the carrier.

The reason why the sea waybill shipper is treated differently from the bill of lading shipper arises because of the nature of the sea waybill. A sea waybill is not a negotiable document of title. A bill of lading shipper parts with his right to control the goods when he parts with the bill of lading; a sea waybill shipper, on the other hand, retains his control until delivery is made unless he contracts otherwise. Sea waybills are marketed on the understanding that they are flexible instruments which enable the shipper to alter his instructions as to the person to whom delivery is to be made, and even, inter alia, to require the goods to be delivered to himself. It would have prejudiced this flexibility if the Act had extinguished the rights of suit of the sea waybill shipper at a time when he still retained such rights of control over the goods.

Ship's delivery orders

In the case of ship's delivery orders, any rights of suit possessed by the person who is a party to the contract of carriage pursuant to which the delivery order was issued are unaffected by the acquisition of rights of suit by the person entitled to delivery under the delivery order. However, since sea carriers do not usually

issue delivery orders except in exchange for the relevant bill of lading, they will not in practice face actions at one and the same time from both a bill of lading holder and the holder of a delivery order.

Section 3—liabilities under shipping documents

3–(1) Where subsection (1) of section 2 of this Act operates in relation to any document to which this Act applies and the person in whom rights are vested by virtue of that subsection—

(a) takes or demands delivery from the carrier of any of the goods to which the document relates;

(b) makes a claim under the contract of carriage against the carrier in respect of any of those goods; or

(c) is a person who, at a time before those rights were vested in him, took or demanded delivery from the carrier of any of those goods,

that person shall (by virtue of taking or demanding delivery or making the claim or, in a case falling within paragraph (c) above, of having the rights vested in him) become subject to the same liabilities under that contract as if he had been a party to that contract.

It was reasonably considered unfair that anyone other than the original party to the contract of carriage should automatically be exposed to any claim by the carrier under the contract of carriage (for example for freight or demurrage) merely by reason of their being the bill of lading holder or the named consignee in the sea waybill or ship's delivery order. This subsection therefore provides, in effect, that where a person has contractual rights under the contract of carriage he will only assume contractual liabilities where he exercises his rights by taking or demanding delivery or otherwise making a claim against the carrier under the contract of carriage.

In the circumstances, any bank or intermediate purchaser of goods shipped under a bill of lading should never be exposed to any liability to the carrier under

the bill of lading contract unless he takes or demands delivery of the goods or otherwise makes a claim against the carrier under the bill of lading contract.

The wording of subsection (1)(c) covers cases such as those envisaged in section 2(2)(a) of the Act—for example where the receiver takes delivery of the goods under a letter of indemnity before he receives the bill of lading and the bill of lading only reaches him later.

3–(2) Where the goods to which a ship's delivery order relates form a part only of the goods to which the contract of carriage relates, the liabilities to which any person is subject by virtue of the operation of this section in relation to that order shall exclude liabilities in respect of any goods to which the order does not relate.

This subsection is the counterpart of section 2(3) of the Act. Ships' delivery orders are usually issued in respect of bulk goods shipped under a bill of lading and cover lesser amounts than the bill of lading quantity. Under section 2(3)(b), the person entitled to delivery under the delivery order only acquires contractual rights in respect of the lesser delivery order quantity. Similarly, he is only exposed to liability under section 3(2) in respect of the lesser delivery order quantity.

3–(3) This section, so far as it imposes liabilities under any contract on any person, shall be without prejudice to the liabilities under the contract of any person as an original party to the contract.

This subsection makes it clear that, irrespective of whether he acquires rights of suit against anyone else pursuant to the terms of subsection (1) and (2), the carrier will continue to retain rights of suit against the original party to the contract of carriage. This is in direct contrast to the position of the bill of lading shipper, who loses his rights of suit against the carrier pursuant to section 2(5)(a) of the Act when someone else becomes the lawful bill of lading holder.

Section 4—Representations in bills of lading

4. A bill of lading which—

(a) represents goods to have been shipped on board a vessel or to have been received for shipment on board a vessel; and

(b) has been signed by the Master of the vessel or by a person who not was the Master but had the express, implied or apparent authority of the carrier to sign bills of lading,

shall, in favour of a person who has become the lawful holder of the bill, be conclusive evidence against the carrier of the shipment of the goods or, as the case may be, of their receipt for shipment.

This is the one section unrelated to issues of title to sue or to be sued.

Under English law, a Shipowner is bound by any term of a bill of lading signed by the Master when it is within the ordinary authority of a Master to include such a term in the bill. Even if such a term has been included in the bill contrary to the express instructions of the Shipowners, they will still be bound by it unless the holder of the bill of lading knew that the Master's authority was limited, in which case the Shipowner is not bound beyond the express instructions given to the Master.

Very often the Master will delegate his authority to sign bills of lading to an agent. Very often, also, the Shipowners will, by the terms of the charterparty, authorise the charterers or their agents to sign bills of lading on the Master's behalf.

From time to time the English courts have had to determine whether particular terms in bills of lading are within the ordinary (i.e. implied or apparent) or express authority of the Master or other person signing the bills.

In 1851, it was held in the case of **Grant -v- Norway** that the Master of a vessel had no ordinary authority from the shipowner to sign bills of lading for goods which had not been shipped on board. This decision has always been followed since then, although it has been severely criticised. Not only was the

decision difficult to justify by reference to the wide general authority of a Master to sign bills of lading binding Shipowners, but it was also inconvenient, since the Master is usually in a far better position to know whether and what goods have been loaded on board the vessel than the purchaser/indorsee of the bill of lading who relies on the representations in the bill when taking up and paying for it. The problem was identified a long time ago and an attempt was made to reverse the decision in the 1855 Bills of Lading Act. Unfortunately the attempt was ineffective and the rule in **Grant -v- Norway** has survived up to this year. Its application was restricted by Article III Rule 4 of the Hague Visby Rules; but it is only now, at last, that it has been finally reversed by section 4 of this Act.

There are three further points which it is worth noting. First, section 4 will be of limited ambit in cases where the Hague Visby Rules apply, because in such cases Article III Rule 4 of the Rules will be the governing provision—see section 5(5) of this Act.

Second, most bills of lading today contain a wide disclaimer clause. For example, the disclaimer clause might state in terms "weight, measure, number, quantity and contents unknown". The carrier will usually be able to contend, therefore, that such a bill contains no representations as to the weight or quantity, etc. of the goods shipped and that, since it contains no such representations, he is not deprived either by Article III Rule 4 of the Hague Visby Rules or by section 4 of the 1992 Act of the right to assert that any missing goods were never shipped on board the vessel in the first place. In practice, the English courts are likely to hold that a bill of lading, even with such a disclaimer clause, does contain a representation that *some* goods have been shipped on board; and that what is being represented is that, even though the precise weight or quantity shipped may not be known to the Master or other person signing the bill on the carriers' behalf the latter has no reason to believe that the bill of lading weight or quantity is inaccurate. It may then be a matter of degree as to whether the extent of any shortage on shipment is within a range which might reasonably have been overlooked by the Master/carrier, or whether it was beyond that range. If it was beyond that range, then arguably the carrier will, despite any disclaimer clause,

be prevented from asserting any short shipment under the terms of Article III Rule 4 of the rules and/or section 4 of this Act.

Third, section 4 applies only to bills of lading. Its application has not been extended to sea waybills and ship's delivery orders.

Section 5—Interpretation

5–(1) In this Act—

"bill of lading", "sea waybill" and "ship's delivery order" shall be construed in accordance with section 1 above;

"the contract of carriage"—

(a) in relation to a bill of lading or sea waybill, means the contract contained in or evidenced by that bill or waybill; and

(b) in relation to a ship's delivery order, means the contract under or for the purposes of which the undertaking contained in the order is given;

"holder", in relation to a bill of lading, shall be construed in accordance with subsection (2) below; "information technology" includes any computer or other technology by means of which information or other matter may be recorded or communicated without being reduced to documentary form; and "telecommunication system" has the same meaning as in the Telecommunications Act 1984.

Subsection 1 is self-explanatory. It is, however, worth noting that "the contract of carriage" in relation to a bill of lading or sea waybill is defined as meaning "the contract contained in or evidenced by" that bill or waybill. Such a definition is, of course, necessary since a bill of lading or sea waybill will not, at least initially, contain the contract of carriage, which is usually made before the bill or waybill comes into existence.

It is also to be noted that the "contract of carriage" within the meaning of this Act does not include any charterparty contract.

5–(2) References in this Act to the holder of a bill of lading are references to any of the following persons, that is to say—

(a) a person with possession of the bill who, by virtue of being the person identified in the bill, is the consignee of the goods to which the bill relates;

(b) a person with possession of the bill as a result of the completion, by delivery of the bill, of any indorsement of the bill or, in the case of a bearer bill, of any other transfer of the bill;

(c) a person with possession of the bill as a result of any transaction by virtue of which he would have become a holder falling within paragraph (a) or (b) above had not the transaction been effected at a time when possession of the bill no longer gave a right (as against the carrier) to possession of the goods to which the bill relates;

and a person shall be regarded for the purposes of this Act as having become the lawful holder of a bill of lading wherever he has become the holder of the bill in good faith.

This is an important subsection since it defines who is the lawful holder of a bill of lading. In order for a person to show that he is the lawful bill of lading holder, three elements must exist:

1. He (or his agent) must have possession of the bill; if he obtained possession of the bill at a time when the bill no longer conferred constructive possession of the goods (e.g. after proper delivery of the goods at the discharge port) he must also show that the bill was consigned or indorsed to him pursuant to a contract or other arrangement made before delivery.

2. He must be the named consignee in the bill; or the indorsee of the bill—the indorsement may be specific or in blank; and

3. He must have become the holder of the bill in good faith.

Provided that these three elements are satisfied, no further enquiry should be necessary for a person to prove his title to sue or to be sued. In particular, there should no longer be any need to contact shippers and intermediate buyers with requests for contractual documents and information. The bill of lading holder should himself be able to supply what is necessary with minimal difficulty.

5–(3) References in this Act to a person's being identified in a document include references to his being identified by a description which allows for the identity of the person in question to be varied, in accordance with the terms of the document, after its issue; and the reference in section 1(3)(b) of this Act to a document's identifying a person shall be construed accordingly.

Sections 1(3) and 1(4) of the Act, which relate, respectively, to the definition of a sea waybill and a ship's delivery order, use the words "identifies" and "identified". In the case of both documents, section 5(3) enables the person to whom delivery of the goods is to be made to be "identified" by a description which allows for the identity of such person to be varied at any time. So, for example, either document may identify as the consignee a named person "or order".

The subsection goes further in the case of sea waybills. Even where the consignee is identified by a description which does not by its terms permit variation, the shipper may still alter his delivery instructions to the carrier and require him to deliver the goods to a different consignee. In such cases the new consignee will still be able to become a party to the contract of carriage pursuant to the terms of the Act, and to acquire both rights and liabilities consequential upon this happening.

5–(4) Without prejudice to sections 2(2) and 4 above, nothing in this Act shall preclude its operation in relation to a case where the goods to which a document relates—

(a) cease to exist after the issue of the document; or

(b) cannot be identified (whether because they are mixed with other goods or for any other reason);

and references in this Act to the goods to which a document relates shall be construed accordingly.

This subsection ensures that rights of suit can exist in respect of goods which are not ascertained (as when goods form part of a larger bulk) or which have ceased to exist (as when goods are carried on a vessel which sinks). As a matter of English law, property in such goods will still be unable to pass to a purchaser. Rights of suit in respect of such goods can, however, now be transferred. This represents a significant change from the previous law.

Moreover, the opening words of the subsection ensure that the bill of lading can also be conclusive evidence of the shipment of goods under section 4 of the Act even where the goods have ceased to exist before the issue of the bill of lading.

5–(5) The preceding provisions of this Act shall have effect without prejudice to the application, in relation to any case, of the rules (the Hague Visby Rules) which for the time being have the force of law by virtue of section 1 of the Carriage of Goods by Sea Act 1971.

Since the subject matter of section 4 of the Act clearly overlaps with Article III Rule 4 of the Hague Visby Rules, this subsection was included, for the avoidance of any doubt, to ensure the continuing application of Article III Rule 4.

Section 6—short title, repeal, commencement and extent

6–(1) This Act may be cited as the Carriage of Goods by Sea Act 1992.

(2) The Bills of Lading Act 1855 is hereby repealed.

(3) This Act shall come into force at the end of the period of two months beginning with the day on which it is passed; but nothing in this Act shall have effect in relation to any document issued before the coming into force of this Act.

(4) This Act extends to Northern Ireland.

The Act, having passed through Parliament, received the Royal Assent on 16th July 1992. Pursuant to subsection (3), the Act came into force in the United Kingdom on the 16th September 1992. Subsection (3) ensures that the Act does not have retrospective effect, by stipulating that it does not apply to documents issued before the 16th September. There will thus be a transitional period during which the old law (including the 1855 Act) will remain relevant.

Summary

It may be helpful to summarise the position of the different parties under the new Act.

1. Shippers

As an original party to the contract of carriage, a shipper has always been able to sue the carrier for any losses he has himself suffered by reason of the carrier's breach of contract. The position remains the same under this Act, except that the bill of lading shipper loses his right to sue if and when some other person has become the lawful bill of lading holder. Thus, if the goods remain at the risk of the bill of lading shipper even after the receiver has become the lawful bill of lading holder, any action to recover for the benefit of the shipper in respect of

loss or damage to the cargo will normally have to be brought in the name of the receiver. Normally, the bill of lading shipper will be unable to sue in his own name unless he obtains a suitable assignment from the receiver.

Of course, if the bill of lading shipper was the owner of the cargo at the time the cargo loss or damage occurred, he would still be entitled to sue the carrier in tort or bailment in his own name.

If the shipper is also a charterer, he will always be able to sue the owner or disponent owner under the charter, although he would only be able to claim substantial damages if he was the owner of the cargo at the time the loss or damage occurred or if he is seeking to recover losses which he has himself suffered.

The shipper will, however, always remain liable for his obligations to the carrier under the contract of carriage, irrespective of whether the contract of carriage is contained in or evidenced by a bill of lading, a sea waybill or a ship's delivery order. The shipper can, therefore, still be sued by the carrier for any freight and demurrage, etc. due under the terms of the contract of carriage long after he has himself parted with the goods and the shipping documents.

2. Intermediate buyers under bills of lading

An intermediate buyer acquires rights of suit under the bill of lading contract when he becomes the lawful bill of lading holder. But he loses such rights of suit when he indorses the bill of lading on to someone else (the indorsement may be either specific or blank) and the latter has become the lawful bill of lading holder.

An intermediate buyer can only be sued by a carrier for freight, demurrage etc. under the bill of lading contract if he takes or demands delivery of any of the goods from the carrier or makes a claim against the carrier under the bill of lading contract.

3. Banks

The position of a bank may be significantly different under the new Act.

Whenever a bank becomes the lawful holder of the bill of lading within the meaning of the Act, it will automatically acquire rights of suit against the carrier under the bill of lading contract. As in the case of an intermediate buyer, it will also lose such rights of suit when it indorses the bill of lading on to someone else and the latter has become the lawful bill of lading holder.

Again, as with the case of an intermediate buyer, a carrier will only be able to sue the bank for freight, demurrage etc. under the bill of lading contract if it takes or demands delivery of any of the goods from the carrier or makes a claim against the carrier under the bill of lading contract.

Having regard to the terms of clause 5(2) of the Act, a bank will normally become the lawful bill of lading holder after it obtains possession of the bill of lading provided either that the bill names the bank as the consignee or that the bill has been indorsed to the bank either specifically or in blank.

In cases where a bank needs to realise its security based upon its possession of the original bills of lading, it will now be in a far stronger position to pursue any contractual remedies against the carrier for loss, damage or mis-delivery of the goods to which the bill of lading relates—but by doing so it will at the same time be exposing itself to any contractual liabilities for freight, demurrage etc.

4. Final receivers

It is the final receiver (and his insurer) who should acquire the most benefit from the new Act. Provided the receiver becomes and remains the lawful bill of lading holder (or, in the case of sea waybills and delivery orders, is and remains identified as the person entitled to delivery of the goods) he receives full rights of suit. He receives such full rights of suit even if the goods have previously perished or if he is the receiver under the contract of carriage of only a small part of a bulk shipment. Nor does it make any difference whether he or any intermediate buyer has purchased the goods on an FOB, CIF or C & F basis or whether property or even risk in the goods have passed to him. The terms of the purchase contract are no longer relevant to the acquisition of rights of suit under

the contract of carriage although the date of the purchase contract may sometimes be needed in the case of bills of lading where the receiver becomes the bill of lading holder at some time after the goods have been delivered. Normally the receiver will receive the original bills before discharge and will collect the goods against presentation of one of the originals. But if he takes delivery before the original bills of lading reach him, he will only obtain rights of suit under the bill of lading contract if he can show that the bill of lading was indorsed or transferred to him pursuant to a contract or other arrangement made prior to discharge.

In practice, since most bills of lading incorporate a 12 months time limit, it will be necessary for any receiver who does not acquire the bills of lading until after discharge and who wishes to pursue a claim against the carrier, to ensure either that he acquires the bills within 12 months or that he can persuade a lawful bill of lading holder higher up the chain to sue for his benefit.

The converse of his acquiring the benefits of rights of suit is that, by taking or demanding delivery of the goods or by making a claim on the carrier, the receiver (as with an intermediate buyer) will also acquire the liabilities under the contract of carriage. He can then be sued by the carrier for freight, demurrage, etc.

5. Cargo insurers

Once an insurance claim has been paid for loss of or damage to cargo, the insurers will often wish to pursue a claim against the carrier to recover their losses. Cargo claims in England on shipments made after 16th September 1992 should now normally be brought in the name of the lawful bill of lading holder or, in the case of sea waybills and ship's delivery orders, in the name of the person to whom delivery was to be made in accordance with those documents. In most cases it is the receiver who will be the lawful bill of lading holder or the person to whom delivery was to be made in accordance with the sea waybill or ship's delivery order; and, since the receiver is normally the assured who presents the claim under the policy it should be easy for the insurers to check that the title to sue

requirements under the Act are satisfied.

In the case of carriage under a bill of lading, it should in many cases be sufficient merely to ask the Assured to provide the relative invoice and all the remaining originals of the bills of lading. The production by him of these documents should in most cases show whether the three necessary elements (see the commentary under s.5(2) above) have been satisfied and whether the Assured is indeed the lawful bill of lading holder with title to sue.

It would, however, also be helpful (and may sometimes be necessary) to obtain from the Assured clarification whether he or his agents presented one of the original bills to the shipowners/agents at the discharge port in order to obtain delivery of the cargo. If he did, it should then be unnecessary to go further to establish that the consignment or indorsement to him of the bills of lading was made pursuant to a contract or other arrangement made before delivery.

A subrogation receipt should, of course, still be obtained in the ordinary way in order to establish that the assured has agreed to any recovery action being brought by insurers in his name.

6. Carriers

The three matters which arise in the context of carriers are:—

(1) To whom the carrier should deliver the cargo.

(2) Who can sue the carrier for loss of or damage to the cargo.

(3) Who can the carrier sue for freight, demurrage, etc.

1. To whom should the cargo be delivered?

The Act does not alter the carrier's duty to deliver the cargo (a) to the holder of the bill of lading, provided of course that either he is the named consignee or the bill is indorsed to him, either specifically or in blank; or (b) to the person identified as the person to whom delivery is to be made in accordance with the terms of the sea waybill or ship's delivery order.

In the case of bills of lading, the carrier is still entitled to demand that one

original bill of lading should be produced and cancelled against delivery of the cargo. If one original is not available for production at the time of delivery, the carrier will have to decide whether to hold on to the cargo or to discharge against an appropriate letter of indemnity from the charterer or receiver.

In the case of a sea waybill, the Act expressly acknowledges the right of the shipper (unless he has previously divested himself of such right) to change the identity of the person to whom delivery is to be made. In the event that a sea waybill shipper does make such a change, therefore, the carrier should comply with his new instructions.

2. Who can sue the carrier?

This has already been dealt with in detail above.

3. Who can the carrier sue for freight, demurrage etc.?

The Act not only extends the range of persons who receive the benefit of the contract of carriage; it also extends the range of persons who incur the obligations of the contract. The carrier may now recover freight, demurrage, etc. not only from the original party to the contract of carriage but also from any person who falls within s.3(1) of the Act—i.e. a lawful bill of lading holder or a person to whom delivery is to be made under a sea waybill or ship's delivery order—if such person takes or demands delivery of the goods or makes a claim against the carrier under the contract of carriage. A carrier will, however, still be unable to sue any person who falls within s.3(1) of the Act if that person does not take or demand delivery of the goods or make a claim under the contract of carriage.

Conclusion

As with all new statutes, it is likely that some points will arise that are unclear and may have to be tested in the courts. But by introducing the concept of the

lawful holder of a bill of lading and by giving rights of suit to him and to the consignee of goods shipped under sea waybills and ship's delivery orders, the Act has created a balance between the interests of cargo owners, carriers, insurers and banks and has substantially simplified title to sue in a way which should be to the benefit of all concerned.

The days when lengthy, troublesome, complicated and expensive title to sue investigations have had to be conducted are now drawing to a close. The Act helps to place the emphasis of legal action in England, whether by litigation or by arbitration, back to the merits of the claim and away from procedural issues such as who has the right to sue whom. That is why the Act has received so much support from all sections of the shipping community.

Notes
on
BEIZAI (AMERICAN LOGS/LUMBER) CHARTERPARTY
Code Name: "BEIZAI 1991"

Sou TOTTORI*

From the time the BEIZAI (AMERICAN LOGS/LUMBER) CHARTER PARTY for the carriage of logs and/or lumber shipped from ports on the Pacific Coast of the United States and Canada was first drafted and issued in 1965 by the Documentary Committee of the Japan Shipping Exchange, Inc., it has been in wide use not only in the Far East but also in the world market. By the late 1980's it had become keenly felt, however, as more than 25 years passed since its introduction, that all the text of the Charterparty should be carefully reviewed and revised to take into account the rapid changes in the customs and usages in log and lumber transport practice.

Under these circumstances, the Documentary Committee of the JSE in February, 1990 passed a resolution to revise the Charterparty and organized for this purpose a Sub-Committee comprised of members, all being distinguished and experienced experts, appointed from among the circle of shipowners, importers and brokers. The Sub-Committee proceeded on the basic principle that the Charterparty must be suitable for wide and actual use in business transactions, giving deliberate consideration to clarity and adaptability of wording and terminology.

After seventeen sessions held between October 1990 and October 1991, a final draft was submitted to the Documentary Committee and on its approval this draft was formally adopted with the Code Name "BEIZAI 1991".

We are confident that, through this revision, the Charterparty, "BEIZAI 1991"

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will enjoy wide and satisfactory use in business transactions.

The followings are some of the special aspects of this Charterparty:

1. The new Charterparty, "BEIZAI 1991" is printed on A4 size paper, the standard size for formal documents currently used in trade businesses.
2. The "BEIZAI 1991" is comprised of Part I and Part II. Part I adopts a "box layout" format in line with the style of many of our other standard forms of charterparty.
3. The revisions are limited to the minimum degree possible in view of the fact that the old Charterparty, "BEIZAI 1964" has been in long and wide use. However, the phraseology in some clauses, e.g. Clause 1., is very different from that in the original clauses, but the changes are the necessary result of the adoption of the "box layout" format and the meaning remains for the most part unchanged.
4. Some new provisions have been added as printed clauses in the new Charterparty. These are Seaworthy Trim (Cl.10), Supercargo (Cl.14), Separation (Cl.15), Fumigation of Logs (Cl.16), P & I Bunker Deviation Clause (Cl.22), Brokerage (Cl.28), and Sublet (Cl.29), which clauses had usually and generally been attached as addenda to the "BEIZAI 1964".
5. Some other detailed points to be noted are as follows:
   a) Freight (Cl.3)
      The wording "without discount and non-returnable" is newly added.
   b) Laytime (Cl.4)
      With regard to "(b) Separate laytime for loading and discharging", there were some opinions to the effect that this term should be deleted since there was no such practice in the BEIZAI carriage. But, considering the fact that the old Charterparty has also been used in the carriage of logs from New Zealand, the term is preserved unchanged.
   c) Laytime (Cl.4)
      In para (a), Sundays and holidays are always excepted in counting laytime at the loading ports even if work is done on such days. At discharging

ports, however, actual working time counts in such cases. The treatment of Saturday in counting laytime has been left unchanged.

The word "reversible" in para (b) in the old Charterparty has been deleted as there was no such custom. The wording "Setting up and down stanchions and catwalk, and putting dunnage shall count as laytime" is newly adopted.

d) Commencement of Laytime (Cl.5)

The wording in the old Charterparty "if notice given during office hours afternoon" has been revised to "if notice given at or before 5.p.m".

e) Commencement of Laytime at Second and Subsequent Ports (Cl.7)

The wording "usual waiting place" is added to the phrase "the Vessel's arrival port" and the time of "5 p.m." is definitely printed in place of "other .... p.m.".

f) Free In and Out (Cl.9)

The old Clause 7 (Charges), which provided that "Stanchions, lashing wire, chains and so on for usual materials for deck-loading to be provided by Owners at their account", is inserted in this clause with some minor changes in the wording. This clause is clarified in the first sentence by the addition of the wording "lash, unlash and trim" and "set up and down stanchion and catwalk and put dunnage".

g) The Owners' Responsibility and Exemption (Cl.19)

The words "mixture of marks" is added in line 172 and the old Clause 13 (Responsibility for the Cargo) is transferred into the last part of this clause which is the appropriate place for it in view of its purpose.

h) Lien (Cl.23)

The word "advances" in the old Charterparty has been deleted as there were no cases in which it was necessary.

i) Measurement and Bills of Lading Quantity (Cl.4)

The old Clause 16 (Measurement) has been replaced with this new clause to take into account the present practice.

j) Bills of Lading (Cl.25)

In the practice of carriage under BEIZAI, the principle of "Freight in

Advance" has been established, so the phrase in the old Charterparty "but should the freight by Bills of Lading amount to less than the total chartered freight, the difference to be paid to Owners in cash on signing Bills of Lading" has been deleted.

The new clause stipulates that "any other person authorized by the Owners shall sign and issue Bills of Lading" together with the Captain.

k) Indemnity Clause

The old Clause 22 has been deleted because the meaning is self-evident without this clause.

(The new form of the Charterparty is attached to the end of this Bulletin.)

Issued Nov. 5. 1964
Amended Jul. 13. 1971
Amended Jul. 18. 1974
Amended Dec. 11. 1991

The Documentary Committee of The Japan Shipping Exchange, Inc.

BEIZAI (AMERICAN LOGS/LUMBER) CHARTER PARTY

1. Place and Date		Code Name "BEIZAI 1991" PART I
2.1 Owners/Chartered Owners/Disponent Owners		2.2 Charterers
3.1 Vessel's name		3.5 GRT/NRT
3.2 Flag		3.6 DWT on Summer load line (abt.)
3.3 When built	3.4 Class	3.7 Bale/Grain capacity (abt.)
4. Present position	5. Expected ready to load.	6. Laydays/Cancelling date (Cl.18)
7. Port(s) or Place(s) of loading (Cl.1)		
8. Port(s) or Place(s) of discharging (Cl.1)		
9.1 Notice of Readiness (load.) (Cl.5)		9.2 Notice of Readiness (disch.) (Cl.5)
10. Cargo and quantity (Cl.1)		
11. Freight rate and method of payment, currency, etc. (Cl.3)		
12.1 Total laytime for load. and disch. (Cl.4)		12.2 Separate laytime for (Cl.4) i) load. ii) disch.
13. Demurrage rate (Cl.8)	14. Despatch money (Cl.8)	15. Days on demurrage(Cl.17)
16. General Average (Cl.26)		17. Place of Arbitration (optional) (Cl.31)
18. Shipbroker and brokerage (Cl.28)		
19. Numbers of additional clauses attached, if any		20. Original Charter Party (ies) being made, mutually signed and possessed by

It is mutually agreed that this Contract shall be performed subject to the conditions in this Charter Party which shall include Part I as well as Part II. In the event of conflict of conditions, the provisions of Part I shall prevail over those of Part II to the extent of such conflict but no further.

Signature (Owners) Signature (Charterers)

1. Preamble
It is agreed between the party mentioned in Box 2.1 as Owners, Chartered Owners or Disponent Owners (hereinafter referred to as "the Owners") of the Vessel named in Box3.1 with particulars stated in Boxes 3.2 - 3.7, now in position as stated in Box4 and expected ready to load under this Charter about the date as described in Box 5, and the party mentioned in Box2.2 as Charterers (hereinafter referred to as "the Charterers") that the Vessel shall, with all convenient speed, sail and proceed to the loading port or place indicated in Box 7 or so near thereto as she may safely get and lie always afloat, and there load, with her own tackle, a full and complete or part cargo, inclusive of deck load, of Logs and / or Lumber as described in Box 10, which the Charterers bind themselves to load, and being so loaded the Vessel shall, with all convenient speed, proceed to the discharging port or place indicated in Box 8 or so near thereto as she may safely get and lie always afloat and there deliver the said cargo in the customary manner, as ordered.

2. Rotation
The loading or discharging ports shall be in geographical rotation.

3. Freight
Freight shall be prepaid by the Charterers as specified in Box 11 in cash, without discount and non-returnable.
Freight shall be deemed earned upon completion of loading, the Vessel and / or cargo lost or not lost.

4. Laytime
(a) *Total laytime for loading and discharging*
The cargo shall be loaded, stowed, lashed, unlashed, trimmed and discharged within weather working days of 24 consecutive hours as stated in Box 12.1. Sundays and Holidays excepted, even if used at the loading port(s), and at the dicharging port(s) Sundays and Holidays excepted unless used, if used, actual working time shall count as laytime. Setting up and down stanchions and catwalk, and putting dunnage shall count as laytime.

(b) *Separate laytime for loading and discharging*
1). The cargo shall be loaded, stowed, trimmed and lashed at the average rate as indicated in Box 12.2 i), per weather working day of 24 consecutive hours, Sundays and Holidays excepted, even if used.
2) The cargo shall be unlashed and discharged at the average rate as indicated in Box 12.2 ii), per weather working day of 24 consecutive hours, Sundays and Holidays excepted unless used, if used, actual working time shall count as laytime.
3) Setting up and down stanchions and catwalk, and putting dunnage shall count as laytime.
4) Laytime for loading and discharging shall be non-reversible.

5. Commencement of laytime
1) Notice of Readiness at the loading or discharging port shall be given to the Charterers or their nominees stated in Box 9.1 or Box 9.2 respectively.
2) Laytime shall commence at 1 p.m. if notice of readiness to load or discharge is given at or before noon and at 8 a.m. next working day if notice given at or before 5 p.m., whether in berth or not.
3) Laytime shall commence at 1 p.m. next working day, if notice of readiness to load or discharge is given on Sunday or holiday, and after 5 p.m. on Saturday, whether in berth or not.
4) If loading or discharging commences earlier, time shall count from actual commencement.

6. Time lost in waiting for berth
Time lost in waiting for berth, whether in or off port, shall count as laytime, the Vessel being in free pratique and ready in every respect to load or discharge.

7. Commencement of Laytime at second and subsequent ports
Laytime at second and subsequent loading or discharging ports shall commence upon the Vessel's arrival at port or usual waiting place. If the Vessel arrives at port or usual waiting place after 5 p.m., laytime shall commence at 8 a.m. on next working day unless sooner commenced.

8. Demurrage, Despatch Money
Demurrage shall be paid to the Owners at the rate as agreed in Box 13 per day of 24 running hours or pro rata for any part thereof, payable day by day, for all time used in excess of laytime at loading or discharging port (s).
Despatch Money shall be paid to the Charterers at the rate as agreed in Box 14 per day of 24 running hours or pro rata for any part thereof for laytime saved at loading or discharging port (s).

9. Free In and Out
The Charterers shall load, stow, lash, unlash, trim and discharge the cargo, and set up and down stanchions and catwalk, and put dunnage, free of risks and expenses to the Owners. The Charterers shall have the liberty of working all available hatches.
The Vessel shall provide motive power, winches, gins and falls, stanchions, lashing wire, chains and any other usual materials for deck cargo loading at all times and, if required, supply light for night work on board free of expenses to the Charterers.

10. Seaworthy trim
The Vessel shall be always kept in seaworthy trim at the Master's discretion during her sailing and / or shifting between port and port or from berth to berth at both ends. Time and expenses incurred thereby shall be for the Charterers' account.

11. Overtime
Overtime for loading and discharging shall be for account of the party ordering the same. If overtime shall be ordered by Port Authorities or any other Governmental Agencies, the Charterers shall pay extra expenses incurred. The Officers' and crew's overtime charges shall be always paid by the Owners.

12. Charges
Lighterage, towage for raft, terminal service charges, handling charges, and such wharfages and other dues and taxes as are charged against cargo, if any, shall be for the Charterers' account.

13. Deck Cargo
The Owners shall load cargo on deck at the Charterers' risk within the limit of the Vessel's seaworthiness, in which case the Owners shall not be responsible for wash away and / or any other damage to deck cargo.

14. Supercargo
Supercargo, if necessary, shall be appointed by the Charterers at their risks and expenses.

15. Separation
Separation of the cargo at the port of loading, if required by the Charterers or their agents, shall be for the Charterers' account, and time used thereby shall count as laytime.

16. Fumigation of logs
The Owners agree to fumigate logs in holds if so required by the Charterers, provided weather conditions and the Vessel's seaworthiness allow. The time so used shall count as laytime and the expenses including shifting charge, landing, lodging and boarding expenses of the Vessel's officers and crew and risks incurred thereby shall be for the Charterers' account.

17. Days on Demurrage
Days of 24 running hours on demurrage as agreed in Box 15 for loading shall be allowed the Charterers at loading port(s). Should the Charterers be unable to load within the period, the Vessel shall have liberty to sail with the cargo then on board, the Charterers paying the dead freight and demurrage incurred.

18. Laytime and Cancelling Date
Laytime shall not commence before the laydays date as stated in Box 6.
Should the Vessel not be ready to load (whether in berth or not) by noon on the cancelling date as stated in Box 6, the Charterers shall have the option of cancelling this Charter, such option shall be declared, if demanded, at least 48 hours before the Vessel's expected arrival at port of loading.

19. The Owners' Responsibility and Exemption
The Owners shall, before and at the beginning of the voyage, exercise due diligence to make the Vessel seaworthy and properly manned, equipped and supplied and to make the holds and all other parts of the Vessel in which cargo is carried fit and safe for its reception, carriage and preservation. The Owners shall properly and carefully handle, carry, keep and care for the cargo. The Owners shall not be liable for loss of or damage to the cargo arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the Owners to make the Vessel seaworthy, and to secure that the Vessel is properly manned, equipped, and supplied, and to make the holds and all other parts of the Vessel in which cargo is carried fit and safe for its reception, carriage and preservation.
The Owners shall not be responsible for loss of or damage to the cargo arising or resulting from: act, neglect, or default of the Master, crew, pilot, or the servants of the Owners in the navigation or in the management of the Vessel; fire, unless caused by the actual fault or privity of the Owners; perils, dangers and accidents of the sea or other navigable waters; act of God, act of war, act of public enemies; arrest or restraint of princes, rulers or people, or seizure under legal process; quarantine restrictions; act or omission of the Charterers or of the shippers or owners of the cargo, their agents or representatives; strikes or lock-outs or stoppage or restraint of labor from whatever cause, whether partial or general (provided, that nothing herein contained shall be construed to relieve the Owners from responsibility for their own acts); riots and civil commotions; saving or attempting to save life or property at sea; wastage in bulk or weight or any other loss or damage arising from inherent defect, quality or vice of the cargo; insufficiency of packing; insufficiency or inadequacy or mixture of marks; latent defects not discoverable by due diligence; any other cause arising without the actual fault or privity of the Owners, or without the fault of the agents or servants of the Owners. The Owners shall not be responsible for split, chafing and / or any damage unless

caused by the negligence or default of the Master or crew.

20. Stevedore Damage
The Charterers shall be responsible for proved loss of or damage (beyond ordinary wear and tear) to any part of the Vessel caused by stevedores at both ends. Such loss or damage, as apparent, shall be reported by the Master to Charterers, their Agents or their stevedores within 24 hours after occurrence.

21. Deviation
The Vessel shall have liberty to sail without pilots, to tow and to be towed and to assist vessels in all situations, to deviate for the purpose of saving life and / or property, and also to call at any port(s) in any order for any other reasonable purpose.

22. P & I Bunker Deviation Clause
The Vessel shall have the liberty as part of the contract voyage to proceed to any port(s) at which bunker oil is available for the purpose of bunkering at any stage of the voyage whatsoever and whether such ports are on or off the direct and / or customary route(s) between any of the ports of loading or discharge named in this Charter Party and may there take oil bunkers in any quantity in the discretion of the Owners even to the full capacity of bunker tanks and deep tanks and any other compartment in which oil can be carried, whether such amount is or is not required for the chartered voyage.

23. Lien
The Owners shall have a lien on the cargo for all freight and all other expenses in relation to the transport, deadfreight, demurrage, damages for detention, general average, and salvage. The Charterers shall remain responsible for above items to such extent only as the Owners have been unable to obtain payment thereof by exercising the lien on the cargo.

24. Measurement and Bills of Lading quantity
The cargo shall be measured by measurers arranged by the Charterers at their risks and expenses before loading.
The Owners shall not employ tally clerks and not let the Vessel's crew tally at both ends.
The Owners shall not be responsible for either the loaded quantity or the number of pieces stated in Bills of Lading.

25. Bills of Lading
The Captain or any other person authorized by the Owners shall sign and issue Bills of Lading as presented without prejudice to this Charter Party.

26. General Average
General Average shall be adjusted and settled at the place indicated in Box 16, according to York-Antwerp Rules, 1974 and amendment thereto.

27. Agency
The Vessel shall be consigned to the Owners' agents both at loading and discharging ports.

28. Brokerage
A brokerage commission at the rate stated in Box 18 on the freight earned is due to the brokers mentioned in Box 18, by the Owners.

29. Sublet
The Charterers have the option to sublet the Vessel's cargo space to others. In this case, the Charterers are responsible for any and all consequences resulting therefrom and the Charterers shall notify the Owners of the sublessee as soon as possible.

30. Strike
Neither the Charterers nor the Owners shall be responsible for the consequences of any strikes or lock-outs preventing or delaying the fulfilment of any obligations under this Contract.
If there is a strike or lock-out interfering with the loading of the cargo or any part of it at the time when the Vessel is ready to proceed or during her voyage to the port(s) of loading, the Captain or the Owners may ask the Charterers to declare that they agree to reckon the laytime as if there were no strike or lock-out. Unless the Charterers have given such declaration within 24 hours after receipt of the request, the Owners shall have the option of cancelling this Contract. If such strike or lock-out is going on at or occurs after the Vessel's arrival at port(s) of loading, the Charterers have the right either to keep the Vessel waiting paying full demurrage or to cancel this Contract. Such cancellation shall be declared within 24 hours after the Vessel's arrival or 24 hours after the subsequent occurrence of such strike or lock-out. If part of the cargo has then already been loaded, the Owners must proceed with same if requested by the Charterers, (freight payable on loaded quantity only), having liberty to complete with other cargo on the way for their account.
If there is a strike or lock-out interfering with the discharge of the cargo at the time of the Vessel's arrival at or off the port(s) of discharge, or occurring after the Vessel's arrival, the Charterers shall have the option of keeping the Vessel waiting until such strike or lock-out is at an end against paying half demurrage for the time the Vessel has been delayed, or of ordering the Vessel to nearby safe port(s) where she can safely discharge her cargo without risk of being detained by strike or lock-out: such option shall be declared within 36 hours after the arrival at or off the port(s) of discharge or the subsequent occurrence of the strike or lock-out. On delivery of the cargo at such port(s), all conditions of this Charter Party and of the Bill of Lading shall apply and the Vessel shall receive the same freight as if she had discharged at the original port(s) of destination, except that if the additional sailing distance exceeds 100 nautical miles, the freight on the cargo delivered at the substituted port(s) shall be increased in proportion.

31. Arbitration
Unless otherwise indicated in Box 17, any dispute arising from this Charter shall be submitted to arbitration held in Tokyo by the Tokyo Maritime Arbitration Commission (TOMAC) of The Japan Shipping Exchange, Inc. in accordance with the Rules of TOMAC and any amendment thereto, and the award given by the arbitrators shall be final and binding on both parties.

32. War Clause
If the nation under whose flag the Vessel sails should be engaged in war and the safe navigation of the Vessel should thereby be endangered either party shall have the option of cancelling this Charter, and if so cancelled, cargo already shipped shall be discharged either at the port(s) of loading or at the nearest safe place at the risks and expenses of the Charterers.
If owing to outbreak of hostilities the cargo loaded or to be loaded under this Charter or part thereof become contraband of war whether absolute or conditional or liable to confiscation or detention according to international law or the proclamation of any of the belligerent powers, each party shall have the option of cancelling this Contract as far as such cargo is concerned, and contraband cargo already loaded shall be then discharged either at the port(s) of loading or at the nearest safe place at the expense of the Chaterers. The Owners shall have the right to fill up with other cargo instead of the contraband.
Should any port(s) where the Vessel has to load under this Charter be blockaded the Charter shall be null and void with regard to the cargo to be shipped at such port(s).
No Bills of Lading shall be signed for any blockaded port, and if the port(s) of destination be declared blockaded after Bills of Lading have been signed, the Owners shall discharge the cargo either at the port(s) of loading, against payment of the expenses of discharge, if the Vessel has not sailed thence or, if she sailed, at any safe port(s) on the way as ordered by the Charterers or if no order is given at the nearest safe place against payment of full freight.

33. Both-to-Blame Collision Clause
If the Vessel comes into collision with another ship as a result of the negligence of the other ship and any act, neglect or default of the Master, mariner, pilot or the servants of the Owners in the navigation or in the management of the Vessel, the owners of the cargo carried hereunder will indemnify the Owners against all loss or liability to the other or non-carrying ship or her Owners insofar as such loss or liability represents loss of, or damage to, or any claim whatsoever of the owners of the said cargo, paid or payable by the other or non-carrying ship or her Owners to the owners of said cargo and set off, recouped or recovered by the other or non-carrying ship or her Owners as part of their claim against the carrying vessel or the Owners.
The foregoing provisions shall also apply where the owners, operators or those in charge of any ship(s) or objects other than, or in addition to, the colliding ships or objects are at fault in respect to a collision or contact.

34. New Jason Clause
In the event of accident, danger, damage or disaster before or after the commencement of the voyage, resulting from any cause whatsoever, whether due to negligence or not, for which, or for the consequence of which, the carrier is not responsible, by statute, contract or otherwise, the goods, shippers, consignees or owners of the goods shall contribute with the carrier in general average to the payment of any sacrifices, losses or expenses of a general average nature that may be made or incurred and shall pay salvage and special charges incurred in respect of the goods.If a salving ship is owned or operated by the carrier, salvage shall be paid for as fully as if said salving ship or ships belonged to strangers. Such deposit as the carrier or his agents may deem sufficient to cover the estimated contribution of the goods and any salvage and special charges thereon shall, if required, be made by the goods, shippers, consignees or owners of the goods to the carrier before delivery.

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