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The New Japanese Hull Insurance Conditions – An Overview

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1. Preface

In April 1990, 57 years after the original clause was drafted, the general conditions of the Japanese hull insurance clause were totally revised by the Hull Insurers' Union.

The purpose of the revision was to make it more up-to-date and in line with the coverage provided under various standard clauses adopted in the major marine insurance markets.

The original clause, the General Conditions of Hull Insurance (1/6/33) was used from 1933, but as time went on its wording and expressions became obsolete.

Therefore, in 1965 a small revision was made and the old terms and expressions were replaced by modern vocabularies, but no alterations in terms of the scope of the coverage were made.

The General Conditions of Hull Insurance (1/6/33 as amended 1/4/65– hereafter called "Old Clause") was in effect until 31st March 1990, when it was replaced by the General Conditions of Hull Insurance 1/4/90 (hereafter called "New Clause").

This paper is intended firstly to review the "Old Clause" and then to introduce the major revisions made in the "New Clause".

Also, some comparison with the coverage in major foreign clauses will be made.

2. Coverage under the "Old Clause"

(1) Relationship between the "Old Clause" and the Special Clauses

The "Old Clause" was the basic clause of the hull & machinery insurance, the hull war risks insurance, the loss of earnings insurance and the builders risks insurance. All such insurance was accepted with the relevant Special Clauses attached to it.

With regard to a time policy of a hull & machinery insurance, there were five Special Clauses, namely, Class No. 1, 2, 3, 4 and 5.

Class No. 1:	total loss only
Class No. 2:	total loss and sue and labor expenses
Class No. 3:	those losses covered by Class No. 2, cost of repairs resulting from the general average act, general average contribution and four-fourths Running Down Clause
Class No.4:	those losses covered by Class No. 3, and cost of repairs in respect of the damage due to sinking, stranding, burning and collision, with deductible of certain percentages of the insured amount
Class No. 5:	those losses covered by Class No. 4, with no deductible of the cost of repairs

Among the Special Clauses, Class No. 5 was generally used while Class No. 1, No. 2 and No. 3 were seldom used. Class No. 4 has not been used for a long time.

Under Class No. 5, the cost of repairs was covered only in the case of the standard perils of Sinking, Stranding, Burning, Contact and collision, the so-called S.S.B.C. risks. Therefore, repair cost for heavy weather damage was not covered.

As to the repair cost of the additional risks, Additional Perils Clauses (A) (the so-called "Inchmaree Clause") and (B) (the so-called "Liner Negligence Clause") were introduced in 1968, with some alterations made thereafter. Those clauses were available with additional premium to the assureds who insure their vessels under the Special Clauses of Class No.5.

For instance, Additional Perils Clauses (A)-1/4/83 covers the cost of repairs of the damage due to the following perils with a certain deductible:

(1) Explosion (on shipboard or elsewhere)
(2) Accident in and due to loading, discharging or shifting cargo or fuel
(3) Accident to main machinery, propeller shaft, propeller or boiler
(4) Accident to auxiliary machinery installed in engine room, cargo handling pump room or refrigerator room for cargo refrigerating hold
(5) Accident to emergency generator, steering engine, refrigerating machinery for provision store, machinery for inert gas system, special machinery for liquefied petroleum gas, side thruster or fin stabilizer.

Additional Perils Clause (B) differs from (A) only in that in covers as well the cost of repairs of the latent defect itself in the case of damage caused to the Vessel due to the latent defect whereas Clause (A) does not cover the cost of repairs of the latent defect itself.

Later, Additional Perils Clauses (C) was introduced to cover the cost of repairs of heavy weather damage.

In 1987, in order to include those additional perils and widen the coverage elsewhere, Special Clauses Class No. 6 was worked out. I shall return to this clause later.

(2) Contents of the "Old Clause"

(a) "Comprehensive" cover

Article 1(1) of the "Old Clause" specifies the perils insured against as follows:

> "Subject to the provisions herein contained, the Company shall indemnify the assured for any loss or damage caused to the subject-matter insured by sinking, stranding, grounding, fire, collision or any other maritime perils. The Company shall also indemnify the assured for any loss or damage caused to the subject-matter insured by any land perils pertaining to the ship when these perils are covered by a special agreement.

As you can see, the cover is very comprehensive indeed and it does not restrict the perils merely to the "perils of the seas".

(b) Exclusions

The excluded risks and warranties can be divided into two categories. One contains those risks which are absolutely excluded and the other contains those which are normally excluded but are insurable subject to previous notice to the insurer and payment of an additional premium, if required.

(i) Risks or "Warranties" absolutely excluded

Loss or damage caused by the following:

- wilful misconduct of the master, crew or pilot (Art. 3(7))
- wilful misconduct or gross negligence of the persons effecting the insurance, the assureds, the beneficiaries or their agents or their employees (Art. 3(6))
- wear and tear of the ship or any defect (except that which could not be discovered by the owner or demise charterer of the ship in spite of his reasonable care) (Art. 3(8))
- nuclear reaction or decay (Art. 3(5))

Loss or damage occurring subsequent to the following happenings:

- when the insured vessel is:
  - unseaworthy at the time of departure from port (including departure from any port of call) (Art. 4(1)).
  - employed for services violating the law (Art. 4(3)).
- when the total insured amount of the insurance effected with two or more insurers separately on the same vessel exceeds the limit of the insurable amount. (Art. 4(6)).
- when the premium has not been paid on the due date (Art. 4(7)).

(ii) Risks or "warranties" normally excluded but insurable with an additional premium or under a separate insurance policy, subject to previous notice to insurer.

Loss or damage caused by the following:

War and S.R.C.C. risks such as war or any hostile operation, mines, torpedoes, attack, capture, seizure, arrest, restraint, detainment, piracy, strikes, sabotage, lockouts or disturbances, riots, civil commotion, etc. (Art. 3(1)–(4))

Loss or damage occurring subsequent to the following happenings:

- when the insured vessel is:
  - outside trading limits (Art. 4(2))
  - lying at anchor in an area of war or warlike disturbance (Art. 4(4))
- when the owner leased the vessel or there has been a change of ownership etc. (Art. 4(5))

(iii) The policy becomes null and void in case the assured:

- has committed any fraud (Art. 2(1)).
- has failed to give notice to insurers of any other insurance at the time of effecting the insurance (Art. 2(2)).
- knows that any peril insured has already occurred at the time of effecting the insurance (Art. 2(4)).

Also, when the person effecting the insurance on behalf of any person has failed to give notice to insurers to that effect, it is null and void (Art. 2(3)).

Generally speaking, the "Old Clause" is similar, to some extent, to the Norwegian Marine Insurance Plan of 1964 in that the coverage is made by way of "comprehensive perils minus exclusions", and is different from the English form of "enumerated maritime perils".

(c) "Warranties" in the "Old Clause"

Art. 4(1) reads as follows:

> Article 4. The Company shall not be liable to pay for any loss or damage occurring subsequent to the happening of the following:
>
> (1) When the ship, at the time of her departure (including departure from any port of call), has failed to make such preparations as were necessary for making the voyage safely, or to keep the necessary documents aboard, or to undergo the necessary inspection by the government authorities.

As to the nature of the "warranties" in the above clause, interpretation was made in two judgements of the Japanese courts.

One is the "Fujikawa Maru" case. In this case the Master disembarked at the port of call, having delegated his responsibilities to his deputies. After the vessel sailed, she stranded and afterwards sank.

Insurers denied liability by referring to Article 4(1), and the assured filed suit in the Kobe District Court. The Court ruled in favor of the insurer, because the capability of the crew at the departure from the port of call was insufficient, and also because Article 4(1) discharges the liability of the insurer. However, the Court said as obiter dicta that in interpreting Clause 4(1), a causal connection between the unseaworthiness and the loss is necessary in order to relieve insurers from liability. (Judgement of the Kobe District Court, 1972).

The other case is the "Seitoku Maru" case. In this case the insured vessel, laden with coal, came into contact with another vessel during her preparations for departure. Due to the contact, a rivet in the shell platings became loose, and caused leakage. Shipowners repaired the damage and, considering that the vessel would withstand the voyage, made the vessel depart without making a report to the officials in charge of safety and without undergoing any survey by the authorities.

During the voyage the vessel sank. There was no causal connection between the damage and the sinking.

The cargo owners presented a claim to the cargo insurer, but the insurer denied coverage, referring to an exclusion clause in the cargo insurance. The clause, which is very similar to the hull clause, read as follows:

> "Insurers are not liable for loss or damage of the cargo when the vessel departs without making sufficient preparation for the safety of the voyage, and when she departs without necessary documents, and when she has not undergone the necessary survey by the government."

The Supreme Court ruled that the insurer should not be absolved of liability when there is no causal connection between the sinking and the fact that the vessel underwent no survey.

Therefore, the insurers failed. (Judgement of the Supreme Court, 1925).

Taking all these rulings into consideration, it became established among Japanese insurers to pay claims with some percentages of deduction in the character of a "penalty"

- when the vessel departs with crew insufficient in number by law, but
- the deficiency has no causal connection with the loss or damage of the vessel.

For example, should a vessel collide with another vessel during the time when the chief officer was not on board due to an emergency at his home and he has asked another man who is well competent to do the job to replace him, if there was no causal connection between the absence of the chief officer and the collision, Japanese insurers would in the usual case deduct 15% from the insurance money.

3. Coverage under the "New Clause"

(1) Background to the revision

As I explained earlier, the hull clause in Japan which was most frequently used was the Special Clauses Class No.5 with the "Old Clause". However, Class No.5 was rather limited in coverage compared with the standard clauses in use in the major marine insurance markets.

Meanwhile, in 1979, U.N.C.T.A.D (United Nations Conference on Trade and Development) began to study various insurance clauses in the world in order to establish a set of standard clauses as a non-mandatory international model. In these discussions, the English Clauses of the S.G. Form in conjunction with Institute Time Clauses, Hulls (hereafter called ITC-Hulls –1/10/70) were severely criticized.

The wordings of the model clauses were finalized in 1984 and were officially approved in March, 1987.

But without waiting for this, in 1983 the English market, as a response to the criticisms,

abolished the S.G. Policy altogether and replaced it with the new clauses, ITC-Hulls (1/10/83).

Against this background, in order to widen the hull coverage in Japan, the Hull Insurers' Union embarked on the making of the new Special Clauses Class No.6.

(2) Introduction of the Special Clauses Class No.6

From the 1st of April, 1987, Class No.6 was sold in the market.

Article 2–1 of Class No.6 enumerates various perils in respect of which the cost of repairs are covered:

(1) sinking, capsizing, stranding, grounding, fire, collision, or contact with any external object other than water, or any general average act

(2) explosion (on board the vessel or elsewhere), provided that explosion of torpedoes, bombs or any other weapons of war used as explosives shall be excluded

(3) earthquake, tidal wave, volcanic eruption or lightning

(4) heavy weather

(5) accident to main machinery, auxiliary machinery or any other machinery or apparatus

(6) accident due to any defect in the hull and appurtenances (limited, however, only to those defects which the person effecting the insurance or the assured could not discover in spite of exercising due diligence), except accident to painting only (including such accident arising from the cases mentioned in (9) below)

(7) accident in and due to loading, discharging or shifting cargo, appurtenances or fuel, provisions or any other consumable stores

(8) wilful misconduct or negligence of the master, crew or pilots, provided that in cases where the master or crew are the person effecting the insurance, the assured, the beneficiary hereunder or the agent of any of these persons, or where they have the intention to have the indemnity be paid to any of these persons, wilful misconduct of the master or crew shall be excluded

(9) negligence of repairers or charterers, provided that such repairers or charterers are neither the person effecting the insurance, the assured, the beneficiary hereunder nor agent of any of these persons

(10) radioactive or detonative or any other detrimental effects of nuclear fission, fusion or any other similar reaction

You can see that the named perils are very similar to those specified in the perils clause of the ITC-Hulls (1/10/83). There are many other articles by which coverage became widened and the exclusions became more restricted. In this sense, Class No.6 not only widened the risks payable as the cost of repairs, but also widened the coverage specified in the "Old Clause" in many respects.

Under these circumstances, a major overhaul of the General Conditions itself became inevitable. The Hull Insurers' Union started preparatory work for the revision in October, 1987, and the "New Clause" replaced the "Old Clause" from 1st April, 1990.

(3) Relationship between the "New Clause" and the Special Clauses

The "New Clause" is intended to be a basic clause of the time policy of hull insurance, the loss of earnings insurance, the builder's risks insurance, and the liability insurance.

With respect to the time policy of a hull and machinery insurance, one of the Special Clauses, Class No.1 to No.6 is always attached as before. The contents of these Special Clauses are the same as before although the wordings have been slightly changed.

(4) Contents of the "New Clause"

(a) Comprehensive Cover

Art.1-1 reads as follows:

> "Subject to the provisions herein contained and in the Special Clauses as specified in the Policy, the Company shall be liable to indemnify the Assured for any loss caused to the insured interest as a result of sinking, capsizing, stranding, grounding, fire, collision or any other maritime perils (hereinafter referred to as "The Accidents") encountered by the vessel specified in the Policy (hereinafter referred to as "the Vessel").
>
> The Company shall also be liable to indemnify the Assured for any loss caused by land perils when these perils are specially agreed to be covered."

Comprehensive coverage as in the "Old Clause" is retained although the wording is slightly different.

(b) Exclusions

(i) Risks or "warranties" absolutely excluded

Loss or damage caused by the following:

- wilful misconduct or gross negligence of the assured or his agent (Art. 12(1))
- wilful misconduct or gross negligence of the beneficiaries or their agents (Art. 12(2))
- wilful misconduct of the master or crew acting with the intention of causing any of the persons referred to in the above two Articles to obtain the indemnity (Art. 12(3))
- attachment, or any other disposal in legal proceedings (Art. 11(9))
- wear and tear (Art. 13(1))
- unseaworthy condition of the vessel at the time of sailing in spite of due diligence by

the assured (Art. 13(3))

- defect existing in the vessel which could not be discovered by the assured in spite of due diligence (Art. 13(2))
- radioactive or detonative or any other detrimental effects of nuclear fission (Art. 11(8))

Loss or damage occurring subsequent to the following happenings:

- When the vessel has failed to undergo a necessary inspection by the authorities or the classification society of the vessel (Art. 14(1))
- When the vessel has been employed for any purpose in violation of the law or regulations (Art. 14(4))

(ii) Risks or "warranties" normally excluded but insurable with an additional premium or under separate insurance, subject to previous notice to the insurer

Loss or damage caused by the following:

War and S.R.C.C. risks such as war, or any other hostile operations, torpedoes, bombs or any other weapons of war, seizure, capture, detainment, confiscation or forfeiture, piracy, strikes, lock-outs, terrorists or any other persons acting maliciously or from a political motive, riots, political or social commotion (Art. 11-(1)-(7)).

Loss or damage occurring subsequent to the following happenings:

- when the vessel's classification society has been changed or its class registration has been deleted (Art. 14(2))
- when, in case of a time policy, the vessel has deviated from the trading limits specified in the policy (Art. 14(3))
- when the vessel has entered an area of war or warlike disturbances (Art. 14(5))
- when there has been a change of the owner or the demise charterer of the vessel (Art. 14(6))
- when the structure of the vessel or the purpose for which she was employed has been substantially changed (Art. 14(7))
- when the risks covered by the insurer have substantially changed or increased for which the assured is responsible (Art. 14(8)).

Meanwhile, the policy becomes null and void in case the assured:

- has comitted any fraud (Art. 16(1))
- knew that the perils insured against had already occurred (Art. 16(2)).

Unlike the English conditions of ITC-Hulls (1/10/83), piracy is treated as a war risk, and not as a marine risk.

(c) Main features

The "New Clause" not only absorbed many points already contained in Class No.6 but

also made various revisions to the "Old Clause".

The main features of the "New Clause" can be summarized as follows:

(i) Abolishment of abandonment

In the "Old Clause" abandonment was described in detail between Art. 10 and Art. 14.

The Japanese Abandonment system is very similar to the system in England under the Marine Insurance Act, 1906 (ss. 60–63). In order to claim a constructive total loss, abandonment of the insured vessel to the insurer had been indispensable. However, nowadays the vessel in distress has usually become a "liability" rather than an asset to the underwriters since it can cause damage to the environment and cause many other problems. Therefore, it has become usual for underwriters to refuse to take over the ownership of the insured vessel from the assured.

In view of the fact that "abandonment" is seldom used in practice, the "New Clause" has abolished it, and retained only the concept of constructive total loss where underwriters pay a total loss when certain conditions have been met.

Therefore, if the assured is able to substantiate his loss under Art. 3, he can claim a total loss without tendering notice of abandonment to the insurer.

Insurers, however, reserve the right to take over the possession of the vessel by Art. 31(1), which reads as follows:

> Where the Vessel becomes a total loss and the Company indemnifies therefor, the Company shall be entitled to choose whether or not to acquire the proprietary right in the Vessel.

(ii) Expansion of coverage

The "Old Clause" specified the limit of indemnity to be the amount insured in each accident plus the same amount under the Running Down Clause.

However, under the "New Clause",

- cover under the Sue and Labour Clause
- cover under the Running Down Clause
- cost of litigation with respect to the suit filed against the assured concerning the damages under the Running Down Clause

are each to be covered to the amount insured.

(iii) Unseaworthiness

The "New Clause" has abrogated the "warranty" in respect of unseaworthiness.

Article 13 reads as follows:

> The Company shall not be liable to indemnify any loss caused by the

> following; provided that in no case shall this exclusion be applicable to the cases where the cause mentioned in item (3) occurred in spite of due diligence exercised by the Person effecting the insurance or the Assured:
>
> .....
>
> (3) unseaworthy condition of the Vessel at the time of sailing (including sailing from a port of call) for safe prosecution of the voyage or unsuitable condition of the Vessel for safe mooring or anchoring in case of the Vessel being moored or anchored.

On this point, a system has been introduced which is very similar to the English system for time policies mentioned in sub-section 39(5) of the Marine Insurance Act, 1906. Meanwhile there is also an Article where warranty is still retained with respect to the inspection of the Vessel.

Article 14 reads as follows:

> The Company shall not be liable to indemnify any loss occurring subsequent to the happening of the following circumstances, unless the Company's agreement in writing to reinstate the cover is obtained after such circumstances have ceased to exist:
>
> (1) When the Vessel has failed to undergo a necessary inspection by the authorities or the classification society of the Vessel or an inspection designated by the Company for the safe prosecution of the voyage.
>
> .....

This Article is very strict, and an assured should be very careful to comply with the requirement of inspection by the classification society.

(d) Cost of Repairs

Finally I will briefly touch upon the cost of repairs.

Under Article 4 of the "New Clause", coverage of the Cost of Repairs has become widened, and in conjunction with the Special Clauses Class No.6, the extent of coverage has become very similar to that under ITC-Hulls (1/10/83). However, one of the peculiar features of our coverage is that we still cover the cost of bottom painting and scraping in addition to the drydocking dues when the repair of the underwater damage is effected in drydock.

(i) Anti-fouling bottom paint

In the "Old Clause", at Art. 13(2), paintings were described as follows:

> "Only that part of the cost and painting expenses of water-line and anticorrosive paints and anti-fouling paint (except oil paint) which is allocated to the damaged portion may be included in the "cost of repairs". The cost and painting expenses of anti-fouling oil paint may be included in the "cost of repairs", only when the casualty causing the damage has occurred within 8 months from the time when she was last repainted . . . . . (omitted) . . . . .
>
> In the case where repair of the damage covered under the contract of insurance is made concurrently with other work and/or inspection, one half of the expenses for docking and undocking the ship or putting her on and off the slip may be added to the "cost of repairs" together with charges for the use of drydock or slip calculated according to the number of days which would have been required had the ship been separately drydocked or placed on a slip solely for the repair of damage covered under the contract of insurance, provided, however, that only one half of such charges are allowable for the number of days overlapping, plus one half of the cost and painting expenses of anti-fouling oil paint (including the expense for scraping the bottom) only when the casualty causing the damage has occurred within 8 months from the time when the ship was last repainted."

Although the above Article distinguished oil paint from other kind of paints, as time went on, long-life paint came to be introduced into the market, and thereafter in practice such long-life paint has also been covered by underwriters.

The "New Clause" has abolished the different treatment of oil paint and other kinds of paint, and also abolished the restriction of "more than 8 months", but we still cover the cost of scraping and painting the bottom.

The treatment of anti-fouling paint is entrusted to the Special Clauses for Anti-Fouling Paint, which limits the amount of coverage to a specified figure.

(ii) "Unrepaired Damage"

The "New Clause" at Art. 27(1) specifies that

> "When the Vessel sustains damage by any of the Accidents, the Person effecting the insurance or the Assured shall repair the damage without delay, after the completion of which the Company shall indemnify the Assured for the cost of such repairs,"

and at Art. 27(3),

> "Notwithstanding the provision of paragraph 1 of this Article, where the Vessel is sold or broken up without effecting repairs to the damage sustained

by the Accident, the Company shall indemnify the Assured for the estimated cost of repairs had the repairs of the said damage been made, but in no case for a higher amount than the depreciation in value of the Vessel due to such damage (and in any event limited only to the amount for which the Company would have been liable to indemnify as the cost of repairs)."

Under the Japanese Conditions, when the vessel is sold to domestic buyers and the vessel is thereafter insured with other underwriters in the Japanese market, but the damage is not repaired at that time, the underwriters usually keep their file of claims open after the expiration of the policy until the repairs are actually effected.

As to the method of calculation of the "depreciation in value of the vessel", please refer to Rule 8 of the Japanese Underwriters' Rules of Practice for Hull Insurance Claims Adjustment, which is included in the Appendices of this paper.

These Rules of Practice are not the Rules of Practice of the Association of the Average Adjusters of Japan, which mainly deal with general average, but a separate set of Rules which were prepared and agreed upon and now are uniformly followed by all the Japanese marine underwriters.

Needless to say, these Rules are not part of the insurance contract and have no express binding power upon the assured, but they are accepted and honoured as established customs by all the interested circles in the Japanese market.

4. Conclusion

Although the "New Clause" has revised the "Old Clause" substantially, the basic characteristics have not been altered.

Firstly, the "comprehensive cover" system is retained.

Secondly, the structure of the various clauses, in particular, the combination between the General Conditions and the Special Clauses Class No.1–No.6 is retained.

In this sense, the Japanese Hull Insurance Conditions is a delicate mixture of the new and old, and it occupies a unique position among the standard hull insurance clauses in the major marine insurance markets.

Reference book:

"Marine and Inland Transit Insurance in Japan" (The Non-Life Insurance Institute of Japan: 4th edition 1991, 3rd edition 1985)

Appendix 1

JHIU 4/90

(TENTATIVE TRANSLATION)

GENERAL CLAUSES OF HULL INSURANCE

Chapter 1 Liability for indemnification

Article 1 (Perils insured against)

1. Subject to the provisions herein contained and in the Special Clauses as specified in the Policy, the Company shall be liable to indemnify the Assured for any loss caused to the insured interest as a result of sinking, capsizing, stranding, grounding, fire, collision or any other maritime perils (hereinafter referred to as "the Accidents") encountered by the vessel specified in the Policy (hereinafter referred to as "the Vessel").

The Company shall also be liable to indemnify the Assured for any loss caused by land perils when these perils are specially agreed to be covered.

2. Losses caused to the insured interest as referred to in the preceding paragraph include a total loss, cost of repairs, general average contribution, collision damages, sue and labor expenses, and other losses, expenses and damages.

Article 2 (Scope of the subject-matter insured)

1. Where a vessel is the subject-matter insured, in addition to the hull and machinery, it shall include, unless otherwise specifically agreed, the following articles which the Assured either owns or hires, and which are on board the Vessel. Those which the Person effecting the insurance either owns or hires shall also be treated in the same manner:

(1) appurtenances and fittings

(2) all articles for use and/or consumption in connection with the Vessel's employment, such as fuel, provisions and stores

2. Notwithstanding the provisions of the preceding paragraph, a launch, among the appurtenances, shall be deemed to be included in the subject-matter insured even while it is separated and away from the Vessel, as long as it is being used for its proper purpose.

Article 3 (Total loss)

1. When the Vessel has been lost or so seriously damaged as to be beyond repair, it shall be deemed a total loss.

2. The Assured may also make a claim for a total loss in the following cases:

(1) where any of the estimated amounts of cost of repairs, general average contribution or sue and labor expenses (limited only to those expenses as provided for in Article 7-1-(1)), or the aggregate amount of these above, exceeds the insured value of the Vessel.

(2) where the Vessel has been missing for 60 days counting from the day on which news of her was last received.

(3) where the Assured has been deprived of the possession and use of the Vessel for a continuous period of 180 days.

3. In the cases provided for in items (2) and (3) of the preceding paragraph, the Assured may make a claim for a total loss even when the Policy terminates before the expiry of the respective periods specified therein.

4. Under this contract of insurance, the Assured may not make a claim for indemnity by way of abandonment of the Vessel to the Company.

Article 4 (Cost of repairs)

1. Cost of repairs means the reasonable cost and expenses for such repairs to damage sustained by the Vessel as are necessary to reinstate the Vessel in the condition she was in immediately before the damage occurred.

2. The cost of repairs as provided for in the preceding paragraph shall include the following costs and expenses which are necessary to repair the damage sustained by the Vessel excluding, however, such costs and expenses as falling under general average contribution, sue and labor expenses or as those which are necessary to be incurred regardless of the occurrence of any accident:

(1) costs and expenses reasonably incurred by the Vessel in proceeding, immediately after she sustained damage, to the nearest place for repairs; provided that where, in order to save on the cost of repairs, the Vessel proceeds to a place other than the nearest place for repairs with the consent of the Company, any extra costs and expenses reasonably incurred in so doing shall be limited to the amount of any saving in the cost of repairs.

(2) costs and expenses reasonably incurred by the Vessel in resuming the voyage originally contemplated immediately after completion of the damage repairs.

(3) costs and expenses reasonably incurred by the Vessel in undertaking sea trials after completion of the damage repairs.

3. The cost of repairs as provided for in paragraph 1 of this Article shall include the cost of temporary repairs in the following cases excluding, however, such costs and expenses as falling under general average contribution:

(1) when the necessary materials or parts for permanent repairs are unavailable for such a period of time as to cause substantial delay in effecting the permanent repairs.

(2) when the temporary repairs are effected in order to save on the cost of permanent repairs; provided that the cost of such temporary repairs shall be allowed only up to the saving in the cost of permanent repairs thereby achieved.

4. In the following cases where temporary repairs are effected to the Vessel, the cost of such temporary repairs other than costs and expenses falling under general average contribution or sue and labor expenses shall be included in the cost of repairs as provided for in paragraph 1 of this Article:

(1) where the Assured does not make a claim either for the cost of permanent repairs or for the cost of repairs as provided for in paragraph 3 of Article 27.

(2) where the Vessel becomes a total loss before effecting permanent repairs.

5. Where repairs to the damage caused by any of the Accidents (hereinafter referred to as "Damage Repairs") require the Vessel to be put in a drydock or on a slipway, the cost and painting expenses of anti-fouling paint (inclusive of the cost of scraping the Vessel's bottom) shall, subject to the provisions in the Special Clauses, be included in the expenses as provided for in paragraph 1 of this Article. Only that part of the cost and painting expenses of boot-topping and anti-corrosive paints which relates to the damaged area shall be included in the expenses as provided for in paragraph 1 of this Article.

6. Where Damage Repairs and other repairs and/or inspection (hereinafter referred to as "Owners' Works") of the Vessel are effected concurrently, and both of them require following expenses to be incurred, those expenses as calculated below shall be included in the expenses as provided for in paragraph 1 of this Article:

(1) one-half of the cost for entering and leaving a drydock or putting on and off a slipway

(2) one-half of the drydock dues or the slipway dues for the days during which both Damage Repairs and Owners' Works are effected concurrently

7. When the Person effecting the insurance or the Assured employs divers or puts the Vessel in a drydock or on a slipway for the sole purpose of sighting the bottom of the Vessel, with the consent of the Company, immediately after the Vessel has stranded, grounded or has been in collision or contact with any external object other than water, expenses reasonably incurred for employing divers, putting the Vessel on and off a slipway or in and out of a drydock shall be deemed the cost of repairs as provided for in paragraph 1 of this Article, even if no damage be found.

Article 5 (General average contribution)

1. General average contribution means the Vessel's proportion of general average based on the general average statement prepared by an adjuster appointed by the Person effecting the insurance or the Assured, and general average shall be adjusted according to the laws or regulations as provided for in the contract of affreightment or, in case of no such provision in the contract of affreightment, the Japanese laws or regulations or the York-Antwerp Rules, 1974. In a case where any amount allowable in general average is included in the cost of repairs as provided for in Article 4 and has been indemnified by the Company, such amount shall be deducted from the general average contribution. Should the Person effecting the insurance or the Assured fail to appoint an adjuster without delay, the Company shall be entitled to make such appointment.

2. When the Vessel sails in ballast, and the Person effecting the insurance or the Assured suffers any loss due to an act which would be construed as a general average act if there were any contributing interest other than the Vessel, the provisions of the York-Antwerp Rules, 1974 (excluding Rules XX and XXI) shall be applicable correspondingly. The voyage in this context shall be deemed to continue from the port of departure until arrival of the Vessel at the first port thereafter other than a port of refuge or port of call for bunkering only; provided that if there is an abandonment of voyage originally contemplated at any such intermediate port, the voyage shall be deemed to be terminated thereat.

Article 6 (Collision damages)

1. Collision damages means damages with regard to the following losses, which the Assured becomes legally liable to pay by way of damages in consequence of the Vessel coming into collision with any other vessel (including cases where, as a direct consequence of which collision, the other vessel further collides with a third vessel or vessels), and the amount of which has become definite by the final and conclusive judgment of a court or with the written consent of the Company:

(1) losses caused to the other vessel (including loss of use of the other vessel arising from the damage caused to her)

(2) losses caused to the cargo and/or other property on board the other vessel (hereinafter referred to as "the cargo and/or other property on board the other vessel")

2. Collision damages as provided for in the preceding paragraph shall be indemnified as follows:

(1) when the Vessel is solely to blame; the damages to be paid by the Assured for losses as referred to in the preceding paragraph.

(2) when the Vessel and the other vessel are both to blame; the damages to be paid by the Assured in proportion to the degree of fault of each vessel (should it be impossible to decide the degree of fault of each vessel, they shall be deemed equally to blame; hereinafter to be so interpreted) and on the basis of each party severally paying in full the amount due to the other without effecting a setoff against each other.

(3) notwithstanding the provisions in the preceding two items of this paragraph, when the liability of the Assured is limited by the laws or regulations of Japan or any other country or by international conventions; such part of the definite amount of the limitation fund or of the current value of any property tendered by the Assured according to the above laws, regulations or international conventions

as apportioned as the damages for losses referred to in the preceding paragraph.

3. If the Vessel comes into collision with another vessel owned or demise-chartered by the Assured (excluding a launch belonging to the Vessel), the preceding two paragraphs of this Article shall be applicable as if the other vessel were owned or demise-chartered by a third party. In such case the degree and proportion of fault and the amount of losses on each vessel shall be determined by agreement between the Assured and the Company.

4. If no such agreement as provided for in the preceding paragraph can be reached, the matter shall be referred to a sole arbitrator to be appointed by agreement between the Assured and the Company. If no such agreement can be reached, the Assured and the Company shall each appoint an arbitrator and then the two arbitrators thus appointed shall appoint a third arbitrator, and the award shall be decided by the majority vote of such three arbitrators.

Article 7 (Sue and labor expenses)

1. Sue and labor expenses means the following expenses:

(1) necessary or useful expenses which the Person effecting the insurance or the Assured has incurred in fulfilling the duty of preventing or minimizing losses as provided for in paragraph 1 of Article 24 (including remuneration due from the Person effecting the insurance or the Assured to a salvor who has salved the Vessel independently of a salvage contract when the Vessel has encountered any of the Accidents).

(2) necessary or useful expenses which the Person effecting the insurance or the Assured has incurred in fulfilling the duty of exercising or preserving a right of claim against third parties as provided for in paragraph 3 of Article 24; provided that when both the losses recoverable under this contract of insurance and other losses are filed or preserved in such a claim against third parties, only such proportion of these expenses as apportioned, according to the respective amounts of losses, to the former losses shall be indemnified.

(3) necessary or useful expenses incurred by the Assured in connection with a lawsuit or an arbitration when a lawsuit for damages in respect of losses which are recoverable under this contract of insurance has been instituted against the Assured, and the Assured has contested the lawsuit with the written consent of the Company or has submitted the dispute to arbitration after deliberations with the Company; provided that when the above-mentioned claim for damages includes both the losses recoverable under this contract of insurance and other losses, only such proportion of these expenses for lawsuit or arbitration as apportioned, according to the respective amounts claimed, to the former losses shall be indemnified.

2. When the Person effecting the insurance or the Assured has incurred the expenses referred to in the preceding paragraph in preventing or minimizing losses of the Vessel together with those of her cargo or other property on board, only the proportion of expenses which should be borne by the Vessel shall be treated as sue and labor expenses; provided that those expenses which fall under general average contribution shall be excluded.

3. Cost of repairs for damage sustained by the Vessel in preventing or minimizing the loss shall not be treated as sue and labor expenses. Losses pertaining to cargo, freight, passengers, the Master, Crew and any other person shall not be treated as such either.

Article 8 (Losses caused by measures for prevention of fire or pollution damage)

Losses caused to the insured interest by any of the undermentioned emergency measures taken by the Japanese or foreign authorities acting under the powers vested in them in consequence of the occurrence of any of the Accidents shall be deemed to have been caused by the Accident in consequence of which the emergency measures have been taken and those losses shall be indemnified by the Company subject

to these Clauses and in the Special Clauses as specified in the Policy; provided that in no case shall the Company be liable for the expenses incurred for the emergency measures:

(1) emergency measures taken for the purpose of extinguishing fire, preventing occurrence or spread thereof or saving human life when such fire has occurred on board the Vessel or when there has been a threat of such fire thereon

(2) emergency measures taken to prevent or mitigate pollution, or threat thereof, of the seas, rivers, etc. resulting from oil etc. spilled or discharged from the Vessel

Article 9 (Limit of indemnity)

1. The indemnity to be paid by the Company shall always be limited to the insured amount per Accident.

2. Notwithstanding the provision of the preceding paragraph, the undermentioned damages or expenses shall be paid by the Company independently of other claims recoverable under this insurance, but the sum recoverable under each item shall in no circumstances exceed the insured amount:

(1) collision damages as provided for in Article 6.

(2) sue and labor expenses incurred by the Person effecting the insurance or the Assured as provided for in Articles 7-1-(1) and 7-1-(2); provided that in respect of those expenses stipulated in Article 7-1-(1), only such expenses as are incurred by the Person effecting the insurance or the Assured with the prior written consent of the Company when the Vessel is in danger of becoming a total loss shall be recoverable.

(3) among the expenses as provided for in Article 7-1-(3), necessary or useful expenses for lawsuit or arbitration incurred by the Assured when a lawsuit for damages for losses as enumerated in paragraph 1 of Article 6 has been instituted against the Assured.

3. The Company shall be liable to indemnify the Assured for losses in such proportion as the insured amount bears to the insured value.

Article 10 (Period of insurance)

1. Where the contract of insurance is for a definite period of time (hereinafter referred to as a "Time Policy"), the Company's liability shall commence, unless otherwise specified in the Policy, from noon of the day specified in the Policy and shall terminate at noon of the day specified in the Policy.

2. Where the contract of insurance is for a single voyage (hereinafter referred to as a "Voyage Policy"), the Company's liability shall commence, unless otherwise specially agreed, at the time when the Vessel has commenced either casting off moorings or weighing anchor, whichever shall first occur, at the port of departure specified in the Policy and shall terminate upon expiry of 24 hours after either she has dropped her anchor or she has been moored, whichever shall first occur, at the port of destination specified in the Policy. If, however, the Vessel has either commenced loading of cargo or other preparations for the departure for another voyage or she has commenced casting off moorings or weighing anchor, the Company's liability shall terminate at the first in time of any such occurrence even if it is within the said 24 hours.

3. Should the period of insurance expire whilst the Vessel is at sea or in distress due to any of the Accidents and the liability of the Company is undecided, the Person effecting the insurance or the Assured may extend the period of insurance for a period of 30 days by giving notice in writing to the Company prior to the expiration of the original period of insurance and by paying a pro rata additional premium for a minimum period of 30 days. Further extensions can be made under the same rule of the minimum period of 30 days. Even when the period of insurance is extended, however, it shall expire at the time when any of the following situations arises:

(1) when the Vessel, which was at sea, has either completed dropping her anchor or completed mooring,

whichever shall first occur, at any port of safety.

(2) when the liability of the Company in respect of the Accident has been decided or when the repair of the damage has been completed, whichever shall first occur.

4. This contract of insurance shall terminate when the Vessel has become a total loss during the period of insurance.

Chapter 2 Exclusions

Article 11 (Excluded losses—1)

The Company shall not be liable to indemnify any loss caused by the following:

(1) war, civil war or any other hostile operations
(2) detonation of or contact with mines, torpedoes, boms or any other weapons of war used as explosives
(3) seizure, capture, detainment, confiscation or expropriation whether by public authorities or otherwise
(4) piracy
(5) strikes, lock-outs or other labor disturbances or related actions by persons taking part therein
(6) actions by terrorists or any other persons acting maliciously or from a political motive
(7) riots, political or social commotions or other similar disturbances
(8) radioactive or detonative or any other detrimental effects of nuclear fission, fusion or any other similar reaction
(9) attachment, provisional attachment, implementation of security rights or any other disposal in legal proceedings

Article 12 (Excluded losses—2)

The Company shall not be liable to indemnify any loss caused by the following; provided that in the case of any one of the persons referred to in items (1) and (2) below being the Master or Crew, these items shall not be applicable to a loss caused by gross negligence of the Master or Crew acting in their capacity as such:

(1) wilful misconduct or gross negligence of the Person effecting the insurance, the Assured or the Agent thereof (directors or any other executive organs in case any of these persons being a corporation)
(2) wilful misconduct or gross negligence of the Beneficiaries or their Agents other than those referred to in item (1) above; provided that this exclusion shall be applicable only to the amount of indemnity due to such person
(3) wilful misconduct of the Master or Crew acting with the intention of causing any of the persons referred to in items (1) and (2) above to obtain the indemnity

Article 13 (Excluded losses—3)

The Company shall not be liable to indemnify any loss caused by the following (in the case of losses due to the causes enumerated in items (1) and (2) below, the loss caused to the part containing any of these causes shall also be included); provided that in no case shall this exclusion be applicable to the cases where the cause mentioned in item (2) could not be discovered, or the cause mentioned in item (3) occurred in spite of due diligence exercised by the Person effecting the insurance or the Assured:

(1) abrasion, corrosion, rust, deterioration or any other wear and tear of the Vessel
(2) defect existing in the Vessel
(3) unseaworthy condition of the Vessel at the time of sailing (including sailing from a port of call) for safe prosecution of the voyage or unsuitable condition of the Vessel for safe mooring or anchoring in case of the Vessel being moored or anchored

Article 14 (Excluded losses—4)

1. The Company shall not be liable to indemnify any loss occurring subsequent to the happening of the following circumstances, unless the Company's agreement in writing to reinstate the cover is obtained after such circumstances have ceased to exist:

(1) when the Vessel has failed to undergo a necessary inspection by the authorities or the classification society of the Vessel or an inspection designated by the Company for the safe prosecution of voyage.

(2) when the Vessel's classification society has been changed or its class registration has been deleted, except when the Company's agreement in writing has been obtained.

(3) when, in case of a Time Policy, the Vessel has deviated from the trading limits specified in the Policy or has navigated by an unusual route, or when, in case of a Voyage Policy, the Vessel has not sailed within the period specified in the Policy or has navigated by an unusual route or has deviated from the route specified in the Policy or has changed its destination, except when any of such deviation or navigation has been made for the purpose of avoiding imminent danger, saving human life or medical treatment for any person on board the Vessel or with the written consent of the Company.

(4) when the Vessel has been employed for any purpose in violation of the laws or regulations of Japan or any other country or international conventions.

(5) when the Vessel has entered an area of war or warlike disturbances or when she has been employed for any purpose connected with war or warlike disturbances, except when the Company's written consent has been obtained.

(6) when there has been a change of the owner or the charterer-by-demise of the Vessel, except when the Company's written consent has been obtained.

(7) when the structure of the Vessel or the purpose for which she was employed has been substantially changed, except when the Company's written consent has been obtained.

(8) when the risks covered by the Company have substantially changed or increased due to any circumstance other than those enumerated in the preceding items, for which the Person effecting the insurance or the Assured is responsible, except when the Company's written consent has been obtained.

2. If, in the cases of items (1) and (2) below, the Person effecting the insurance or the Assured makes a request in writing to the Company for its agreement to continue the coverage, the Company may decline such request and may cancel the contract of insurance at the time of such request; such cancellation shall take effect therefrom only for the future:

(1) when any of these circumstances enumerated in items (1) or (4) of the preceding paragraph has ceased to exist.

(2) when any of these circumstances enumerated in items (6) through (8) has occurred.

3. When the risks covered by the Company have substantially changed or increased for any circumstance, other than those enumerated in items (1) through (7) of paragraph 1 of this Article for which the Person effecting the insurance or the Assured is not responsible, he must give notice thereof to the Company as soon as he has become aware of the fact. If he fails to give such notice by his wilful misconduct or gross negligence, the Company shall not be liable to indemnify any loss occurring subsequent to the happening of the circumstance of which notice should have been given.

4. In case of the preceding paragraph, the Company may cancel this contract of insurance by giving 10 days' previous notice when the Company has become aware of such fact irrespective of a notice having been given or not by the Person effecting the insurance or the Assured; such cancellation shall take effect therefrom only for the future.

5. The Company's right to cancel the contract of insurance as provided for in the preceding paragraph shall cease to exist, unless the Company exercises such right within 30 days from the date on which the Company became aware of the circumstances giving rise to its right of cancellation.

Article 15 (Excluded losses—5)

The Company shall not be liable to indemnify collision damages as provided for in Article 6 for the following liabilities as well as liabilities arising from the causes enumerated in Articles 11 through 13:

(1) aggravated liability under any contract
(2) liability for losses on any property other than the other vessel and the cargo and/or other property thereon
(3) liability for losses on any interest other than the interest of use of the other vessel
(4) liability for loss of life, personal injury or illness
(5) liability for expenses incurred to comply with the order of the authorities to refloat or remove the other vessel and the cargo or other property thereon or any other things
(6) liability for expenses incurred to prevent or mitigate pollution of the seas, rivers, etc.
(7) when the Vessel is being towed or pushed by another vessel or vessels or is towing or pushing another vessel or vessels, liability for losses arising from collision between any other vessel belonging to such flotilla of vessels and another vessel not belonging thereto, unless such collision has occurred in direct consequence of a collision between the Vessel and any other vessel belonging to the flotilla.

Chapter 3 Invalidation of the contract of insurance, etc.

Article 16 (Invalidation of the contract of insurance)

This contract of insurance shall be null and void if, at the time of effecting the same, any of the following circumstances exists:

(1) the Person effecting the insurance or the Assured has committed any fraud.
(2) the Person effecting the insurance or the Assured knew that the perils insured against had already occurred.

Article 17 (Cancellation of the contract of insurance for breach of duty to disclosure)

1. If, at the time of effecting this contract of insurance, the Person effecting the insurance or the Assured failed to disclose what he knew or made untrue disclosure, by his wilful misconduct or gross negligence, in respect of the following matters, the Company may cancel this contract of insurance, unless the Company was aware of the facts not disclosed or was aware of the untruth of the facts disclosed or was unaware of them through its own negligence:

(1) the fact that any other contract or contracts or insurance are effected concurrently with this contract on the same insured interest, insured perils and period of insurance or any part thereof
(2) the fact that this contract of insurance is for the benefit of another person
(3) the items mentioned in the application form of insurance
(4) any material facts, other than those enumerated in the preceding items, which may affect the decision of the Company as to the acceptance or non-acceptance of the contract or the contents thereof.

2. When the Company has cancelled this contract of insurance according to the preceding paragraph, such cancellation shall take effect retroactively from the time of effecting the contract.

3. The right to cancel the contract as provided for in paragraph 1 of this Article shall cease to exist, unless the Company exercises it within 30 days from the date on which it became aware of the circumstances giving rise to its right of cancellation.

Article 18 (Agreement as to the amount of insured value and its substantial increase or decrease)

1. The Company and the Person effecting the insurance shall agree as to the amount of insured value when the contract of insurance is effected.

2. If the value of the insured interest has substantially increased or decreased during the period of

insurance, either the Company or the Person effecting the insurance may request in writing to the other to change the amount of insured value and/or the insured amount specified in the Policy.

3. When such agreement is reached on the change as referred to in the preceding paragraph, the Company shall claim or return a pro rata daily insurance premium for the increased or decreased portion of the amount of insured value or the insured amount.

Article 19 (Inspection of the Vessel)

1. The Company may inspect, whenever it deems it necessary to do so at any time during the period of insurance, the Vessel or loaded condition of the cargo or ballast thereon, and may also demand the Person effecting the insurance, the Assured or the Master to produce his report on whatever subjects the Company may designate.

2. If the Person effecting the insurance, the Assured or the Master refuses to allow an inspection or to produce report as referred to in the preceding paragraph without any justifiable reason, the Company may cancel this contract of insurance; such cancellation shall take effect therefrom only for the future.

Chapter 4 Payment and return of premium

Article 20 (Payment of premium)

1. The Person effecting the insurance shall pay the premium as specified in the Policy on the date(s) specified also therein (hereinafter referred to as "the Due Date").

2. If the Person effecting the insurance shall have failed to pay the premium on the Due Date, the Company shall not be liable to indemnify any loss occurring during the period from the Due Date to the time when payment is made.

3. In the event of non-payment of premium within 30 days after the Due Date, the Company may cancel this contract of insurance at such time; such cancellation shall take effect therefrom only for the future.

Article 21 (Claim for whole amount of premium)

Even when this contract of insurance has become null and void or has been cancelled, the Company may claim the whole amount of premium and shall not return the premium already received.

Article 22 (Return of premium–1)

Notwithstanding the provision of the preceding Article, when the Company cancels this contract of insurance in accordance with the provision of paragraph 4 of Article 14, the Company shall return the proportion of the premium for the unexpired period of the insurance calculated on a pro rata daily basis from the day following that on which the contract is cancelled.

Article 23 (Return of premium–2)

Notwithstanding the provision of Article 21, when the Company cancels this contract of insurance in accordance with the provisions of paragraph 2 of Article 14 or paragraph 3 of Article 20, the Company shall return the proportion of the premium for the unexpired period of the insurance calculated on a pro rata daily basis as from the following day on which the contract has been cancelled; provided that no claim for indemnity under this insurance has been made during the period already expired.

Chapter 5 Occurrence of the Accident

Article 24 (Duty to prevent loss)

1. In case of any of the Accidents having occurred, it is the duty of the Person effecting the insurance or the Assured to endeavor to prevent or minimize a loss and to cause the Master to do so.
2. If the Person effecting the insurance or the Assured has failed to prevent or minimize the loss by wilful misconduct or gross negligence, the Company shall determine the amount of indemnity on the basis of the balance arrived at by deducting from the amount of loss such proportion thereof as could otherwise have been prevented or minimized.
3. Where the Person effecting the insurance or the Assured has a right of claim for compensation of the loss against a third person (including the Person effecting the insurance, his agents and employees in case of the insurance for the benefit of another person; hereinafter to be so interpreted), it is his duty to exercise or preserve such right of claim.
4. If the Person effecting the insurance or the Assured has failed to take necessary measures to exercise or preserve his right of claim for compensation of the loss against a third party by wilful misconduct or gross negligence, the Company shall determine the amount of indemnity on the basis of the balance arrived at by deducting from the amount of loss such proportion thereof as could otherwise have been recovered from the third party.

Article 25 (Duty to notify the Accident)

1. When the Person effecting the insurance or the Assured becomes aware of the Vessel having encountered any of the Accidents or has a doubt that the Vessel may have encountered such Accident, he shall, without delay, give notice thereof to the Company and produce the Master's report duly certified by the maritime authorities having jurisdiction over the waters where such Accident occurred and any other documents that may be required by the Company.
2. If the Person effecting the insurance or the Assured has failed to comply with such duty as provided for in the preceding paragraph without any justifiable reason, the Company shall not be liable to indemnify any loss resulting from such Accident.
3. If the Person effecting the insurance, the Assured or the Master has made, in giving notice of the Accident or producing any documents stipulated in paragraph 1 of this Article, any false statement or wilful concealment of the facts, the Company shall not be liable to indemnify any loss resulting from such Accident.
4. If the Person effecting the insurance or the Assured has given such false notice to the effect that the Accident has occurred, when it has not in fact occurred, the Company shall not be liable to indemnify any loss subsequent to such false notice.

Article 26 (Investigation when the Accident occurred)

1. On receiving the notice of the Accident stipulated in paragraph 1 of the preceding Article, the Company may make necessary investigation in respect of the Vessel and may also demand the Person effecting the insurance, the Assured or the Master to produce his report on whatever subjects the Company may designate.
2. If the Person effecting the insurance, the Assured or the Master refuses such investigation or to produce the report stipulated in the preceding paragraph without any justifiable reason, the Company shall not be liable to indemnify any loss resulting from such Accident.

Article 27 (Repairs)

1. When the Vessel sustains damage by any of the Accidents, the Person effecting the insurance or the Assured shall repair the damage without delay, after the completion of which the Company shall indemnify the Assured for the cost of such repairs. Where the Person effecting the insurance or the Assured has failed to repair the damage without delay and has repaired it later, the Company's liability

shall be limited to the estimated cost of those repairs which would have been required and incurred had the repairs been effected without delay.

2. In obtaining the quotation for the cost of repairs before effecting the repairs as mentioned in the preceding paragraph, the Person effecting the insurance or the Assured shall consult with the Company beforehand and, if the Company so requests, he should let any person named by the Company participate in the quotation for the cost of repairs.

3. Notwithstanding the provision of paragraph 1 of this Article, where the Vessel is sold or broken up without effecting repairs to the damage sustained by the Accident, the Company shall indemnify the Assured for the estimated cost of repairs had the repairs of the said damage been made, but in no case for a higher amount than the depreciation in value of the Vessel due to such damage (and in any event limited only to the amount for which the Company would have been liable to indemnify as the cost of repairs).

4. Where the Vessel has become a total loss (irrespective of whether resulting from any of the Accidents or not) before completion of the repairs to damage caused by the Accident, the Company shall not be liable for the unrepaired damage existing at the time.

Chapter 6 Claims for and payment of indemnity

Article 28 (Claims for and payment of indemnity)

1. In making a claim for indemnity, the Person effecting the insurance or the Assured must prove the occurrence of the loss and the amount thereof.

2. When a claim for indemnity has been made in accordance with the provision of the preceding paragraph, the Company shall pay it within 30 days from the day on which the claim was made; provided that where the Company cannot complete the necessary investigation within the above period, the Company shall pay it without delay upon completion of the investigation.

Article 29 (Deduction of unpaid premium from indemnity)

If there is any unpaid premium out of the premium specified in the Policy, the same shall be deducted from the amount to be indemnified in the following manners:

(1) when an indemnity for a total loss is to be made, the unpaid premium shall be deducted therefrom whether it is due or not.

(2) when an indemnity is to be made for losses other than a total loss, the unpaid premium which is already due shall be deducted therefrom.

Article 30 (Measure of indemnity in case of double insurance)

1. Where one or more other policies are effected with the Policy on the same insured interest, insured perils and period of insurance or any part thereof, and the aggregate sum of the respective amounts of indemnities in each policy calculated independently of the other policies (hereinafter referred to as "the Independent Sum of Indemnity") exceeds the amount of loss, the Company shall pay as its indemnity such proportion of the amount of loss as the Independent Sum of Indemnity under the Policy bears to the aggregate sum of each Independent Sum of Indemnities.

2. Where the amounts of insured value of these policies differ, the amount of loss as provided for in the preceding paragraph shall be that applicable under the policy incorporating the highest amount of insured value.

Article 31 (Proprietary right in the Vessel in case of a total loss)

1. Where the Vessel becomes a total loss and the Company indemnifies therefor, the Company shall

be entitled to choose whether or not to acquire the proprietary right in the Vessel.

2. Where the Company does not acquire the proprietary right in the Vessel in accordance with the preceding paragraph, the Company shall so inform the Assured before making the payment of indemnity.

3. Where the Company acquires the proprietary right in the Vessel in accordance with paragraph 1 of this Article, the Company shall, by the payment of total loss, acquire the proprietary right in the Vessel in such proportion as the insured amount bears to the insured value.

Article 32 (Encumbrances existing on the Vessel in case of a total loss)

1. Where the Vessel becomes a total loss, the Assured or the Beneficiary must inform the Company of the following facts before they make a claim for the indemnity of total loss:

(1) Existence or non-existence of any preferential right, pledge, mortgage, right of charter-by-demise, lien and any other rights existing on the Vessel which may restrict the proprietary right therein and, if any such exists, the contents thereof.

(2) Existence or non-existence of any legal liabilities attaching to the Vessel either under the public or private law or any fact that may give rise to such liabilities.

2. The Company may withhold the payment of indemnity until the information is provided by the Assured or the Beneficiary in accordance with the preceding paragraph.

3. Even after the Company has acquired the proprietary right in the Vessel in accordance with the preceding Article, any sum of money necessary to satisfy or extinguish the rights enumerated in item(1) of paragraph 1 of this Article, or, to discharge the liabilities stipulated in item(2) of paragraph 1 of this Article, shall be borne by the Assured or the Beneficiary.

Article 33 (Subrogation to rights of claim against third parties)

If, in a case where loss has been caused by any of the Accidents, the Assured has acquired a right of claim for compensation against a third party and the Company has indemnified the Assured for the loss, the Company shall acquire such right, to the extent of the amount paid and in so far as the right of the Assured is not prejudiced.

Chapter 7 Miscellaneous

Article 34 (Jurisdiction)

Any lawsuit arising out of this contract of insurance shall be filed to the court having the jurisdiction over the district where the Company's Head Office is located.

Article 35 (Governing law)

The matters which are not provided for either in these Clauses or in the Special Clauses as specified in the Policy shall be governed and construed in accordance with Japanese laws and regulations.

Appendix 2

GENERAL CONDITIONS OF HULL INSURANCE (1/6/33 as amended 1/4/65)

Article 1. (Perils insured against and scope of the subject-matter insured)

1. Subject to the provisions herein contained, the Company shall indemnify the Assured for any loss or damage caused to the subject-matter insured by sinking, stranding, grounding, fire, collision or any

other maritime perils. The Company shall also indemnify the Assured for any loss or damage caused to the subject-matter insured by any land perils pertaining to the ship when these perils are covered by a special agreement.

2. Where a ship is the subject-matter insured, it includes, unless otherwise specially agreed, the hull, machinery, appurtenances (whether entered in the ship's inventory of appurtenances or not – hereinafter to be interpreted in the same way), fuel, provisions, stores and all other articles, which are the property of the Assured and are on board the ship for use and/or consumption in connection with her employment.

Article 2. (Invalidity of insurance contract)

The contract of insurance shall be null and void in the following cases:

(1) If the Person effecting the insurance or the Assured has committed any fraud in connection with the contract of insurance;

(2) If, at the time of effecting the contract of insurance, the Person effecting the insurance or the Assured has failed to give notice in writing to the Company of the existence of any other contract or contracts of insurance effected on the subject-matter insured, in spite of his knowledge of the existence of such other contract or contracts;

(3) If the Person effecting the insurance, when effecting the contract of insurance for and on behalf of another person or persons, has failed to give notice in writing to the Company to that effect;

(4) If, at the time of effecting the contract of insurance, the Person effecting the insurance or the Assured knew that any peril or perils insured against by the Company had already occurred.

Article 3. (Exclusions-1)

The Company shall not be liable to pay for any loss or damage caused by the following:

(1) War (whether declared or not, or whether before or after the declaration of war – hereinafter to be interpreted in the same way) or any other hostile operations;

(2) Contact with or explosion of mines, torpedoes or any other explosives, stationary or in motion on or in the water or bombs or other explosives dropped or discharged from aircraft or stray shells, bullets, bombs or missiles;

(3) Attack, capture, seizure, arrest, restraint, detainment or piracy;

(4) Strikes, sabotages, lockouts or other labour disturbances, riots, civil commotions, political or social disturbances or any other incidents similar thereto;

(5) Nuclear reaction or decay;

(6) Wilful misconduct or gross negligence of the Person effecting the insurance, the Assured, the Beneficiary or their agents (in case any of these persons is a corporation, its director or other executive organ – hereinafter to be interpreted in the same way) or their employees (in regard to agents and employees, the persons enumerated in (7) of this Article are excluded);

(7) Wilful misconduct of the Master, Crew or Pilot;

(8) Wear and tear of the ship or any part thereof or any defect or defects existing therein (except defect or defects which could not have been discovered by the Owner or Charterer-by-demise of the ship even with reasonable care).

Article 4. (Exclusions-2)

The Company shall not be liable to pay for any loss or damage occurring subsequent to the happening of the following, provided, however, the Company shall, subject to the Company's agreement after the conditions giving rise to such cases have ceased to exist, indemnify the Assured for any loss or damage occurring thereafter:

(1) When the ship, at the time of her departure (including departure from any port of call), has failed to

make such preparations as were necessary for making the voyage safely, or to keep the necessary documents aboard, or to undergo the necessary inspection by the government authorities;

(2) When the ship proceeds outside the trading limits mentioned in the Policy, or has sailed or prepared to sail with the intention of going outside such limits or has navigated by any unusual route or sailed or prepared to sail with the intention of making such navigation, except when such deviation or navigation by an unusual route has been made for the purpose of avoiding imminent danger or saving human life or with the Company's consent in writing;

(3) When the ship has been employed for smuggling or for he carriage of any contraband or for any other purposes in violation of the laws or regulations of or treaties ratified by Japan or any other country or when the ship has prepared herself to be employed for such purpose;

(4) When the ship lies at anchor in the areas of war or warlike disturbances or enters such areas or when the ship has sailed or prepared to sail with the intention to lie at anchor in such areas or to enter there or when she has been employed for any purpose connected with war or warlike disturbances or when the ship has sailed or prepared to sail to be employed for such purpose, except when the Company's consent in writing has been given;

(5) When the Owner has leased the ship or when the Charterer-by-demise has returned the ship or when there is a change in the owner or charterer-by-demise or when the structure of the ship and/or the purpose for which she was employed have been substantially changed, except when the Company's consent in writing has been given;

(6) When the total insured amount of the insurances effected with the Company and other insurers on the subject-matter insured exceeds the limit of the insurable amount mentioned in the Policy;

(7) When the premium has not been paid on the due date.

Article 5. (Inspection of the subject-matter insured)

1. The Company may inspect, whenever it deems it necessary to do so, the hull, machinery, appurtenances, fuel, provisions, stores, etc. of the ship and the condition of the stowage of her cargo and/or ballast, and may also demand the Master of the ship to produce his report on whatever subjects the Company may designate.

2. If the Person effecting the insurance, the Assured or the Master of the ship refuses such inspection or to produce the report stipulated in the preceding paragraph without any justifiable reason, the Company may cancel the contract of insurance; but such cancellation shall take effect only as from the time thereof.

3. In the case mentioned in the preceding paragraph, the Company shall not indemnify the Assured for any loss or damage even if a peril or perils insured against by the Company, which gave rise to such loss or damage, had occurred before such cancellation.

Article 6. (Change or increase of risk-1)

If, during the currency of the insurance, the risks covered by the Company have substantially changed or increased from causes for which the Person effecting the insurance or the Assured is responsible, the contract of insurance shall become void, unless the Company's written agreement is given to such change or increase.

Article 7. (Change or increase of risk-2)

1. If during the currency of the insurance, the risks covered by the Company have substantially changed or increased from causes for which the Person effecting the insurance or the Assured is not responsible, the Company may cancel the contract of insurance by giving 10 days' previous notice; such cancellation shall take effect only as from the time of expiry of the notice.

2. When, in the case of the preceding paragraph, the Person effecting the insurance or the Assured

has become aware of the fact that the risks have substantially changed or increased, he shall give immediate notice thereof in writing to the Company. If he fails to give such notice the Company may treat the contract of insurance as being void as from the time of such change or increase.

3. When, in the case of the first paragraph of this Article, the change or increase in the risks has been caused by the happening of a peril or perils insured against by the Company, the Company shall not cancel the contract of insurance.

Article 8. (Decrease of value of the subject-matter of insurance)

If during the currency of the insurance, the value of the subject-matter insured has substantially decreased, the Company may, by giving 10 days' previous notice, either reduce the insured amount and the limit of insurable amount together with the insured value or cancel the contract of insurance but such reduction or cancellation shall take effect only as from the time of expiry of the notice.

Article 9. (Commencement and termination of voyage insurance)

Unless otherwise specially agreed, the Company's liability in the case of risks covered for a single voyage shall commence at the time when the ship has commenced casting off moorings or weighing anchor at the port of departure and terminate upon expiry of 24 hours after she has entered the port of destination named in the Policy irrespective of whether the cargo and/or passengers remain on board or not. However, if the ship has commenced loading of cargo or other preparations for the departure for another voyage within the aforesaid 24 hours, the Company's liability shall terminate forthwith.

Article 10. (Causes of abandonment)

Only in the following cases the Assured may abandon the subject-matter insured to the Company and claim a total loss;–

(1) When the ship is missing for the following period calculated from the time when a news of her was last received:–
   (a) If both the place where the ship was last heard of and the next port to be called or arrived at are east of 100°E. long. and west of 150°E. long., and north of 20°N. lat. and south of 50°N. lat., 60 days for a steam or motor ship; 90 days for a sailing ship; 90 days for other ships;
   (b) In all other cases, 120 days for a steam or motor ship; 180 days for a sailing ship; 180 days for other ships;

(2) When the ship is damaged beyond repair.

Article 11. (Notice of abandonment)

When the Assured chooses to abandon the subject-matter insured in accordance with the provision of the preceding Article, he must give notice of abandonment to the Company within 30 days counting from the expiry of the stipulated period in the case of (1) and 30 days from the time when he has become aware of the fact that the ship has been damaged beyond repair in the case of (2), but even within the said 30 days, if prior to the dispatch of notice of abandonment the whereabouts of the ship has become known or the cause of abandonment has disappeared or repair of the ship has been commenced, the Assured cannot tender abandonment.

Article 12. (Rights and duties on the subject-matter of insurance abandoned)

1. Any sum of money necessary to satisfy or extinguish any lien, preferential right, pledge, mortgage or any other real right and/or right of the charterer-by-demise existing upon the subject-matter of insurance abandoned, and any sum of money necessary to discharge any legal obligations, whether private or public, attaching to the subject-matter of insurance shall be borne by the Assured or the Beneficiary.

2. If the Company has paid or deems it necessary to pay any sum as stipulated in the preceding paragraph, the Company may deduct such sum from the amount to be indemnified.

Article 13. (Definition of "damaged beyond repair", "salvage expenses" and "cost of repairs")

The ship shall be deemed as being damaged beyond repair if and when the estimated amount of salvage expenses (subject to the following provision), which would be necessarily incurred after the time when the notice of abandonment is tendered or the estimated amount of the share falling on the ship of the loss of cargo and/or freight due to jettison (but only when the loss is admissible in general average), which would be necessarily effected after the time when the notice of abandonment is tendered, or the estimated cost of repairs (subject to the following provisions), or the aggregate amount of these, exceeds the insured value of the ship:

(1) Expenses which are necessary or useful to prevent or minimize loss or damage in the case of the ship having sunk, stranded, grounded, been on fire or in collision, or encountered any other maritime perils, and those expenses (excluding loss of the profits accruing from the employment of the ship, wages and maintenance, and any outlays in connection with fuel or any other stores) which are necessary to salve the ship and remove her in tow or under her own power to the nearest place where she can safely be moored, and the reward to the salvor, shall be regarded as the "salvage expenses".

In the case of salvage of both the ship and her cargo, the share falling on the ship of the expenses and reward as stipulated in the preceding paragraph shall be regarded as the "salvage expenses".

In no case shall loss of or damage to the cargo, freight, passengers, crew or any other persons, including expenses incurred in connection therewith, and loss of or damage to hull, machinery and appurtenances be regarded as the "salvage expenses".

(2) Where the ship has sustained loss or damage by sinking, stranding, grounding, fire, collision or any other maritime perils, the minimum amount of such expenses as are necessary to reinstate the ship in the condition she was in immediately before the casualty shall be regarded as the "cost of repairs".

Only that part of the cost and painting expenses of water-line and anticorrosive paints and anti-fouling paint (except oil paint) which is allocated to the damaged portion may be included in the "cost of repairs". The cost and painting expenses of anti-fouling oil paint may be included in the "cost of repairs", only when the casualty causing the damage occurred within 8 months from the time when she was last repainted.

In cases where repair of damage covered under the contract of insurance is made concurrently with other work and/or inspection, one half of the expenses for docking and undocking the ship or putting her on and off the slip may be added to the "cost of repairs" together with charges for the use of drydock or slip calculated according to the number of days which would have been required had the ship been separately drydocked or placed on a slip solely for the repair of damage covered under the contract of insurance, provided, however, that only one half of such charges are allowable for the number of days over-lapping, plus one half of the cost and painting expenses of anti-fouling oil paint (including the expense for scraping the bottom), provided that the casualty occurred within 8 months from the time when the ship was last repainted. However, if repair of the damage covered under the contract of insurance would be made without drydocking the ship or placing her on the slip, the above charges, cost and expenses shall not be included in the "cost of repairs".

In obtaining the estimate of the "cost of repairs", the Assured shall consult the Company beforehand and, if the Company so requests, he should let any person named by the Company participate in the estimation of the "cost of repairs".

Article 14. (Abandonment and salvage)

Commencement of salvage of the ship by the Company shall not be deemed as an acceptance of

abandonment or that by the Assured as a waiver of his right of abandonment.

Article 15. (Duty to prevent loss)

1. The Person effecting the insurance or the Assured must endeavour to prevent or minimize loss or damage.
2. Unless otherwise specially agreed, the Company shall not be liable for expenses incurred in preventing or minimizing loss or damage.
3. In case the Person effecting the insurance or the Assured or his Agent has failed to prevent or minimize loss or damage which could have been prevented or minimized, the Company shall determine the amount to be indemnified on the basis of the balance arrived at by deducting from the amount of loss or damage such portion thereof as could otherwise have been prevented or minimized.
4. If, in cases where the whole or a part of the loss or damage could be recovered from any other party or parties, the Person effecting the insurance or the Assured or his Agent lets his right of claim for compensation lapse or fails to take the necessary procedures to exercise or preserve his right of claim, the Company shall determine the amount to be indemnified on the basis of the balance arrived at by deducting from the amount of loss or damage such portion thereof as could otherwise have been recovered.

Article 16. (Extension of period of insurance)

1. Should the period of insurance expire whilst the ship is at sea or in distress and the Company's liability is undecided, the Person effecting the insurance or the Assured may extend the period of insurance.
2. Should the Person effecting the insurance or the Assured intend to extend the period of insurance in accordance with the preceding paragraph, he must give notice in writing to the Company prior to the expiration of the original period of the insurance and pay a pro rata additional premium for a minimum period of 30 days; the same rule shall apply to any further extension.
3. Even if the period of insurance has been extended, the contract of insurance shall expire when a ship, which was at sea, has arrived at any port of safety or when a ship, which was in distress, has become a total loss (including the cases stipulated in Article 10), or when repair of the damage has been completed.

Article 17. (Basis of indemnity)

1. The Company's liability shall be determined in respect to each accident separately.
2. In any case the amount to be indemnified by the Company in respect to a single accident shall be limited in the aggregate to the insured amount.

Article 18. (Duty to notify accident)

1. When the Person effecting the insurance or the Assured becomes aware of the ship having encountered any accident, he must give notice thereof to the Company by the quickest possible way, and produce the Master's report on such casualty duly certified by the maritime authorities having jurisdiction over the waters where the accident occurred and/or any other documents that may be required by the Company.
2. If the Master, the Person effecting the insurance or the Assured has made, in any of the documents mentioned in the preceding paragraph, any false statement or wilful concealment of the facts in connection with the accident, the Company shall not be liable for any loss or damage resulting from such accident.

Article 19. (Claims and payment of indemnity)

1. The Person effecting the insurance or the Assured must, in claiming the indemnity, prove the occurrence of the loss or damage and the amount thereof.
2. When a request for the payment of indemnity has been made with the proofs required in the preceding

paragraph, the Company shall pay it within 30 days from the day on which the claim was made, unless the Company specially requires further time for the purpose of investigations.

Article 20. (Deduction of unpaid premium)

If there is any unpaid premium at the time of the Company making payment of a claim, the same shall be deducted from the amount to be indemnified whether it is due or not.

Article 21. (Return of premium-1)

1. Even if the contract of insurance has become null and void, has lost its effect or has been cancelled, the Company may claim the whole amount of the premium and shall not return the premium already received, provided, however, that, if the contract of insurance has become null and void from causes for which the Company is liable, the Company shall return the whole amount of the premium received, and, if the contract has lost its effect or has been cancelled from the same cause, the unexpired portion of the premium already received calculated on a pro rata daily basis as from the day following the day on which the contract has lost its effect or has been cancelled shall be returned.
2. In the case of the first paragraph of Article 7 or Article 8, the Company shall return the unexpired portion of the premium already received (or that portion of the premium corresponding to the amount reduced in case of the reduction of the insured amount), calculated on a pro rata daily basis as from the day following the day on which the contract has been cancelled or the insured amount has been reduced.

Article 22. (Return of premium-2)

If, in the case of Article 4 (5), the Company does not comply with a request made in writing by the Person effecting the insurance or the Assured to continue to hold itself liable for loss or damage, the Company shall return 90% of the premium already received calculated on a pro rata daily basis for each unexpired period of 30 days (a period less than 30 days shall not be considered) from the day on which such request was made, provided that no loss or damage for which the Company is liable has occurred during the expired period.

Article 23. (Jurisdiction)

Any lawsuit relating to the contract of insurance shall come under the jurisdiction of the court in the district where the Company's Head Office is situated.

Appendix 3.

(Tentative Translation)

1/4/90

SPECIAL CLAUSES OF HULL INSURANCE CLASS NO.5

(Liability for indemnification)

Article 1

1. The Company shall be liable to indemnify the Assured only for the following losses, among the losses enumerated in Article 1 of the General Conditions of Hull Insurance (hereinafter referred to as "the General Conditions"):
   (1) Total loss (as provided for in Article 3 of the General Conditions)
   (2) Cost of repairs (as provided for in Article 4 of the General Conditions); provided that it shall be

limited to that of damage caused to the Vessel by sinking, capsizing, stranding, grounding, fire, collision or contact with any external object other than water, or any general average act

(3) General average contribution (as provided for in Article 5 of the General Conditions)

(4) Collision damages (as provided for in Article 6 of the General Conditions)

(5) Sue and labor expenses (as provided for in Article 7 of the General Conditions); provided that these expenses shall be limited to those which have been incurred for preventing or minimizing the losses as enumerated in the preceding items.

2. The cost of repairs of damage caused to the Vessel while she is sailing in ballast by an act which would be deemed as a general average act if there were any contributing interest or interests other than the Vessel shall be deemed as the cost of repairs of damage arising from a general average act.

(Return of premium in case of lay-up)

Article 2

1. In the case of insurance effected for a period of one year, if the Vessel is laid up (including lay-up on a slipway or in a drydock; hereinafter to be so interpreted) for a period of 30 or more consecutive days during the period of this insurance, a return of premium shall be allowed, upon the expiry of the period of this insurance, in the manner mentioned in paragraph 2 below, subject to no claim under this insurance.
2. The return premium shall be calculated for each period of lay-up of 30 days separately (any fraction of 30 days shall be ignored), and the difference between the premium for such period apportioned on a pro rata daily basis and the larger sum of the followings shall be returned:
   (1) one-third of the premium apportioned as above, or
   (2) the sum calculated at the rate of Yen per 100 Yen of the insured amount for each period of the 30 days.
3. In asking for a return of premium under paragraphs 1 and 2 above, the Person effecting the insurance or the Assured shall, prior to laying up the Vessel, give a written notice of such lay-up to the Company and obtain the Company's agreement in respect of the place and method of the lay-up.

(Relation with the General Conditions)

Article 3

In the event of the whole or a part of any provision of the General Conditions being inconsistent with these Special Clauses, these Special Clauses shall prevail.

Appendix 4.

(Tentative Translation)

1/4/90

SPECIAL CLAUSES OF HULL INSURANCE CLASS NO.6

(Liability for indemnification)

Article 1

1. The Company shall be liable to indemnify the Assured for the following losses, among the losses enumerated in Article 1 of General Conditions of Hull Insurance (hereinafter referred to as "the General Conditions"):
   (1) Total loss (as provided for in Article 3 of the General Conditions)

(2) Cost of repairs (as provided for in Article 4 of the General Conditions)
(3) General average contribution (as provided for in Article 5 of the General Conditions)
(4) Collision damages (as provided for in Article 6 of the General Conditions)
(5) Sue and labor expenses (as provided for in Article 7 of the General Conditions); provided that these expenses shall be limited to these which have been incurred for preventing or minimizing the losses as enumerated in the preceding items

(Cost of repairs)
Article 2

1. The cost of repairs for which the Company shall be liable to indemnify under item (2) of the preceding Article shall be limited to that of damage caused to the Vessel by any of the accidents mentioned below:
   (1) sinking, capsizing, stranding, grounding, fire, collision or contact with any external object other than water, or any general average act
   (2) explosion (on board the Vessel or elsewhere); provided that explosion of mines, torpedoes, bombs or any other weapons of war used as explosives shall be excluded
   (3) earthquake, tidal wave, volcanic eruption or lightning
   (4) heavy weather
   (5) accident to main machinery, auxiliary machinery or any other machinery or apparatus
   (6) accident due to any defect in the hull and the appurtenances (limited, however, only to those defects which the person effecting the insurance or the Assured could not discover in spite of exercising due diligence), except accident to painting only (including such accident arising from the causes mentioned in item (9) below)
   (7) accident in and due to loading, discharging or shifting cargo, appurtenances or fuel, provisions or any other consumable stores
   (8) wilful misconduct or negligence of the Master, crew or pilots; provided that in cases where the Master or crew are the Person effecting the insurance, the Assured, the Beneficiary hereunder or the Agent of any of these persons, or where they have the intention to have the indemnity be paid to any of these persons, wilful misconduct of the Master or crew shall be excluded
   (9) negligence of repairers or charterers, provided that such repairers or charterers are neither the Person effecting the insurance, the Assured, the Beneficiary hereunder nor Agent of any of these persons
   (10) radioactive or detonative or any other detrimental effects of nuclear fission, fusion or any other similar reaction
2. The cost of repairs of damage caused to the Vessel while she is sailing in ballast by an act which would be deemed as a general average act if there were any contributing interest or interests other than the Vessel shall be deemed as the cost of repairs of damage arising from a general average act.

(Deduction from the cost of repairs)
Article 3

1. In respect of the cost of repairs incurred by any of the accidents enumerated in paragraph 1 (4) to (10) of Article 2 above, the deductible stated in the Policy shall be deducted from the cost of repairs per accident.
2. In respect of the damage caused to the Vessel by heavy weather as mentioned in paragraph 1 (4) of Article 2 above (hereinafter referred to as "the Damage by Heavy Weather"), such damage occurred during a single voyage from any port of departure to the next port of destination shall be treated as being due to one accident. If it is impossible to distinguish the Damage by Heavy Weather which

has occurred during the period of this insurance from that which has occurred out of such period in the case of the period of this insurance commencing or terminating during the period of such single voyage, the amount of indemnity by the Company shall be such proportion of the balance of the cost of repairs after deducting therefrom the deductible mentioned in paragraph 1 above as the number of days of heavy weather falling within the period of this insurance bears to the total number of days of heavy weather occurred during the single voyage.

(Excluded losses)

Article 4

1. The Company shall not be liable to indemnify any loss caused by radioactive or detonative or any other detrimental effects of nuclear fission, fusion or any other similar reaction of a nuclear weapon of war (including a nuclear-propelled war vessel).
2. The provision of item (8) out of the items enumerated in Article 11 of the General Conditions shall not apply.

(Return of premium in case of lay-up)

Article 5

1. In the case of insurance effected for a period of one year, if the Vessel is laid up (including lay-up on a slipway or in a drydock; hereinafter to be so interpreted) for a period of 30 or more consecutive days during the period of this insurance, a return of premium shall be allowed, upon the expiry of the period of this insurance, in the manner mentioned in paragraph 2 below, subject to no claim under this insurance.
2. The return premium shall be calculated for each period of lay-up of 30 days separately (any fraction of 30 days shall be ignored), and the difference between the premium for such period apportioned on a pro rata daily basis and the larger sum of the followings shall be returned:
   (1) one-third of the premium apportioned as above, or
   (2) the sum calculated at the rate of Yen per 100 Yen of the insured amount for each period of 30 days.
3. In asking for a return of premium under paragraph 1 and 2 above, the Person effecting the insurance or the Assured shall, prior to laying up the Vessel, give a written notice of such lay-up to the Company and obtain the Company's agreement in respect of the place and method of the lay-up.

(Relation with the General Conditions)

Article 6

In the event of the whole or a part of any provision of the General Conditions being inconsistent with these Special Clauses, these Special Clauses shall prevail.

Appendix 5

Japanese Underwriters' Rules of Practice for Hull Insurance Claims Adjustment

Section 1 Accidents

Rule 1. Contact of the Vessel with cargo

Rule 2. Accident of a launch

Rule 3. Accident to main machinery, auxiliary machinery or any other machinery or apparatus

Section 2 Cost of Repairs
Rule 4. Removal expenses for effecting repairs
Rule 5. Voyage for sea trials
Rule 6. Apportionment of changes for slipway, drydocking and bottom anti-fouling painting
Rule 7. Expenses for putting the vessel on and off a slipway or in and out of a dry dock for sighting bottom of the vessel
Rule 8. Depreciation in calculating the cost of repairs not effected

Section 3 General Average
Rule 9. Application of provisions on general average
Rule 10. General average arising on a fishing vessel
Rule 11. Advance payment of general average expenditure other than salvage charges

Section 4 Sue and Labor Expenses
Rule 12. Treatment of Salvage charges (sue and labor expenses)
Rule 13. Expenses incurred for providing security in cases of collision

Section 1 Accidents

Rule 1 (Contact of the Vessel with cargo)

In interpreting "collision or contact with any external object other than water", contact of the Vessel with cargo shall be treated or construed in the following manner:

(1) Cargo on board the Vessel is deemed not to be an "external object"
(2) Cargo being loaded onto the Vessel is deemed not to be an "external object" as soon as it has cleared the ship's rail.
(3) Cargo being discharged from the Vessel is deemed to be an "external object" as soon as it has cleared the ship's rail.

Rule 2 (Accident of a launch)

1. A launch shall be deemed to be "separated and away from the Vessel" as provided in Article 2.2 of the General Clauses of Hull Insurance when it has cleared the ship's rail.
2. When a launch separated and away from the Vessel comes into collision with the Vessel, both the cost of repairs of the damage to the launch and to the Vessel shall be treated as a loss caused to the Vessel herself by contact with an external object.
3. When a launch separated and away from the Vessel comes into collision with any other vessel, the collision is to be treated as a collision of "the Vessel with any other vessel" as provided in Article 6.1 of the General Clauses of Hull Insurance.
4. Article 3 (Total Loss) of the General Clauses of Hull Insurance shall not apply to the loss of a launch itself while it is separated and away from the Vessel.

Rule 3 (Accident to main machinery, auxiliary machinery or any other machinery or apparatus)

"Accident to main machinery, auxiliary machinery or any other machinery or apparatus" (including an accident thereto caused by wilful misconduct or negligence of the Master, crew or pilots) provided for in the various Special Clauses means in principle an accident which happens while a vessel is at sea and

does not include loss or damage detected merely upon a routine inspection.
This rule, however, shall not apply to loss of or damage sustained to crank shafts, tail shafts, stern tubes or the like which have long durability.

Section 2 Cost of Repairs

Rule 4 (Removal expenses for effecting repairs)

1. "Costs and expenses reasonably incurred by the Vessel in proceeding to the nearest place for repairs" (hereinafter referred to as "Removal expenses for effecting repairs") provided for in Article 4.2(1)–(3) of the General Clauses of Hull Insurance includes cost of temporary repairs, towage charges, escorting charges, charges for persons and instruments necessary for the removal, survey fees, additional premiums of marine insurance, fuel charges, wages and maintenance of the Master, officers and crew, expenses for other consumable goods, port charges, agent fees, pilotage fees and other similar expenses. However, when any ordinary expense which would have been incurred is saved, such saved amount shall be deducted from the removal expenses.
   In calculating wages of the crew, bonuses and other allowances paid regularly every year shall be taken into account, but no account shall be taken in respect of reserves for retirement allowances.
2. The phrase "in proceeding, immediately after she sustained damage, to the nearest place for repairs", contained in Article 4.2(1) of the General Clauses of Hull Insurance, shall include the situation where the vessel, upon completion of the voyage in which the Vessel was engaged at the time of the accident, proceeds to the place for repairs.
   When after completion of the damage repairs the Vessel returns to the same port where she had completed the previous voyage in which she was engaged at the time of the accident, she shall be deemed to be "resuming the voyage originally contemplated" referred to in Article 4.2(2) of the General Clauses of Hull Insurance.
3. Removal expenses for effecting repairs shall be indemnified in full when the insured vessel proceeds to the nearest place for repairs immediately after she has sustained damage and effects the Damage Repairs (including the cases described in the preceding paragraph), notwithstanding that the shipowner may have taken advantage of the opportunity to carry out Owners' Works on that occasion.
   When, however, Owners' Works are carried out concurrently with Damage Repairs at the time and place originally intended, removal expenses for effecting repairs shall not be indemnified at all except for expenses incurred on account of the accident in excess of the removal expenses for Owner's Works.
4. When, by virtue of the provisory clause of Article 4.2(1) of the General Clauses of Hull Insurance, in order to save on the cost of repairs the Vessel proceeds to a place for repairs other than the nearest one and she can earn any new freight or other income through the removal, the removal expenses for effecting repairs shall be calculated by being apportioned pro rata between the saved cost of repairs and the freight or other income earned.

Rule 5 (Voyage for sea trials)

1. A voyage for sea trials referred to in Article 4.2(3) of the General Clauses of Hull Insurance shall commence at the earlier of either the time when the anchor is heaved up or the time when the mooring line is discharged for sea trials at the place for repairs, and terminates when the engineers/workers of the dockyard on board the vessel for sea trials leave her after completion of sea trials.
   If, however, the insured vessel commences another new voyage before they leave her, the voyage for

sea trials shall terminate on commencement of the new voyage.

2. A voyage for adjusting a magnetic compass is not included as a voyage for sea trials.

Rule 6 (Apportionment of charges for slipway, drydocking and bottom anti-fouling painting)

1. When two or more Damage Repairs are carried out concurrently, the cost and expenses which are in common for anti-fouling painting, slipway and drydocking shall be apportioned equally to each casualty and shall be added to the cost of the respective repairs.
2. If the cost of Damage Repairs of any one accident is less than a deductible amount stipulated in a policy, those costs and expenses shall be apportioned to the other Damage Repairs and shall be added to the repair cost thereof.

Rule 7 (Expenses for putting the vessel on and off a slipway or in and out of a dry dock for sighting bottom of the vessel)

1. Expenses for putting the Vessel on and off a slipway or in and out of a dry dock for sighting the bottom as stipulated in Article 4.7 of the General Clauses of Hull Insurance shall include the cost of general gas freeing, but the cost and painting expenses of anti-fouling paint and the cost of scraping the Vessel's bottom shall not be included.
2. Expenses for putting the Vessel on and off a slipway or in and out of a dry dock as referred to in the preceding paragraph shall be indemnified either when the Damage Repairs are deferred or when the permanent repairs are deferred by effecting temporary repairs, after obtaining approval of a government or ship classification society, with their survey if necessary, even if the damages are found at the time of sighting the bottom.

Rule 8 (Depreciation in calculating the cost of repairs not effected)

The depreciation mentioned in Article 27.3 of the General Clauses of Hull Insurance shall be calculated according to the following formula:

$$\text{Insured value} \times \frac{\text{Sound value} - \text{Damaged value}}{\text{Sound value}}$$

Section 3 General Average

Rule 9 (Application of provisions on general average)

When the insured vessel and its cargo belong to the same owners, provisions of the General Clauses of Hull Insurance and various kinds of Special Clauses in respect of general average shall be applied as if the Vessel and cargo belonged to different owners.

Rule 10 (General average arising on a fishing vessel)

1. Subject to the preceding rule, when a fishing vessel is insured against general average, fishing instruments, catch, bait, ice and other fishing materials which are aboard the insured vessel (excluding those which are included in the subject matter insured under the hull insurance) shall be regarded as cargo.
2. In no circumstances shall a loss of or damage to fishing instruments which are not aboard the insured vessel be allowed as general average, nor shall these instruments contribute to general average.

3. Wages and maintenance of persons aboard the Vessel who exclusively engage in fishing and/or processing of catch shall not be allowed as general average.

Rule 11 (Advance payment of general average expenditure other than salvage charges)

In addition to an advance payment of salvage charges under Rule 12 (Treatment of salvage charges (sue and labor expenses)) Section 4, general average expenditure, other than the wages and maintenance of the Master, officers and crew, fuel and stores not replaced during the voyage and expenses for communication and other miscellaneous expenses shall also be payable in advance under a contract of insurance covering general average, up to the ship's estimated contribution to general average or, if there is an advance payment made under Rule 12.4, of the balance after deducting such advance from the ship's estimated contribution.

Commission or interest allowed on such advance payment in a general average statement shall be due to the insurer in the proportion that the sum advanced bears to the total general average expenditure.

Section 4 Sue and Labor Expenses

Rule 12 (Treatment of Salvage charges (sue and labor expenses))

1. Among the sue and labor expenses stipulated in Article 7.1(1) of the General Clauses of Hull Insurance, expenses incurred to salve the insured vessel and to remove or tow her to the nearest place where she might be able to berth safely and remuneration to a salvor, whether under salvage contract or otherwise, shall be called salvage charges, and they shall be treated in accordance with both the following provisions and the stipulations in the General Clauses of Hull Insurance.
2. Even though commission or interest is allowed on salvage charges in a statement of general average or otherwise, such commission or interest shall not be admitted as salvage charges from the insurer.
3. When salvage charges are adjusted as general average, in the case of a contract of insurance excluding general average the ship's proportion of the salvage charges shall be assessed based on her contributory value for general average.
4. When advancing salvage charges under a contract of insurance which excludes general average, the sum payable shall not exceed the estimated amount of salvage charges due from the insurer.
   In the case of a contract of insurance covering general average, the ship's estimated contribution to general average shall be the top limit of such advance. In this instance, commission or interest allowed on such advance payment in a general average statement shall be due to the insurer in the proportion that the sum advanced bears to the total salvage charges.
5. Bail fees, the cost to the assured of opening a letter of credit and/or the interest on money borrowed by the assured to provide a cash deposit to the salvor, shall be payable as salvage charges.

Rule 13 (Expenses incurred for providing security in cases of collision)

Where, in consequence of a collision between vessels, expenses are necessarily incurred to obtain release or avoid arrest of the insured vessel or any other vessel owned by the assured/shipowner (or in the case where insurance is effected by a demise charterer, any other vessel owned by him), only bail fees, the cost of opening a letter of credit and interest on a loan for the period during which a cash deposit was required can be admitted as part of the costs of defence mentioned in Article 7.1(3) of the General Clauses of Hull Insurance.

Some Recent Developments in Safe Ports Law

Robert MARGOLIS*

Introduction

If a charterparty, whether for voyage or time, expressly[1] provides that the charterer shall order the vessel only to a safe port or berth and the port or berth nominated is not safe, the shipowner can refuse the order.

Should the shipowner comply with the order, the charterer will be liable for any loss, whether for delay or actual physical damage, which arises from the owner's reasonable[2] compliance with the order, subject to the normal contractual rules as to remoteness of damage[3] and as to causation.

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1. Where the charterparty provides for loading or discharge at a named port but is silent as to whether that port must be safe, no warranty that the named port is a safe port will be implied: *The A.P.J. Priti* [1987] 2 Lloyd's Rep. 37 (C.A.). Similarly, where the charterparty provides for the nomination of ports by the charterer but there is no express provision that the nominated ports be safe, it would seem, following the reasoning of Bingham L.J. in *The A.P.J. Priti* that a safe ports warranty ought not to be implied when "such an implied term is not necessary for the business efficacy of the charter", that such a warranty will not be implied; cf. *Scrutton on Charterparties* (19th ed.) at 125.
2. The compliance must be reasonable. Morris L.J. said in *The Stork* [1955] 1 Lloyd's Rep. 349: "The owners must not throw their ship away. If, having the opportunity to refrain from obeying the order, and having the knowledge that the ship had been wrongly directed to run into danger, those responsible for the ship allowed her to be damaged when they could have saved her, it would be contrary to reason if damages could be recovered. They could not be recovered for the reason that they would not be the result of the breach of the contract."
3. In *The Lucille* [1984] 1 Lloyd's Rep. 244 (C.A.) a charterer was held liable for the loss of a ship 'trapped' in an unsafe port even though it was not foreseeable that the vessel would be trapped for such a period that she would become a constructive total loss. Kerr L.J. said at 250-51: "[I]t was no doubt unforeseen that the Shatt would remain closed for many months, and indeed by now for over three years so that vessels in it became constructive total losses. But this merely goes to the extent and gravity of what was foreseeable, not to the foreseeability of the risk itself, and it is settled law that in such cases the actual damage is not too remote to remain a legal consequence of the charterers' breach".

The Kanchenjunga

However, an owner who, with full knowledge of the facts, agrees to go to what is subsequently held to be an unsafe port may be held to have waived either his right to refuse to load at that port or his right to damages for loss arising from the charterer's nomination of an unsafe port, or both.

In the recent decision of the House of Lords in *The Kanchenjunga* [1990] 1 Lloyd's Rep. 391 charterers entered into a voyage charter in the Exxonvoy form which defined the loading ports as "1/2 safe ports Arabian Gulf excluding Fao and Abadan".

On 20 November 1980 the charterers ordered the vessel to load at Kharg Island. The vessel proceeded there and on 23 November gave notice of readiness to load. Because of congestion, and then one day of fog, the vessel was unable to berth. The next day, on 1 December, the port was raided by Iraqi planes and the master sailed away.

On 2 December the shipowners called on the charterers to nominate a new safe port. The charterers declined and the master refused to return to Kharg Island.

The charterers claimed the shipowners had repudiated the contract by refusing to load at Kharg Island; the owners claimed the charterers had repudiated by failing to nominate another safe loading port.

It was held that Kharg Island was prospectively an unsafe port and therefore was a port which the charterers were, under the terms of the charter, not entitled to nominate (at 397), but that by proceeding to give notice of readiness to load (having full knowledge of the state of the port) the owners had waived their right to reject the nomination, though they retained their right to claim damages from the charterers for breach of contract (should, for example, the vessel have been damaged by missile fire in the nominated port), and the owners were therefore in breach of the charter when the master left the nominated port and refused to return (at 400).

However, as the owners were entitled to refuse to load under a war risks clause, in the end neither party was held to be liable in damages to the other.

Lord Goff said at 397:

> ...Kharg Island was, at the time of its nomination by the charterers, prospectively an unsafe port... Kharg Island was not therefore a port which, under the terms of the charter, the charterers were entitled to nominate. It followed that the nomination was a tender of performance which did not conform to the terms of the contract; as such, the owners were entitled to reject it. Even so, by their nomination of Kharg Island the charterers impliedly promised that that port was prospectively safe for the vessel to get to, stay at, so far as necessary, and in due course, leave (see *The Evia* (*No. 2*) [1982] 2 Lloyd's Rep. 307 at 315

> per Lord Roskill). Accordingly if the owners, notwithstanding their right to reject the nomination, complied with it and their ship suffered loss or damage in consequence, they would be entitled to recover damages from the charterers for breach of contract, though the ordinary principles of remoteness of damage and causation would apply to any such claim: see *The Stork* [1955] 1 Lloyd's Rep. 349; and *The Houston City* [1956] 1 Lloyd's Rep. 1.

And at 400 he said:

> Here, as I have already indicated, the situation in which the owners found themselves was one in which they could either reject the charterers' nomination of Kharg Island as uncontractual, or could nevertheless elect to accept the order and load at Kharg Island, thereby waiving or abandoning their right to reject the nomination but retaining their right to claim damages from the charterers for breach of contract.

The Meaning of Safe Port

The definition of a safe port adopted by Lord Goff in *The Kanchenjunga* can be directly traced to the leading statement of Sellers L.J. in *The Eastern City* [1958] 2 Lloyd's Rep. 127 (C.A.), where he gave the following definition of a safe port at 131:

> ... a port will not be safe unless, in the relevant period of time, the particular ship can reach it, use it and return from it without, in the absence of some abnormal occurrence being exposed to danger which cannot be avoided by good navigation and seamanship...

It will be noticed from this definition that the safe port warranty is vessel specific. That is, the port must be safe for the particular vessel as loaded in accordance with the terms of the contract and assuming she is properly manned, equipped and navigated.[4]

The port must also be one which it is safe for the vessel to get to, remain at and leave.

This means that it must be politically as well as physically possible for the vessel to reach, stay at and leave as loaded (within the terms of the contract): *The Evia* [1982] 2 Lloyd's Rep. 307 (H.L.) at 320 per Lord Roskill, who regarded war as being a political event.

The safe port warranty applies to dangers outside the port, and indeed, in a very recent case about which I will say a little more in a moment, the issue was not whether the nominated port itself was safe, but whether the approach thereto was safe.[5]

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4. *The Eastern City*, supra; *The Universal Monarch* [1988] 2 Lloyd's Rep. 483 (Q.B., Com. Ct.).
5. Compare the case of a safe berths warranty, where the promise of safety applies only to that part of the voyage within the port to the berth: per Bingham L.J. in *The A.P.J. Priti* [1987] 2 Lloyd's Rep. 37 (C.A.) at 42.

In the seminal case of *The Sussex Oak* (1950) 83 Ll.L.R. 297 (K.B.D.), Devlin J. said in this regard:

> There is a breach of [the safe ports clause] if the vessel is employed on a voyage to a port she cannot safely reach. It is immaterial in point of law where the danger is located, though it is obvious in point of fact that the more remote it is from the port the less likely it is to interfere with the safety of the voyage. The Charterer does not guarantee that the most direct route or any particular route to the port is safe, but the voyage he orders must be one which an ordinarily prudent and skilful master can find a way of making in safety.

Finally, according to the Sellers definition in *The Eastern City*, the dangers or attributes which make a port unsafe are not every danger or attribute but only those which can be said to be a "characteristic" of the port; an abnormal danger will not render the port unsafe.

The courts tend to give a broad meaning to the concept of characteristic.

Bad weather which is a regular hazard of a place is a characteristic which will render a port unsafe at least for vessels of such a size that they haven't room to manoeuvre in bad weather: *The Stork* [1955] 1 Lloyd's Rep. 349; also, *The Eastern City*, supra.

However, such a port may be rendered safe if there is a reliable weather forecasting service which will warn vessels of dangerous weather in sufficient time for them to put themselves in a position of safety: *The Evia*, supra, per Lord Roskill at 319.[6]

The Houston City [1956] 1 Lloyd's Rep. 1 is an example of the concept of "characteristic" being given a broad meaning. In this case the port nominated by the charterers under a voyage charterparty was held by the Privy Council to have been unsafe, both at the time of the nomination and when the damage to the vessel occurred, by reason of a missing hauling off buoy used to keep a vessel off the wharf in certain winds, notwithstanding that the buoy had been missing only a number of weeks.

However, it may be said with some confidence that *The Houston City* is at the extreme end of the treatment of a temporary occurrence as a characteristic of the port.[7]

When the Port must be Safe

The primary obligation

According to the House of Lords in *The Evia (No. 2)* [1982] 2 Lloyd's Rep. 307, a port to be safe must be prospectively safe at the time it is nominated or the order to go there is

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6. That is, if it has a safe "system", or it is what Lord Denning called, in *The Evia (No. 2)* [1982] 1 Lloyd's Rep. 334 (C.A.) at 338, "safe in its set-up".
7. Compare *The Hermine* [1979] 1 Lloyd's Rep. 212 (C.A.). See also the facts of *The Mary Lou* [1981] 2 Lloyd's Rep. 282, over-ruled in *The Evia*, supra, at 317.

given by the charterer.

In this case 'Evia' was let to charterers for a period of 18 months. Clause 2 of the charterparty, made in the Baltime 1939 form, provided:

> The vessel to be employed in lawful trades for the carriage of lawful merchandise only between good and safe ports.

The charterers ordered the vessel to load a cargo of cement in Cuba for carriage to Basrah, the Iraqi port situated on the west bank of the Shatt al Arab waterway.

The vessel arrived safely at Basrah but after discharging her cargo there she was unable to leave because of the large scale hostilities which had broken out between Iraq and Iran on 22 September 1980. Probably she is there still.

On the issue whether Basrah was a safe port, it was held that as the port of Basrah was "prospectively safe" when the order to go there was given, the charterers were not in breach of cl. 2 in nominating that port.

To paraphrase Lord Roskill at 315-16:

> It is at the time when the charterer gives the owner orders to go to a particular port or place of loading or discharging (as is his contractual right to do) that the contractual promise by the charterer regarding safe ports had to be fulfilled; but the port needn't be safe at the time the order is given but the port must be "prospectively safe for the vessel to get to, stay at so far as necessary, and in due course leave"; and if in spite of the port being prospectively safe some unexpected or abnormal event occurs which creates conditions of unsafety so that the vessel is damaged or delayed, the contractual promise does not extend to make the charterer liable for any resulting loss or damage, physical or financial.

In principle, therefore, it would not be a breach of the safe port warranty if the port becomes subsequently unsafe due to an abnormal occurrence; and of course the port needn't have been safe when the order was given, provided it was "in all human probability" (*The Evia* at 315) expected to be safe when the vessel arrived.

"Prospectively safe": *The Saga Cob* and *The Chemical Venture*

Regarding what is meant by "prospectively safe", there are perhaps two possible meanings.

It may mean that the port is objectively expected to be safe; that is, "in all human probability" it will be safe. The obligation would thus be an absolute one, in the sense that

if the port was not in fact going to be safe when the vessel arrived, the charterer is in breach of the primary obligation.

Or, "prospectively safe" may mean that the diligent (or prudent or reasonable) charterer, basing his decision on all the facts he possessed (or could reasonably be expected to have known), reasonably believed the port to be prospectively safe, or used his best endeavours to nominate a port which he reasonably expected, on the facts available to him, to be safe.

Until the recent decision of the Court of Appeal in *The Saga Cob*, it was not clear which of these two standards was the law: see Reynolds, "Legitimate Last Voyage: *The Peonia*" [1991] LMCLQ 173 at 175-76.

However, in *The Saga Cob* [1992] 2 Lloyd's Rep. 545 the Court of Appeal compared the safe port obligation in *The Evia (No. 2)* ("Vessel to be employed ... only between good and safe ports or places where she can always lie afloat") and that in the charterparty then under consideration ("Charterers shall exercise due diligence to ensure that the vessel is only employed between and at safe ports ...") and concluded that on its face the *Evia* clause imposed a "higher obligation" upon the charterers than did the *Saga Cob* clause, which required them only to use due diligence to ensure that the vessel is ordered to safe ports (at 547). This of course suggests that the strict or unqualified safe port obligation is more like an absolute obligation than like a best endeavours one.

In *The Saga Cob* disponent owners (demise charterers) let 'Saga Cob' to charterers under a time policy in the Shelltime 3 form which provided in cl. 3:

> Charterers shall exercise due diligence to ensure that the vessel is only employed between and at safe ports, places, berths, docks, anchorages and submarine lines where she can also lie safely afloat, but notwithstanding anything contained in this or any other clause of this charter, Charterers shall not be deemed to warrant the safety of any port, place, berth, dock, anchorage or submarine line and shall be under no liability in respect thereof except for loss or damage caused by their failure to exercise due diligence as aforesaid...

The vessel, laden with a cargo of petroleum products, was ordered to the Ethiopian port of Massawa, and while at anchor there she was attacked by Euritrean guerillas in motorboats using heavy machine guns and rocket grenades. The master was wounded and the vessel suffered substantial damage.

The issues arising on appeal were: 1) whether, when the order to proceed to Massawa was given, that port was a safe port; and 2) if it was not a safe port, whether charterers had exercised due diligence to ensure that the vessel was only employed at and between safe ports.

It was held, first, that although there had been an attack three months earlier on a vessel proceeding to Massawa but 65 miles out, the port was not prospectively unsafe at the time

the order to proceed there was given.[8]

Second, it was said (obiter, because the finding on the first issue rendered further comment unnecessary) that it does not follow that if the charterers know all the facts which make a port prospectively unsafe they must be held to have failed to exercise due diligence. "If a charterer knows all the facts and orders the vessel to a port which is regarded generally by owners of vessels to be safe, he might well be protected" (at 551).

"Due diligence", said Parker L.J., "is the same as reasonable care ... There is, moreover, a difference between physical danger such as a sand bank or reef and political danger where what has to be assessed is necessarily subjective. In such a case, if a charterer comes to a reasonable conclusion as to the safety of the port, why should he be said to have failed to exercise due diligence" (at 551).

And regarding the "due diligence" safe port obligation he said, "There is ... at least a strong argument that the test should be expressed thus 'if a reasonably careful charterer would on the facts known have concluded that the port was prospectively safe' " (at 551).

The Court of Appeal in *The Saga Cob* expressed its view on the proper construction of the due diligence qualification in the safe port obligation, although strictly it was not necessary that it do so, because there was at the time this appeal was being heard a similar case set down for trial in the Commercial Court of the Queen's Bench Division which then seemed likely to turn on the meaning of the due diligence qualification in a Shelltime 3 safe ports clause.

In the later case, *The Chemical Venture*, [1993] 1 Lloyd's Rep. 508, a Liberian flagged product carrier was time-chartered to Japanese charterers on amended Shelltime 3 terms. The safe ports clause in this charterparty was identical to that considered in *The Saga Cob*. The vessel was then sub-chartered for a single voyage with loading at "one or two safe port(s) Arabian Gulf excluding Iran/Iraq".

During the period of the head charter, in April/May 1984, the Iran-Iraq War, then in its fourth year, took a new turn. In response to a number of attacks by Iraqi aircraft upon tankers using Kharg Island, Iran's principal oil terminal in the Gulf, Iran began to attack vessels using Saudi Arabian and Kuwaiti terminals.

In May 1984 'Chemical Venture' was ordered in ballast to the Kuwaiti port of Mina Al Ahmadi. At first the master refused to comply with the order on the ground that the nominated port was unsafe, but ultimately, upon payment by the charterers of "war bonuses" to the officers and crew, he agreed to sail for Mina Al Ahmadi. While proceeding there 'Chemical Venture' was struck by a missile fired from an Iranian warplane and sustained

8. The fact that the Ethiopian navy had instituted an escort system for vessels using the port and its approaches was taken not as evidence that the port was unsafe but as evidence, perhaps analogous to the lighting of dangerous rocks, that this system made an otherwise (politically) dangerous port safe in its set-up (at 550).

severe damage.

Gatehouse J. hesitated little in concluding that Mina Al Ahmadi was an unsafe port at the time 'Chemical Venture' was ordered there, Iranian warplanes having made at least three attacks on neutral tankers in the area of the approach to that port within the previous 11 days (at 518).

On the issue whether, notwithstanding that the nominated port was unsafe, the charterers had exercised due diligence to ensure that the vessel was employed only between safe ports, Gatehouse J. accepted as correct the proposition of the Court of Appeal made obiter in *The Saga Cob* that if charterers, with knowledge of all the facts showing that a port was unsafe, nevertheless ordered the vessel to that port, it would not necessarily follow that they had ipso facto failed to exercise due diligence (at 519).

Gatehouse J. then made three further points regarding the due diligence qualification to the safe ports warranty.

First, if a port is ultimately held to be unsafe, the onus will lie on the charterers who ordered the vessel to that port to establish the due diligence defence (at 519).

Second, to establish this defence it will not be sufficient for the charterers to adduce some opinions that the port is safe if there is evidence that other users, qualified to give an opinion, hold a contrary view (at 519).

Third, although the Court of Appeal in *The Saga Cob* suggested at 551 that events subsequent to the casualty in question are relevant to determining the issue of due diligence, Gatehouse J. was of the view that this could not be correct. Nevertheless, as he could see no logical difference between taking account of subsequent events on the issue of whether a port was safe, which by precedent he was bound to do, and on the issue of whether the charterers exercised due diligence to employ the vessel only between safe ports, Gatehouse J. was prepared to consider subsequent events when determining the due diligence issue (at 519).

In the event, Gatehouse J. held that the charterers had not exercised the due diligence stipulated in the safe ports clause of the head charter, and were thus in breach of the safe ports warranty.

However, his Lordship went on to find that in certain telexes exchanged between the charterers and the owners following the master's refusal to comply with the order to go to Mina Al Ahmadi, and in particular those telexes dealing with payment of the war bonus to the master and crew, the owners had unequivocally, albeit impliedly, represented that they would not treat the order to go to Mina Al Ahmadi as a breach of the safe ports warranty (at 521).

Therefore, Gatehouse J. held that the charterers were not liable for the damage to the vessel, the owners having "either waived their right to contend that Charterers were in breach or they were estopped from so contending" (at 521).

The secondary obligation[9]

Time charters

If, after the order to go to a particular port is given, it subsequently becomes clear that the port is unsafe (due to a change in its character[10]), the charterer, at least in the case of a time charter, is under a 'secondary' obligation to make a fresh nomination.

To paraphrase Lord Roskill in *The Evia*, supra, at 319-20:

> While the primary obligation of a charterer under cl. 2 is to order the vessel to go only to a port which at the time when the order was made was prospectively safe, there might be circumstances in which, by reason of a prospectively safe port subsequently becoming (prospectively) unsafe, cl. 2 might impose a further and secondary obligation on the charterer either to cancel his original order and order the vessel to go to another port which at the time of the new order is prospectively safe, or in the case where the vessel is already in port, if it is possible for the vessel to avoid such danger, to order the vessel to leave the port for another.

It will be noticed that in *The Evia* itself, as the events giving rise to the unsafety did not occur until after 'Evia' had entered the port, and as an order to leave the port would have been ineffective, the charterers were not in breach of the secondary obligation under cl. 2.

Such a secondary obligation to renominate does not impose a greater burden on the shipowner under a time charter, although there may be a greater obligation on the charterer because, for example, he is liable to holders of bills of lading for costs of transhipment (although he may not be so liable if the bill of lading holder is required to take delivery at

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9. The secondary obligation may differ for time charters and voyage charters. Baker, in [1988] LMCLQ 43, suggests that the distinction is unwarranted, as the true issue is how are the holders of the bills of lading effected, and in both voyage charters and time charters the same bills of lading are used (at 49).

10. If the port becomes hazardous due to an abnormal occurrence, it cannot be said that the port is unsafe in the technical sense, and it may be that in this case the charterer is under no secondary obligation to nominate a new safe port; the shipowner might be required to wait out, at his own expense in time, the abnormal occurrence. In *The Evia*, supra, at 320 Lord Roskill suggests that there is no secondary obligation where the new unsafety is "purely temporary in nature", and this may well mean that there is no secondary obligation when there is a purely temporary abnormal occurrence as well as when there is a purely temporary unsafe characteristic. A storm in typhoon season may be an example of a purely temporary unsafe characteristic.

the new port because a) the bill of lading incorporates the safe port rule[11]; b) the contract of carriage is frustrated; or c) there has been a justifiable deviation to a near port such that the shipowner is protected).

Voyage charters

It is not clear on the authorities whether the voyage charterer is under a duty to renominate a safe port, or whether he is even entitled to do so, when the port originally nominated becomes prospectively unsafe.[12]

Scrutton[13] suggests that there is no overwhelming objection to carrying the implied secondary obligation one step further by treating it as conferring a liberty to change the port in a voyage charterparty, subject perhaps to the qualification that the charterer must substitute a neighbouring and convenient port, or that he must exercise the renomination in a reasonable way.

Safe Ports and Insurance for Charterers' Account

In some charterparties it is agreed that while the shipowners cannot be directed to take their vessel to a port in a war zone, they can choose to do so at their option and "the owners to be entitled from time to time to insure their interests in the Vessel and/or hire against any of the risks likely to be involved thereby on such terms as they shall think fit, the Charterers to make a refund to the Owners of the premium on demand".[14]

In *The Evia* at 321-22 Lord Roskill concluded[15] that although the determination depends on the construction of the charterparty as a whole, in the present case, under the Baltime 1939 form, the charterer who pays the insurance premium on a policy is not liable for loss

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11. As envisaged by Lord Roskill in *The Evia*, supra, at 321, where he said: "[I]f it be said that the imposition of these further and secondary obligations upon a time charterer may put him in difficulties with any sub time charterer or voyage charterer from him or under any bill of lading issued by him or at his behest, my answer is that a time charterer would be prudent to protect himself against the consequences of such possible inconsistencies by including suitable wording into whatever further contracts he chooses himself to make or into which the owners, the master or other agent of the owners, wish to enter".
Scrutton (19th ed.) at 127, n. 32 points out that no sub-charter or bill of lading in common use contains such a provision.
12. The issue was expressly left open in *The Evia* at 320, where Lord Roskill said: "I think, therefore, in a case where only a time charter-party is involved, it would be unwise for your Lordships to give further consideration to the problems which might arise in the case of a voyage charter-party, and for my part, I would leave those problems for later consideration if and when they arise".
13. *Scrutton on Charterparties* at 127, n. 32. See also Baker, [1988] LMCLQ 43 at 49.
14. This is the provision in cl. 21B in the Baltime 1939 form, considered in *The Evia*.
15. This discussion of Lord Roskill was called the 'second ratio' of *The Evia* by Bingham J. in *The Concordia Fjord* [1984] 1 Lloyd's Rep. 385 at 385, although technically the discussion was obiter, it having been held in *The Evia* that the charterers were not in breach of their safe port obligations.

covered under the policy which occurs in an unsafe port to which he has ordered the vessel.

Lord Roskill said at 321:

> [I]f the dangers, against the risks on which they have paid those premiums materialize and cause loss or damage to the ship, then war risk insurers, upon payment of the relevant claim, become subrogated to the owners' rights against the time charterers for the assumed breach of cl. 2. My Lords, this result would no doubt be highly attractive to war risk insurers but the less fortunate time charterers would have paid the premiums not only for no benefit for themselves but without shedding any of the liabilities which clause 2 would, apart from cl. 21, impose upon them.

But whether the charterers will be liable in such a case is a matter of construction of the contract, and in *The Concordia Fjord* [1984] 1 Lloyd's Rep. 385 (Q.B., Com. Ct.) the argument of the charterers based on the "second ratio" in *The Evia* was rejected.

In *The Concordia Fjord* the shipowners, by a time charterparty in the NYPE form,[16] let their vessel to the charterers to be used in a liner service between the US and Eastern Mediterranean ports. Under the charter the charterers were entitled to employ the vessel between safe ports and the owners were to provide insurance, including annual war risk insurance, except that in the case of trading in waters where extra war risks premiums were payable, these were for the charterers' account.

The charterers on 10 June 1978 ordered the vessel to Beirut, which was then a safe port. However, by the end of June, before the vessel reached Beirut and while there was still time for the charterers to countermand their orders, the port had become unsafe as a result of war. The vessel entered Beirut and was badly damaged by a napalm rocket and a resulting fire.

The charterers appealed from the arbitrator's decision against them on the ground that, following the "second ratio" in *The Evia*, where charterers are liable to pay the extra insurance premium in respect of the use of a port unsafe due to war, they cannot be in breach of the safe ports clause if they do use the port, the additional premium clause having the effect of exempting them from liability for the breach of the safe ports clause (by virtue of their liability to contribute to the increased costs of the war risk insurance on the vessel visiting Beirut).

The court rejected the charterers' argument, and *The Evia* was distinguished[17] because, inter alia (at 387), in *The Evia* the owners had an unqualified right to refuse to accept orders

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16. *The Evia (No. 2)* is a decision on the Baltime 1939 form.

17. A second distinction is that there was no breach of the secondary obligation in *The Evia*, whereas in *The Concordia Fjord* there was.

for the vessel to enter a port in a war zone, whereas in the present case the owners could only refuse to enter a port if it were unsafe, and all ports that are within a "war zone" such that additional war risks premiums are payable are not necessarily unsafe.[18]

In the end, said Bingham J. at 388:

> The construction of each charter-party must turn on consideration of its own detailed terms and it is not surprising that different results are achieved where the detailed terms differ.

The result in *The Concordia Fjord* was that the charterers paid the additional insurance premium and then were liable (to the insurer by way of subrogation) for the amount paid by the insurer.[19]

One might wonder whether as a matter of policy the "second ratio" in *The Evia* is correct, and whether, if so, that decision was improperly distinguished in *The Concordia Fjord*.[20]

Finally, it is perhaps worth noting that the charterers in *The Chemical Venture* had also paid extra war risk premiums. It was apparently not argued by charterers' counsel that this gave the charterers a right to send the vessel to unsafe ports without risk. At any rate, the only reference to the point in the judgment of Gatehouse J. is his acceptance of the shipowners' argument that the terms of the present charter in this regard were comparable to those of the charter considered in *The Concordia Fjord* and materially different from those in the charter considered in *The Evia* (at 516).

Conclusion: Difficulties with the Safe Ports Rule

In *The Kanchenjunga*, discussed supra, the House of Lords distinguished between an owner's waiver of his right to refuse to load in an unsafe port and a waiver of his right to

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18. That is, *The Concordia Fjord* was a case where the war risk premium was payable yet there may not have been a breach of the unsafe ports clause.
19. See also *The Lucille* [1984] 1 Lloyd's Rep. 244 (C.A.), where Kerr L.J. accepted at 249 that although the charterers might remain liable for the consequences of unsafety due to hostilities when they had previously been compelled to pay large war risk premiums before they could order the vessel into a particular geographical area, such an "unfortunate anomaly" resulted from the terms of the contract. And in *The Helen Miller* [1980] 2 Lloyd's Rep. 95 (Q.B., Com. Ct.), like *The Concordia Fjord* a decision on the NYPE form, it was held that payment by charterers of extra insurance entitled the charterers to order the vessel to ports outside the Institute Warranty Limits but did not relieve them from liability under the safe ports clause in the event the vessel sustained damage as a result of her being ordered to an unsafe port outside the IWL.
20. Baker, in [1988] LMCLQ 43, suggests on policy grounds that the second ratio is not correct as it permits the charterer to release himself from the obligation to nominate a safe port (at 56-57). Of course, the owners still have a right to reject a nomination to an unsafe port. See also C.G.C.H. Baker and P. David in "The Politically Unsafe Port" [1986] LMCLQ 112 at 119-20 and P. David [1986] LMCLQ 149.

claim damages for (physical) loss resulting from his entering an unsafe port. It is certainly settled law that the shipowner is entitled to claim for physical damage to his ship which occurs in an unsafe port if the ship was ordered there in breach of an unsafe ports warranty: see, for example, *The Eastern City*, supra.

But this is a relatively modern interpretation of the charterer's responsibility under the safe ports clause, and before a number of cases in the 1950's[21] the general view was that the safe ports warranty did no more than entitle the shipowner to refuse to load in an unsafe port without being in breach of the charter. The distinction was made clear in *The Kanchenjunga*.

In their leading American textbook, *The Law of Admiralty* (1975, 2nd ed.), Gilmore and Black at pp. 204-06 question whether the modern rule that the charterer is liable for the physical damage sustained by a ship which is ordered into an unsafe port in breach of an unsafe ports clause is consistent with the relative positions of the parties to the charter.

They argue:

1. It is the master who ordinarily has the best means of judging the safety of a port or berth, first because he is an expert in navigation, furnished with aids thereto, secondly because he knows his vessel (including its draft and its present trim), and thirdly because he is on the spot. The charterer, on the other hand, need not be a nautical expert at all, knows nothing about the vessel except its capacity, and normally is far from the scene of decision as to safety; his designation of port and berth are made (and are known to be made) on commercial rather than on nautical grounds.

2. The master, by the clear words of the usual clauses, is not obligated to take his vessel to any unsafe port or berth.

The very purpose of the clauses is to free him of this obligation. Since these clauses can be and have been given this meaning, it is by no means necessary that they be given the quite different meaning of creating an affirmative liability of charterer to ship in case of mishap.

3. The ship can and almost invariably does carry insurance covering damage to her; the realistic question, in nearly every case, is whether the ship's underwriters or the charterer shall pay.

Curiously, the law has come full circle, and in *The Kanchenjunga* the House of Lords

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21. Including *The Stork* [1955] 1 Lloyd's Rep. 349 (C.A.), *The Houston City* [1956] 1 Lloyd's Rep. 1 (P.C., from Aust. H.C.), *The Eastern City* [1958] 2 Lloyd's Rep. 127 (C.A.), all being decisions in which Devlin L.J. participated.
It was in fact argued unsuccessfully in *The Sussex Oak* (1950) 83 Ll.L.R. 297 (another decision of Devlin J.) at 306, that, "the only result which can flow from the order to sail to an unsafe port is that the master is at liberty to refuse to go".

found (at 400) that while, on the facts, the owners had waived their right to reject the nomination of an unsafe port, they had retained their right to claim damages from the charterers for breach of contract (should the vessel suffer physical damage in the unsafe port).

Moreover, waiver by the shipowners was also the basis of the recent decision in *The Chemical Venture*, and alongside *The Kanchenjunga* this decision may be indicative of a trend by the courts more readily to find waiver by shipowners of their rights under the safe ports clause, which trend reflects, it is suggested, the true relative positions of the parties.

It may be, however, that this is not the most efficient way to correct the problems with the safe ports rule, which since the 1950's has come to favour shipowners over charterers, since the question of whether the shipowner has waived his rights, especially when it is a question of whether he has impliedly done so, is a difficult one which may result in more cases going to arbitration or to trial.

Perhaps the old rule is the preferable one so far as efficient dispute resolution is concerned: the safe ports clause gives an owner the right to refuse to sail to an unsafe port, but if he accepts the order, he accepts as well the risk of any danger there.

But in any case, whether the present law is unfair to charterers in view of their relative position is perhaps an unnecessary consideration, because the parties, knowing the obligations imposed by the safe ports clause, continue to include it. It may be best to conclude that the merits of the safe ports rule appear to have been tested in the market place and found to be satisfactory enough, the large number of safe ports cases going to trial in the last 10 years notwithstanding.

Canadian Maritime Law
New Developments

A. Barry Oland*

This article will describe briefly recent developments in Canadian Maritime Law that will be of interest to shipowners, P & I Clubs, cargo insurers and marine financial institutions.

I. CARRIAGE OF GOODS BY WATER ACT, 1993

With a measure of speed that surprised many, the Parliament of Canada enacted a new *Carriage of Goods by Water Act* S.C. 1993, C. 21 on May 6, 1993.

The Act repealed the old Hague Rules, 1924 that were made part of Canadian law by the *Carriage of Goods by Water Act*, 1936. The new statute enacted the Hague-Visby Rules of 1968 and the SDR Protocol of 1979. Canada thereby joins its trading partner Japan to bring the Hague-Visby Rules and SDR Protocol into force at approximately the same time.

For shipowners and P & I Clubs there is the certainty and familiarity of defences in Article IV. For cargo insurers there is finally a package limitation that partially allows for better recovery for damage to large packages or units by way of the 2 SDR per kilo provision of Article III (5)(a). There is also much greater certainty about what constitutes a package or unit in a container situation because of Article IV (5)(c).

The Hague-Visby Rules apply by force of law in Canada and govern all contracts of carriage where shipment is from Canada pursuant to a bill of lading. The act specifically allows for contracting out of the Hague-Visby Rules for carriage of goods from one place in Canada to another place in Canada where the shipment contract is not covered by a bill of lading and contains a stipulation that the Rules do not apply.

By itself enactment of the Hague-Visby Rules and SDR Protocol is not a major event. Our European trading partners have had Hague-Visby Rules since 1971 and the Government of Canada has been criticized for failure to upgrade promptly its carriage of goods legislation, particularly where Canada is a shipper nation.

What is important for shipowners, P & I Clubs and cargo insurers in the future, is the dual nature of the act. The *Carriage of Goods by Water Act* brought into force immediately on May 6, 1993 the Hague-Visby Rules and SDR Protocol. However in addition to the Hague-Visby Rules as Part 1 and the Hamburg Rules are incorporated as Part 2. Of importance is section 3(b) which states that a purpose of the act is to replace the Hague-Visby

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Rules with the Hamburg Rules at a later date. The two-stage approach can be seen by review of sections 1-5 of the Act which are set out as follows:

> "1. This Act may be cited as the *Carriage of Goods by Water Act.*
>
> 2. In this Act,
>
> "Hague-Visby Rules" means the Rules set out in Schedule 1;
>
> "Hamburg Rules" means the rules embodied in the United Nations Convention on the Carriage of Goods by Sea, 1978, as set out in Schedule II.
>
> 3. The purpose of this Act is
>
> (a) to repeal the Carriage of Goods by Water Act, chapter C-27 of the Revised Statutes of Canada, 1985, and to replace the Rules relating to bills of lading set out in the schedule to that Act with the Hague-Visby Rules; and
>
> (b) to replace the Hague-Visby Rules with the Hamburg Rules at a later date.
>
> 4. The Minister of Transport shall, on or before December 31, 1999, and thereafter every five years,
>
> (a) consider whether the Hague-Visby Rules should be replaced by the Hamburg Rules; and
>
> (b) cause a report setting out the results of that consideration to be laid before each House of Parliament.
>
> 5.(1) The report laid before Parliament pursuant to section 4 stands permanently referred to such committee of Parliament as is established to review matters relating to transport.
>
> (2) The Parliamentary committee shall undertake a comprehensive review of the report referred to in subsection (1) and shall report to the House of Commons thereon, including a statement on the advisibility of enacting the Hamburg Rules." (Underlining added)

The Minister of Transport Canada is required on or before December 31, 1999 and thereafter every five years to consider whether the Hague-Visby Rules should be replaced by the Hamburg Rules and cause a report setting out results of that consideration to be laid before each House of Parliament. The report is referred to the committee of Parliament

dealing with transport matters. The Parliamentary Committee is directed to undertake a comprehensive review of the Minister of Transport's report and in turn report to the House of Commons with a statement on the advisability of enacting the Hamburg Rules.

In my view the key to enactment of the Hamburg Rules in Canada will be the position taken by Canada's trading partners. If a significant number of Canada's major trading partners enact the Hamburg Rules there will be strong pressure upon the Parliament of Canada to do likewise. Because the Hamburg Rules are already part of the *Carriage of Goods by Water Act* it will take much less time for the Parliament of Canada to recommend and direct that the Hamburg Rules be proclaimed on a day to be fixed by order of the Governor in Council made on the recommendation of the Minister of Transport.

Canada is not considered to be a deep sea ship owning country. Canada is considered primarily to be a nation of shippers and various shipper interest exert considerable influence on government policy. The two stage approach was implemented because of representations made by shipper interests, otherwise only the Hague-Visby Rules and SDR Protocol would have been enacted.

Of interest to maritime lawyers will be the possible unspoken influence of the Hamburg Rules upon Canadian judges as they decide maritime cases. In situations calling for a common law decision on a point of practice or procedure, it will now be easier for maritime lawyers to argue that a particular aspect of the Hamburg Rules should be considered and where practical made part of the maritime common law.

For example Article 21 of the Hamburg Rules provides a structured method of deciding bill of lading jurisdiction issues. It is possible that a Canadian court may implement Article 21 as part of Canadian maritime law which is common law and universal across Canada. This could happen, if for example, the Federal Court of Canada decided that Article 21 of the Hamburg Rules provided a common sense solution to bill of lading jurisdiction disputes and approved Article 21 as part of maritime common law.

In Canada letters of indemnity are in most situations void and of no effect even against the shipper. The Hamburg Rules, Article 17(2) and (3) provide that a letter of indemnity is void against a third party to whom the bill of lading has been transferred, but is valid as against the shipper unless there is an intent to defraud a third party. P & I Club lawyers may argue that a Hamburg Rule approach should be taken by Canadian courts in letter of indemnity situations where a shipper is a claimant or one of the claimants.

By enacting the Hamburg Rules into Canadian law even though they are not presently in force the Government of Canada has given official sanction to the Hamburg Rules that will increase their statute in Canada. The official recognition of the Hamburg Rules will require shipowners, P & I Clubs and cargo insurers to give more serious consideration the Hamburg Rules in the future.

II. SISTER SHIP ARREST

The most significant recent development in Canadian admiralty practice concerning arrest occurred on February 1, 1992 when the *Federal Court Act* S.C. 1990 C. 8, S. 12 was amended to allow for sister ship arrest. It is now possible to commence an action in rem against vessels that are owned and/or beneficially owned by the same party who is owner of the ship that is subject to the action. Canada did not adopt the 1952 International Convention for the Unification of Certain Rules relating to the Arrest of Seagoing Ships (the "Brussels Convention"), rather Section 43(8) was added to the *Federal Court Act* as follows:

> "43(8) The jurisdiction conferred on the Court by Section 22 may be exercised in rem against any ship that, at the time the action was brought, is beneficially owned by the person who is the owner of the ship that is the subject of the action." (Underlining added)

The wording of this provision is deceptively simple. It allows for arrest of a vessel that is owned or beneficially owned by the same owner of the wrongdoing vessel. The burden of proof of beneficial ownership in the Affidavit to Lead Warrant is described in Rule 1003(2)(f) of the *Federal Court Rules* as follows:

> "1003(2)(f) If the application is for a Warrant against a ship described in subsection 43(8) of the Act, that the person making the affidavit shows reasonable grounds to believe that the ship for which the Warrant is sought is beneficially owned by the person who is the owner of a ship that is the subject of the action."

Rule 1006 provides that an owner or other person interested in the arrested sister ship may apply to the court for release of the ship.

Rule 1002(2.1) provides that where the action is commenced against a ship in accordance with subsection 43(8) of the Act, each of the ships shall be named as defendants in the Statement of Claim. This procedure follows English practice.

By deciding not to enact the 1952 Brussels Convention the Canadian legislation has raised a number of issues that will have to be decided by Canadian courts.

Beneficial Ownership – What does it Mean

Section 43(8) of the *Federal Court Act* provides for arrest of any ship which is "beneficially owned" by the person who was, at the time when the maritime claim arose, the owner of the ship which is the subject matter of the action. Because the term "beneficial ownership"

is not defined by the Act, Canadian courts will have to interpret the meaning of the term.

The Brussels Convention at Article 3 defines a sister ship in terms of ownership of "of all of the shares in both vessels by the same person or persons". The U.K. *Supreme Court Act*, 1981 U.K. C.54 at section 21(4) refers to "the beneficial owner of that ship as respects all the shares in it". Section 43(8) of the *Federal Court Act* does not restrict the term beneficial owner to that person who owns all the shares in the vessel. It can be argued that the Canadian act allows for a broader interpretation of the term "beneficial ownership" when an attempt is made to pierce the corporate veil. Because Canadian maritime practice is derived from that of the U.K. I expect that English decisions such as the following will be examined and considered. Some of these cases likely to be considered are as follows:

The Andrea Ursula [1971] 1 Lloyd's Rep. 145
The I Congreso del Partido [1977] 1 Lloyd's Rep. 536
The Aventicum [1978] 1 Lloyd's Rep. 184
The Maritime Trader [1981] 2 Lloyd's Rep. 153
The Saudi Prince [1982] 2 Lloyd's Rep. 255
The Evpo Agnic [1988] 2 Lloyd's Rep. 411

The most recent Canadian decision to consider beneficial ownership in Canada outside the context of Section 43(8) of the *Federal Court Act* is the Federal Court of Appeal decision in *Mount Royal/Walsh Inc.* v. *The "Jensen Star" et al.* [1990] 1 F.C. 190. The issue for consideration was whether a demise charterer could be considered a beneficial owner for the purposes of s. 43(3) of the *Federal Court Act.* In that case Marceau, J.A. stated in relation to beneficial ownership at page 209, 210:

> "The problem, however, is that I simply do not see how a Court could suppose that Parliament may have meant to include a demise charterer in the expression 'beneficial owner' as it appears in subsection 43(3). Whatever be the meaning of the qualifying term 'beneficial', the word 'owner' can only normally be used in reference to title in the res itself, a title characterized essentially by the right to dispose of the res. The French corresponding word 'propriétaire' is equally clear of that regard. These words are clearly inept to describe the possession of a demise charterer. In my view, the expression 'beneficial owner' was chosen to serve as an instruction, in a system of registration of ownership rights, to look beyond the register in searching for the relevant person. But such search cannot go so far as to encompass a demise charterer who has no equitable or proprietary interest which could burden the title of the registered owner.

> As I see it the expression 'beneficial owner' serves to include someone who stands behind the registered owner in situations where the latter functions merely as an intermediary, like a trustee, or legal representative or agent. The French corresponding expression 'véritable propriétaire' (as found in the 1985 revision, R.S.C., 1985, c. F-7) leaves no doubt to that effect."

In my view it is probable that a Canadian court dealing with the issue of beneficial ownership in section 43(8) will follow the direction of Marceau, J.A. in the "*Jensen Star*" decision to determine the identity of a beneficial owner by looking behind the corporate veil of the registered owner. To accomplish this a Federal Court will consider evidence of corporate shareholdings, directorships, registered offices, management and other indices of common ownership.

I suggest that Canadian courts have a clear understanding of the corporate labyrinth that surrounds true ownership of a vessel. In practical terms a Canadian court will lift the corporate veil where necessary to establish the correct beneficial owner of a vessel.

Multiple Arrests

The Brussels Convention allows the plaintiff to arrest the offending ship or the sister ship. The *Federal Court Act*, Section 43(8) allows the plaintiff to arrest "any ship" which is beneficially owned by the same person. It is unclear whether the courts will interpret "any ship" to mean "any and all ships" or "any one ship". The possibility therefore exists for multiple arrests.

Commencement of Action – Timing

The Brussels Convention stipulates that the sister ship must be owned by the defendant at the time "the claim arose". Section 43(8) of the *Federal Court Act* stipulates the sister ship must be beneficially owned by the person at "the time the action is brought" in order that it be arrested. Under Section 43(8) the claimant must be careful to commence action before the ship or sister ship is sold, otherwise the claim will not normally follow the vessel.

Ownership – Mortgage Disputes

The Brussels Convention and the U.K. Supreme Court Act 1981 s. 21(4) do not allow sister ship arrest for disputes relating to title or ownership of any ship, disputes between co-owners of any ship as to ownership, possession, employment or earnings of that ship, or the mortgage or hypothecation of the ship. Section 43(8) of the *Federal Court Act* contains

no such limitation and in theory it would be possible to arrest a sister ship in an ownership or mortgage dispute. The Federal Court Rules Committee has attempted to bring Canadian practice into line with the Brussels Convention and U.K. practice by Rule 1006(3.2). This rule provides that the court may order release of the ship without the taking of bail or make such order as it deems just in relation to claims for title, possession or ownership of the ship, employment or earnings of that sistership, or any claim in respect of a mortgage.

It is by no means certain that Rule 1006(3.2) is intra vires the powers of the Federal Court Rules Committee. It is by no means certain that a Federal Court judge would always release a sistership from arrest in an ownership/mortgage type of dispute. This lack of restriction on the subject matter of sister ship arrest may be of considerable benefit to owners and/or financial institutions seeking to enforce maritime claims dealing with ownership and mortgage issues.

It will be seen in the above-noted comments that Canadian sister ship arrest legislation has provided broader grounds for sister ship arrest than the Brussels Convention.

III. ARREST PROCEDURES IN CANADA

The Federal Court of Canada has continued to refine its arrest procedures so that arrests in Canada are efficient, inexpensive and make Canada a good place to enforce a maritime claim.

Shipowners, P & I Clubs, marine financial institutions and cargo insurers regularly face problems of enforcement of maritime claims. Vessels are transient assets. The need for arrest procedures were perhaps best described by Lord Simon in *The "Atlantic Star"* [1973] 2 All E.R. 175 at 197-198 as follows:

> "Ships are elusive. The power to arrest in any port and found thereon an action in rem is increasingly required with the custom of ships being owned singly and sailing under flags of convenience. A large tanker may by negligent navigation cause extensive damage to beaches or to other shipping: she will take very good care to keep out of the ports of the 'convenient' forum. If the aggrieved party manages to arrest her elsewhere, it will be said forcibly (as the appellants say here): 'the defendant has no sort of connection with the forum except that she was arrested within its jurisdiction'. But that will frequently be the only way of securing justice."

Canada's geographic size combined with the nature of Canada's trade ensures that a large percentage of the world's dry bulk cargo fleet call at Atlantic or Pacific ports of Canada.

The reasons for Canada being a good place to enforce a maritime claim are described briefly as follows:

1. *Nationwide Jurisdiction*

   The Federal Court of Canada has nationwide admiralty jurisdiction. Arrest proceedings can be commenced at any Federal Court registry in Canada to arrest a vessel at any port in the country. There is no issue of state or district jurisdiction. The arrest warrant is enforceable at any port where a vessel is found.

2. *Right of Action In Rem – Maritime Jurisdiction*

   The right of action in rem against the res, or ship can be enforced for many types of maritime claims. They are essentially governed by Section 22 of the *Federal Court Act*. The subject matter of jurisdiction is extensive. It includes all traditional maritime claims. True maritime liens can be exercised against a vessel notwithstanding a change of ownership. Other maritime claims can be exercised against the vessel if the vessel was owned by the same person at the time the action was commenced.

3. *Arrest Documents*

   When one considers the effect of a vessel arrest the documents to achieve the result are extraordinarily simple. They are three in number:

   (a) Federal Court Statement of Claim
   (b) Warrant for Arrest
   (c) Affidavit to Lead Warrant

   None of these documents is likely to be more than three pages in length.

4. *Court Order for Arrest – Not Required*

   The warrant for arrest is issued by the District Administrator of the Federal Court of Canada. Issuance of the warrant for arrest does not require a separate court order or hearing before a judge. The warrant for arrest is issued by the District Administrator after review of the documents. Registry staff are on call 24 hours a day.

5. *Cost of Arrest*

   Typical out-of-pocket disbursement expense for a simple arrest of a deep sea vessel in Vancouver, B.C. is between Cdn. $500—$700, including cost of issuing the Federal Court Statement of Claim and payment of the Marshall's account. Costs will vary in other parts of Canada but it would be unusual to have disbursement expense for arrest exceed Cdn. $1,500.

6. *Counter Security for Arrest – Not Required*

   The Federal Court of Canada does not require a Bond or counter security to be posted by the party instituting an arrest. In some countries arrest is only granted if a Bond equal to a percentage of the claim is posted with the court. This is not the case in Canada.

7. *Bail – P & I Club Letters of Undertaking*

As a practical matter the number of arrests of deep sea vessels in Canada is few in relation to the number of claims. In most cargo damage claims security is negotiated with the vessel's P & I Club through their legal representatives in major Canadian ports. Security by way of a P & I Club Letter of Undertaking is often accepted for cargo damage claims both large and small. Admiralty lawyers for cargo insurers and shipowners work together informally to obtain security and avoid commercial delay to a member's vessel.

Where a P & I Club Letter of Undertaking cannot be offered, or is not accepted, the Federal Court Rules provide for filing a Bail Bond as security to prevent arrest, or release of a vessel from arrest. A Bail Bond acceptable to the Federal Court of Canada must be given by a Canadian chartered bank or other recognized Canadian financial institution. In practice a Bail Bond will be provided by a leading insurance company or chartered bank which will obtain counter security from the vessel owner, its P & I Club or financial institution.

8. *Marshall in Possession – Not Required*

The Rules of the Federal Court of Canada do not require that an admiralty marshall be put in possession of an arrested vessel. In practice this means that a typical security deposit of marshall's fees of up to U.S. $10,000 does not have to be provided by the arresting party to the marshall at the time of arrest. The practice in Canada is different from that in the United States.

9. *Power of Attorney – Not Required*

No formal power of attorney is required from a client to instruct a Canadian admiralty lawyer. Instructions to the solicitor are sufficient.

10. *Judicial Sales*

Of interest to financial institutions are procedures to enforce mortgage security. In British Columbia there have been a number of recent judicial sales. The procedure has been streamlined to allow for control of the sale by the plaintiff's admiralty lawyer under the directions of a Federal Court order. Typically there will be directions as to the manner and method of advertisement of the vessel and the time for filing of claims against the sale proceeds. Depending on the amount of sale there may be a priorities contest between creditors of the vessel owner.

In Canada the rules of priority of maritime claimants generally follow those of the United Kingdom.

11. *Enforcement of Foreign Maritime Liens*

The Supreme Court of Canada has determined that Canadian maritime law will recog-

nize a foreign maritime lien, even though the particular claim would not be considered a maritime lien in Canada. The most common example concerns a claim for supply of equipment and necessaries to a vessel in the United States. That situation normally gives rise to a maritime lien under U.S. law which allows the claimant to rank ahead of a bank's mortgage. The Supreme Court of Canada has held that Canadian maritime law should recognize the foreign maritime lien as a true maritime lien in order of ranking although the claim would not be ranked as a maritime lien if it had arisen in Canada.

In conclusion refinement and simplification of Canada's arrest procedures together with liberal sistership arrest procedures make Canada a worthwhile jurisdiction to obtain security and enforce maritime claims.

CASE NOTE:

Identification of the Carrier on the Bill of Lading and Validity of the Demise Clause under Japanese Law *The Jasmin*

Takashi AIHARA*

INTRODUCTION

The Tokyo Court of Appeals held in *The Jasmin* case that in general the carrier evidenced by the bill of lading should be identified by the descriptions on the bill of lading and that the demise clause had the effect it purported to have. [1] The first part of the decision suggests the possibility that the precedent will be changed after about sixty years' interval. In 1935 the Supreme Court held in a similar case that a time charterparty had an aspect of a bareboat charter. Therefore, because the time charterer was considered a bareboat charterer, he had the same rights and obligations as a shipowner when the master issued bills of lading. The second part, which confirmed the validity of the demise clause, is the first decision on this subject in Japan.

The Court of Appeals affirmed the judgment of the District Court. [2] As for the District Court decision a number of case notes in Japanese have been published, most in support of the decision. Clearly, *The Jasmin* case has gathered much interest in Japan.

In *The Jasmin* case five major issues were discussed. Among them this case note will cover only the issue of whether the time charterer was the party to a contract of carriage by sea evidenced by the bill of lading or not. This issue is dividend into two points: (1) whether the question of the carrier's identity was settled by the legal nature of the time charter, or by the descriptions on the bill of lading and the interpretation thereof; and (2) whether the demise clause was null and void under Art.15 Sec.1 of the International Carriage of Goods by Sea Act, 1957 (hereinafter referred to as "the Japanese COGSA").

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* Associate professor, Kanto Gakuin University. The author would record here my warmest acknowledgments to Mr.John Taylor for his helpful advice kindly given during the preparation of this Case Note in English.

1. The text translated into English of the decision of the Tokyo Court of Appeals appeared in this Bulletin No.27. An excellent Comment on the first instance decision by Mr. Robert Margolis was published in [1993] LMCLQ 164.
2. The text translated into English of the decision of the Tokyo District Court appeared in this Bulletin No.22 and 23.

FACTUAL BACKGROUND

The Cargo carried by *The Jasmin* from Indonesia to Korea in 1986 suffered water damage worth about 200 million Korean Won. The insurance companies (hereinafter collectively referred to as X), subrogated to the rights of the holders of the bills of lading concerned, brought this suit against both the time charterer of *the Jasmin* (hereinafter referred to as Y1) and her owner (hereinafter referred to as Y2). In this suit X demanded payment of damages from Y1 for his breach of obligation as a carrier under the contract of carriage, evidenced by the bills of lading, and from Y2 for his breach of obligation as a carrier, or for tortous acts. Japanese law was designated as the governing law in this case by a clause in each bill of lading.

The outline of the facts on issuing the bills of lading is as follows:

The owner of *the Jasmin*, Y2 and the charterer, Y1 concluded the time charterparty on the New York Produce Exchange form. This charterparty included a clause to the effect that it was agreed that the Master authorized the Charterer or his agents to sign bills of lading on behalf of the Master in conformity with mate's or tally clerk's receipts as well as with this time charter.

In turn, the time charterer, Y1 entered into a voyage charterparty using the chartered vessel. In this voyage charter, Y1 gave the charterer, or his agent, the authority to sign bills of lading on behalf of the Master. Under this authorization, a ships' agent at the port of shipment, who was the agent of the voyage charterer, signed the bills of lading concerned. The signatures were made under the designation "For the Master." The name of the time charterer was printed at the top of each bill of lading, while the demise clause was included in the back clauses. The clause provided that "If the Vessel is not owned by or chartered by demise to Y1, ... this bill of lading shall have effect only as a contract with the owner or demise charterer ... as principal made through the agency of Y1, who acts as agent only and shall be under no liability whatsoever in respect thereof.".

THE COURT OF APPEALS DECISION

The court determined that the carrier in this case was not the time charterer but the owner for the following reasons:

(1) As to the principle of identifying the carrier on the bill of lading

The claimant X asserted that the carrier in this case was the time charterer, on the grounds that the legal nature of a time charter was a hybrid contract consisting of a bareboat charter and a contract of manning, and that the provision of Art.704 Sec.1 of the Commercial Code, which was applicable to a bareboat charterer, was also applicable in itself (by analogy) or

mutatis mutandis to a time charterer.

The Court of Appeals decided, however, that the legal nature of a time charterparty was of no use in identifying the carrier. It held that the carrier evidenced by the bill of lading should be identified by the descriptions themselves on the bill of lading.

The Court of Appeals held:

> When the time charterer is given the right to make a sub-charterparty of the chartered vessel under the time charter, he can do it for himself with a cargo owner. On the other hand, ...if the owner and the time charterer intend that the former enters into another charterparty of the chartered vessel (it may usually be a voyage charter) with a third party, the owner can give the charterer the authority to make a charterparty on behalf of the owner among the provisions of the time charter. Consequently, although it is understood that the legal nature of a time charter is of a hybrid contract consisting of a bareboat charter and a contract of manning, that does not mean in itself that it is only the time charterer who can be party to a charterparty with the cargo owner. Therefore, ... there are no grounds on which the provision [of Art.704 Sec.1 of the Commercial Code] [3] should be applied itself or mutatis mutandis to the contractual liability of the carrier evidenced by the bill of lading.
>
> ... The carriage was an international carriage of goods by sea and the bills of lading were those for an oceangoing vessel. The descriptions on them were not absolute, but prima facie evidence (under Art.9 of the Japanese COGSA). In general the carrier evidenced by the bill of lading should be identified by interpreting the descriptions on the bill of lading.

(2) As to the carrier on the bills of lading concerned

The claimant X asserted that the carrier evidenced by the bills of lading was the time charterer Y1 because of his name appeared on the top of each bill of lading. However, the Court of Appeals denied this assertation and held:

> ... There were some facts in each bill of lading on which the carrier could be identified, such as the description of "For the Master" and the signature at the space for signature in the bill of lading and the demise clause among

3. Art.704 Sec.1 provides:
If the bareboat charterer of a ship makes the vessel available in navigation for the purpose of engaging in commercial transactions, he shall in relation to third persons have the same rights and obligations as the owner in connection with matters relating to the use of the ship.

> the back clauses. Therefore, the appearance of Y1's name on the bill of lading shall be considered to mean only that the forms of the bill of lading were intended for use by Y1, that the name was only for contact purposes, or at most that Y1 participated in the charterparty with the carrier, evidenced by the bill of lading, as the time charterer.
> ...The designation, "For the Master" on the bill of lading, under which the ships' agent made his signature, is generally understood to be an indication that the owner was party to the contract of carriage of goods by sea (that is, he was the carrier). When the owner enters into a time charterparty of his ship and entrusts the charterer with its operation, it is understood, according to the present shipping practice, that the owner authorizes the charterer or his agents to conclude the contract evidenced by the bill of lading on behalf of him even if there is no specific stipulation in the time charter. ... Even if a time charter is made, the power to direct and supervise the master and other mariners is retained in the hands of the owner who employs them. ... Based upon the facts found above, it is held that it was not the time charterer but the owner indicated on the bill of lading who is the ... carrier.

(3) Validity of the demise clause

The claimant X asserted that the demise clause was null and void under Art.15 Sec.1 of the Japanese COGSA. However, the Court of Appeals decided that the demise clause should have the effect it purported to have and held:

> ... A bill of lading clause designating the owner as the carrier, such as the demise clause in this case, does not make the responsibility of the carrier on the bill of lading ambiguous. It does not reduce the carrier's responsibility or conflict with the effect of the provision in Art.15 Sec.1 of the Japanese COGSA which prohibits the carrier from benefitting from the exemption clauses.

COMMENTS

1. The identification of the carrier on the bill of lading

(1) The traditional approach

In Japan, it has been argued that the problem of whether the shipowner or the time charterer bears contractual and tort liabilities toward third parties which occur by using the

chartered vessel is a question of whether Art.704 Sec.1 of the Commercial Code applies to time charterers. The Commercial Code generally places the rights and responsibilities of the shipping enterprise squarely with the owner. Hence, it would not apply when a bareboat charter is formed and, the bareboat charterer would not become responsible for the enterprise. Art.704 Sec.1 is the provision that is devised to correct this defect by placing on the bareboat charterer the obligations of the owner in relation to third parties.

There are no provisions in the Commercial Code concerning time charters. The key to the legal relationship between shipowners and time charterers is in the interpretation of their contracts. Once again, the traditional view of the courts is to interpret the time charterparty as a hybrid contract consisting of a bareboat charter and a contract of manning. According to this view, because the time charter is considered to be a bareboat charterer, he is liable to third parties subject to Art.704 Sec.1.

There are several interpretations of the nature of time charterparties. Aside from the court's view that they are bareboat-manning hybrids, they are sometimes seen as contracts of carriage or as leases of shipping enterprises:

- The contract of carriage theory says that the time charterparty is just a contract of carriage, so the time charterer is not a bareboat charterer, and is not subject to Art.704 Sec.1. The only one responsible to third parties is, quite simply, the owner.
- The leases of shipping enterprises theory, on the other hand, says that the true nature of the time charter must be inferred based on aspects of the enterprise itself. That is, the time charterer, who is supplied by the owner with the vessel and its crew, himself gets the profit generated by using the manned ship or bears the loss, while the owner merely collects the charter hire for use of his manned ship as rent on invested capital. In effect, like the hybrid contract theory, this view places the liability to third parties with the time charterer.

However, in the event that a time charterer sublets the chartered vessel and bills of lading are issued under the sub-charterparty, the question of who is the "carrier" in respect of those bills of lading would appear to be fundamentally unrelated to the legal nature of the original time charterparty. In this case, the real issue is the legal relationship surrounding the issuance of the bill of lading, and the need to clarify on whose behalf the bill of lading was signed. As in the case of the hybrid contract theory and the lease of shipping enterprise theory, the mere fact that the time charterer is a bareboat charterer, and bears the same liability as the owner, is not sufficient to say that he is the carrier on the bill of lading.

(2) *The Jasmin* decision

The Court of Appeals ruled, first of all, that it is not possible to determine the carrier's identity based on the traditional approach, that is, to apply Art.704 Sec.1 of the Commercial Code via the legal nature of the time charter. Because time charterers can not only make a sub-charterparty of the chartered vessel for himself, but also conclude a charterparty on

behalf of the owner, the carrier under a charter with a cargo owner is not limited to the time charterer. When the shipowner authorizes the time charterer to conclude a charterparty with a cargo owner, the shipowner becomes the carrier. In short, the question of whether the owner or the charterer is the carrier under the original time charterparty is quite different from the question of whether the owner or the time charterer is the carrier under the charterparty with a cargo owner. The latter question can not be solved by the legal nature of the time charterparty. The theory developed in this part of *The Jasmin* decision seems to be somewhat doubtful. It is clear, however, that the court declared its farewell to the traditional approach.

Secondly, the Court of Appeals held that in general the carrier evidenced by the bill of lading should be identified by the descriptions on the bill of lading. This decision appears to be reasonable and has had much support of scholars. In the event that bills of lading are put into circulation out of the hands of the charterer or shipper who is party to a contract of carriage, both the question of what are the rights and obligations under the bills of lading and the question of who is the carrier that bears the obligations should be settled by the descriptions of the bills of lading.

Finally, in this case, the time charterer entered into a voyage charterparty using the chartered vessel and gave the voyage charterer, or his agent, the authority to sign bills of lading on behalf of the Master. The agent signed the bills of lading concerned under the designation "For the Master". In addition, the demise clause was included on each bill of lading. On these facts, the Court of Appeals held that the carrier on those bills of lading was the owner. It seems, however, that we have to discuss further the following two questions in order to appreciate this decision. The first question is concerned with the fact that the name of the owner did not appear on the bills of lading and that the name of the time charterer was printed on them. It is necessary to some extent to protect good faith holders of bills of lading who rely on the representation of the charterer's name and consider him as the owner. The second question is on the validity of the demise clause.

2. The indication of the name of the charterer on the bill of lading and the need to protect bona fides holders

The Court of Appeals held that the carrier was definitely identified by the designation "For the Master" and the demise clause.

This decision seems to be quite right. It should be noted, however, that identification of the carrier is different from the question of who is the carrier. Although the holder of the bill of lading could know that the carrier in this case was the owner by referring to such designation and clause, he could not know who was the owner. In order to confirm the owner's name, he would have to refer to a ship register and to search the name of the owner of the vessel. Although the name of the vessel appears on the bill of lading, it is not practical

that the holder has to study a register for confirming the owner's name and it is not reasonable that he has to confirm the owner's name on the facts outside the bill of lading. Both the Hague Visby Rules and the Japanese COGSA provide that the name of a carrier must be stated in the bill of lading. Therefore, it impairs the fairness between the parties that the holder of a bill of lading is obliged to confirm the owner's name at his own risk even if the name of a carrier is not stated in the bill of lading and the name of the time charterer is printed on the top. In such cases, it will be nessesary to some extent to protect the good faith holder who believed that the party whose name was printed on the top of the bill was the owner. In *The Jasmin* case, it seems that the time charterer should have been considered the carrier because of his appearance on the face of the bill of lading as the owner.

3. Validity of the demise clause

The Court of Appeals held that the demise clause was held to be valid because it did neither made the carrier's responsibility on the bill of lading ambiguous nor reduced it. This decision is also acceptable. The validity of the demise clause is closely related with the effect of the designation "For the Master". If the latter makes it clear that the signature on the bill of lading is for the owner, the demise clause has only a function to support such effect. Therefore, in the circumstance, it seems to be less useful to consider the validity of the clause.

In *the Jasmin* case, although it is somewhat doubtful, the Court of Appeals appears to have decided that the demise clause itself is valid. Even if a bill of lading contains only the demise clause without the designation "For the Master", the validity of the clause will be affirmed for the same reason that the court showed. The problem concerning the validity of the clause will occur in the event that a real owner becomes the time charterer by using a dummy company as the owner. However, in such cases, it will be usual that only the name of the time charterer, that is, the real owner, appears on bills of lading. If so, as above mentioned, it will be sufficient to place the responsibility of the carrier with the time charterer as an apparent owner, instead of denying the validity of the demise clause.

4. Conclusion

The Court of Appeals decisions in *the Jasmin* case that the carrier should be identified by the descriptions on the bill of lading and that the demise clause is valid are seemed to be quite reasonable. On the other hand, as mentioned above, good faith holders are necessary to be protected when the name of a time charterer is printed on the bill of lading and he has appearance as the owner who is the carrier. Bills of lading without the name of the carrier are something like promissory notes without the name of the bank. It is not unreasonable for the holders to believe that the company whose name appears on bills of lading is the owner or the carrier.

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