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CONTENTS

Assessment of Loss and Damage for Tort Claims under Japanese Law

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1. Introduction

It is said that prices are very expensive in Japan. Foreign shipowners are complaining about expensive port charges such as pilotage, tuggage, wharfage and so on. Japanese lawyers' bills are no exception. I think the reason for these complaints is soaring exchange rate of Japanese Yen against foreign currencies.

Seen from outside Japan, the scale of damages looks also expensive. However, the strong Yen has nothing to do with those who live in Japan. From the Japanese point of view, it is mostly reasonable, of course, it has differences and similarities to standards of the other states. I would like to explain about the legal situation relating to assessment of loss and damage in case of claims arising out of tort, mainly on basis of negligence. The Supreme Court of Japan ruled that the following article 416 of Civil Code as to assessment of damages in case of breach of contract shall apply to tort cases likewise (Judgements of Supreme Court of Japan of June 17, 1973 and May 22, 1925).

Article 416. (Scope of damages)

1. A demand for damages shall be for compensation from the obligor for such damages as would ordinarily arise from the non-performance of the obligation-duty.

2. The obligee may also recover for damages which have arisen through special circumstances, if the parties have foreseen or could have foreseen such circumstances.

(Translation from "Doing Business in Japan" by Prof. Zentaro Kitagawa of Kyoto University)

The concept of this article is "foreseeability" or "proximity" or "remoteness". We say that a claimant is entitled to recover the same economical position which would have been attained but for the tort in question. In other words, tortfeasors shall compensate a claimant for loss and damage which would have been able to be anticipated to occur before the tort from the view-point of general but reasonable people. I understand that this theory is also adopted by the other countries such as England, United States, Korea and else.

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2. No Applicability of Bright Line Rule

There is a principle called "Bright Line Rule" that there could be no recovery for economic loss where no physical injury to a proprietary interests is incurred. Claims for loss can only be allowed in cases where claimants sustained physical damage to their proprietary interests ("BJORNEJORD" 1928 AMC 61 [1927] Judgement of Supreme Court of the United States of December 12, 1927; **Cleveland Tankers, Lim. Procs.** 1992 AMC 1727, Judgement of United States District Court, Eastern District of Michigan of February 25, 1992, Salmond & Heuston, Law of Torts, 20th edition, p.213, "... the principle now established in England is that there is no liability for economic loss unless there is also proved loss to the plaintiff's person or property.)

The summary of Cleveland Tanker's case above is as follows:

> On September 16, 1990 a tanker "JUPITER" caught fire followed by explosion while discharging the gasoline at the dock. As a result of this accident, the "JUPITER" broke loose from its mooring and drifted into the navigation channel of the river. The vessel blocked all commercial navigation in the channel which was closed until October 22, 1990 for 36 days. A large number of claimants sued the shipowner of the "JUPITER", including marina operator, railway company, trucking company, dredging company and a shipowner whose ship was detained by the blockage of the channel. All of these claims were denied and the litigation was dismissed for the reason of Bright Line Rule.

I think it is definitely necessary to draw a line somewhere between wide chains of various losses. If you have a serious marine accident causing the blockage of a whole harbour or oil pollution, you will face a great number of claims from various people. For example, it is possible that because of blockage of the harbour, vessels carrying imported goods can not unload the cargo and as a result of which shopkeepers who plan to sell the imported goods will sustain economical loss. This kind of economical loss can not be allowed. Why? The Bright Line Rule gives a very clear answer to this. It is a good method to cut "remote" damages. Under this rule, it is a prerequisite for a claimant to sustain a physical damage to its owned property. No property damage, no claim. This is limitation of the title to claim damages.

Under Japanese law, there is no limitation concerning title to claim damages. If you sustain loss and damage and your claim stands within the category of foreseeability, then you are entitled to damages even if you do not sustain any damage to your property. We have in Japan many precedents in which tenants of offices and shops were permitted to claim economic loss when the rented offices and shops were damaged by negligence of the third parties (eg. car plunging into offices and shops, Judgements of Tokyo District Court of Sept. 1, 1982 and Yokohama District Court of July 19, 1984.)

In this sense, under Japanese law, theoretically speaking, a time charterer of a ship can claim his own loss when his chartered vessel is involved in marine accidents. However, in most of time charter cases, time charterers do not sustain economic loss because in such cases vessels become off-hire, and charterers need not pay for that period. However, if time charterers sustain additional loss which can not be recovered by off-hire and such economic loss would have been able to be anticipated by the tortfeasor before the accident, then such economic loss would be recoverable to the extent of the requirement of "Special Circumstances" provided for Article 416-2 of the Civil Code of Japan.

In the Canadian law, the situation seems near in Japan. It was ruled by Federal Court of Appeal that the law on economic loss was more opening in Canada than in England if only because there had been fewer decisions. In November 1987, the tug "JERVIS CROWN" collided with the New Westminster Railway Bridge spanning the Fraser River. As a result of the collision, all railway traffic and water traffic were suspended for several weeks. The railway company brought action against the tug owners to claim pure economic loss arising from the suspension of railway traffic. The court admitted the economic loss sustained by the railway company. The loss of the railway company was reasonably foreseeable to the tug boat owners who knew the precise nature of the economic loss to the railway company since previous accidents to the bridge had caused precisely the same result. I think this Canadian court's approach is very similar to the one introduced by Japanese courts [Canadian National Railway Co. v. Norsk Pacific Steamship Co., Ltd. (The "JERVIS CROWN"), Federal Court of Appeal of 5th January 1990] (Lloyd's Maritime Law Newsletter No. 272).

3. The Company's Loss in case of Injury of its Director

In case of personal injuries, it is natural that a claimant is limited to a person who actually sustains injury to the body. However, under Japanese law, it is again a problem of foreseeability. In fact, the Supreme Court of Japan ruled that a company whose director was injured by car accident can claim its economical loss because of its director's suspension of working when the company was a small business controlled and managed by that director (Judgement of November 15, 1968). Anyway, I think that in Japan even if in personal injury claim cases, there are no special rules or standards to decide on the title to claim damages like the Bright Line Rule. This issue shall be completely depend upon foreseeability as well.

4. Detention Loss in case of a Total Loss of a Ship

We have many precedents rendered by the Supreme Court of Japan that loss for expected earnings in case of a total loss of a ship is not recoverable because the value of lost ship plus interest from the day lost should cover all the losses sustained by the shipowner

(Judgement of The Supreme Court of Japan of May 22, 1925, similar judgement in U.K., The Columbus (1849) 3 W ROB 159).

However, on July 17, 1981, the Supreme Court gave a different judgement ruling that expected loss of earnings during the period reasonably needed for obtaining a replacement vessel is recoverable. This case was concerning loss of earnings of a fishing boat owner. However, this judgement followed that the previous Supreme Court precedents to the above effect which seem to be contrary are not contradictory to this judgement.

This following reference is causing still now hot debates in Japan concerning this issue. Some say that expected loss of earnings in case of a total loss of a ship is recoverable only in cases where the vessel lost is a fishing boat (Masako Yoshitake of Waseda University "SHOJI HANREI KENKYU" p.283). It seems that there is no reasonable ground to distinguish between a fishing boat and a cargo boat.

In car accident cases in Japan, we have many precedents in which it was ruled that loss of expected profit in case of a total loss of a car is recoverable for the period reasonably needed to obtain a substitute new car which was commercially used (Judgement of Tokyo District Court of April 1, 1966, Judgement of Nagoya District Court of July 3, 1968 and Judgement of Yamagata District Court of December 25, 1986). These cases, of course, all related to car accidents which, of course, occurred on land, not at sea. Car collision and ship collision, both are causes for tort claims. Therefore, it is possible that precedents on land influence tort claims at sea.

Anyway, under such circumstances, this problem is not clearly resolved in Japan.

5. Standardization of Personal Injury Claims and Loss of Life Claims

Under Japanese law, claims for personal injury and loss of life are very much standardized.

(1) Loss of Expected Income

If you give age, yearly income and number of dependents of a deceased, then you can easily calculate approximate figures of loss and damage.

In case of loss of life, claims consists of 3 categories, (i) Loss of Expected Earnings, (ii) Solatium and (iii) Funeral Expenses and others.

Although there are some exceptions, amount of loss of expected earnings is calculated as follows:

$$I \times (1 - L) \times M$$

I: yearly income before death.

In cases of a student or a housewife who earn no incomes, the average wage income of all Japanese employees is adopted as follows:

Man ¥5,441,400

Woman ¥3,093,000 (as of 1994)

L: Living costs which would have been needed.
20%–50% depending upon number of dependents and etc. In case of a seaman, this rate is lower than a worker on land as seamen are supplied with food at sea.

M: Multiplier for deduction of future interest at 5% per annum to receive the expected income to be incurred in future at once. This is calculated on basis that earning age ends usually at 67 years old.

(Example)

Deceased: a business man

age	:	35
yearly income	:	¥ 7,000,000
dependent	:	wife and two minor children

Loss of Expected Income

¥ 7,000,000 x (1–0.3) x 18.8060 = ¥ 92,149,400

Multiplier of 18.8060 is the Hoffman rate for 32 years (67–35).

(The bereaved family of 29 years old fisherman was awarded ¥141,538,804 plus interest by Tokyo District Court by its judgement of February 19, 1991.)

(2) Amounts of Solatium for pain and suffering are as follows:

(a) When deceased was a main earner	:	¥ 26,000,000
(b) When deceased was a spouse or mother	:	¥ 22,000,000
(c) The other cases	:	¥ 20,000,000

As to claim for solatium and funeral expenses (usually up to ¥ 1,200,000), claimants are not required to produce any documents in support of its claims. We have no concept of "instant death" (contrary to The Law Reform (Miscellaneous Provisions) Act of U.K., 1934). Whether the death was instant or not is irrelevant to assessment of this mental damage.

(3) Solatium for Injured Person

We have a table to calculate this mental damage according to degree of injury and length of medical treatment, for example, as follows:

Hospitalization (month)	Amount
1	¥ 320,000 ~ ¥ 480,000
2	¥ 600,000 ~ ¥ 920,000
3	¥ 840,000 ~ ¥ 1,320,000
4	¥ 1,050,000 ~ ¥ 1,670,000
5	¥ 1,230,000 ~ ¥ 1,970,000

(4) Death of Single Person with no dependents

When a young and single person is killed by an accident, in some states, very low amount of compensation is only admitted (e.g. in England only £3,700 in case of the deceased being under 18, The Fatal Accident Acts 1976 amended in 1982). However in Japan, heirs of the deceased, parents or brothers or sisters can recover damages for loss of expected income and solatium though the amounts accepted are lower than the amounts in case of the deceased having dependents. This is same as when a victim is a small child. In Japan, claim for loss of life belongs to the deceased person including mental damage (estate) which is later inherited by heirs. Therefore, Japanese law has put less weight on dependents' right for future benefits which would have been given by the deceased than inheritance left by the deceased as a "replacement" of his life.

6. Assessment of Loss When a Foreigner is Killed in Japan

When a foreigner comes to Japan on a holiday or on business and involved in serious accidents and is killed, then what standard, Japanese one or the foreigner's home country's one should apply? We have one case in which a Chinese worker came to Japan on holiday and died of a car accident. His family sued the car driver and the car owner. The first court denied his claim applying the Chinese standard to assess his loss. However, the Court of Appeal overruled the first court's decision and applied the Japanese standard giving payment order for about ¥ 27,000,000 (the admitted amount for damages in the sum of ¥ 47,000,000 less ¥ 25,000,000 paid by the car insurer plus costs) to the Chinese family (Judgement of Takamatsu Court of Appeal of June 25, 1991). This case has been appealed to the Supreme Court of Japan which has yet to decide. I think that the principle of compensation in tort claims is that a claimant can recover the same position from the economical point of view as he would have but for the accident. Therefore a foreigner's compensation is to be decided on that foreigner's home country's standard.

7. Simultaneous Decision on Liability and Damages

In tort claims, you have two issues, liability and assessment of loss and damage. In Japan, these two issues are reviewed and decided in one procedure at the same time when a judgement is rendered. However, I understand in England, Hong Kong and Singapore, these two issues are separately determined in such manner as liability issue is first decided and later on, assessment of loss and damage is decided. I am not sure which system is good. However, it seems to me that to discuss and decide the two issues simultaneously would take less time to settle the matter. It would match with this speedy world. ■

Sources of Law relating to Maritime Arbitration in Japan

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Introduction

In Japan, arbitrations are governed by Book VIII-Arbitration Procedure of the Code of Civil Procedure (the "CCP") as there is no independent "arbitration law". No distinction is made between domestic and foreign arbitrations. As the parties to arbitration agreements are regarded to have waived their rights of action, arbitration and litigation are alternative means for resolving disputes.[1.2.3.4.5.]

Arbitration awards are given "the same effect as a final and conclusive judgement of a Court of Justice" under Section 800 and may be executed forcibly under Section 802[6.] of the CCP.

Japan guarantees execution of a foreign arbitration award[7.] under the Geneva Protocol on Arbitration Clauses, 1923, the Geneva Convention on the Execution of Foreign Arbitral Awards, 1927 and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 in addition to bilateral treaties of commerce and navigation such as the Treaty of Friendship, Commerce and Navigation between Japan and the United States of America. Thus, the execution of arbitral awards in international cases is considered to be highly likely in Japan.[8.]

Book VIII of the CCP, consisting of only twenty sections, provides for arbitrations that take place in Japan, and each of them is of a basic and general nature. Since detailed rules are necessary in arbitration procedures, the parties tend to rely on institutional arbitrations with their published rules, instead of ad hoc arbitrations.

The Arbitration Rules of the Tokyo Maritime Arbitration Commission of the Japan Shipping Exchange, Inc. (the TOMAC Rules)[9.] enjoy the confidence of parties to TOMAC arbitrations[10.] as it boasts 70 years of history in Japan, the longest among similar institutions. The precedents of the Japanese courts related to arbitration procedures recognize the reasonableness of the TOMAC Rules,[11.] and the TOMAC Rules are amended from time to time by referring to legal decisions in Japan and abroad.

Under these circumstances as mentioned above, I'd like to discuss arbitration procedure first referring to court precedents[12.] and TOMAC Rules, and then discuss substance applied to render an arbitral award in maritime arbitration secondly. This is to clarify the sources

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of law relating to maritime arbitration in Japan.[13]

Section I Arbitration Procedure

1. Agreement for Arbitration and its Formalities

Section 786 (Arbitration Agreement) of the CCP provides that "an agreement to submit a controversy to one or more arbitrators is valid only where the parties have the right to make a compromise regarding the subject matter in dispute", and Section 787 thereof provides that "an agreement to submit a future controversy to arbitration shall have no effect unless it relates to a particular relation of right and a controversy arising therefrom". To define it concisely, an agreement for arbitration is one between the parties to submit all or some controversies which have arisen or are likely to arise between the parties under the original contract or under any other agreement related to it.[14]

As for the forms of an agreement for arbitration, there is no legal provision or legal decision. Section 3 of the TOMAC Rules provides that "where the parties to a dispute have, by an arbitration agreement or by an arbitration clause contained in any other contract between them, stipulated that any dispute shall be referred to TOMAC arbitration or arbitration in accordance with TOMAC's Rules, the TOMAC Rules shall be deemed to constitute a part of such arbitration agreement". This provision requires, albeit indirectly, that an agreement for arbitration shall be according to an arbitration agreement or by an arbitration clause in a contract, and is in a written form.[15]

When the parties agree to arbitration under Section 3 of the TOMAC Rules, the agreement covers all the procedures under TOMAC arbitration even if the details are not provided therein.

There may be cases where the parties may wish to resolve a dispute by arbitration even though they have no written agreement regarding arbitration. The Supreme Court has held that "an arbitration agreement is concluded tacitly where the respondent to the application for an arbitration understands the meaning of an arbitration procedure, appears on the due date, and pleads on the merits without asserting the non-existence of an arbitration agreement in case of a dispute".[16]

In a case where the respondent asserts that he "signed a printed contract for convenience sake without really understanding the arbitration clause printed therein", the court in two cases[17, 18] have denied the presence of an agreement for arbitration by holding that "the charterparty was used without much thought, particularly without giving thought to the arbitration clause therein".

There are, however, other cases[19, 20, 21] in which the arbitration clause in a contract was held to be valid. From the reasons given in these decisions, it may be concluded that parties to contracts using printed forms well known in the fields of navigation, shipbuilding and

commerce and frequently used by shipping-brokers, such as the Forms of the Documentary Committee of the Japan Shipping Exchange[22] and those of the Baltic & International Maritime Council (BIMCO)[23], cannot validly claim that they were not aware of the existence of an arbitration clause.

2. Validity of Arbitration Agreement

A Supreme Court decision[24] that "the effect of an arbitration agreement is not influenced by a defect in the principal agreement unless there is a specific agreement between the parties" and a Tokyo Appeal Court decision[25] that "cancellation of the principal agreement does not affect the effectiveness of the arbitration agreement" indicate incontrovertibly that the arbitration agreement is independent of the principal agreement.

3. Arbitrators and the Arbitration Tribunal

The TOMAC Rules provide for both ordinary and simplified arbitrations.[9, 26, 27] In both cases, the quorum of arbitrators is three. In the exceptional case of merely confirming the amount of debts, the quorum is one.

TOMAC is a permanent arbitration organ and its secretariat is established within the Arbitration and Document Department of the Japan Shipping Exchange. An application is accepted by the Secretariat by filing the application, the documentary evidences and the arbitration agreement (an agreement containing the arbitration clause) without appointing arbitrators unless the parties have agreed specifically to the manner of appointment.

In an ordinary arbitration, arbitrators are selected after the respondent files a defense. TOMAC selects a number of candidates who are suitable for the case in question whose interests do not conflict with those of the parties and having regard to the substance of the application and the defence. It then prepares a list of such candidates, presents the same to and asks the opinions of the parties, and finally makes its own selection giving due consideration to the views of the parties.

In simple arbitrations, TOMAC selects arbitrators whose interests do not conflict with those of the parties or the case, but does not disclose the candidates to the parties before it makes its selection.

4. Challenging an Arbitrator

The TOMAC Rules recognize a challenge to an arbitrator.[28] Section 16 of the TOMAC Rules provides that "a party desiring to challenge an arbitrator must do so by filing a written document stating the name of an arbitrator and the reason for challenge", and provides that "an Arbitrator Challenge Review Committee made up of three committee members appointed from the Panel of Members of TOMAC should be set up. The examination of the case is entrusted to the Review Committee.

Section 792(1) of the CCP stipulates that "the parties may challenge an arbitrator on the same grounds and on the same conditions as they are entitled to challenge a judge", thus providing for application *mutatis mutandis* of Sections 35 and 37 of the CCP. Section 35 (Causes of exclusion of judges) provides for the exclusion of a judge from the examination on the ground of involvement with a party to the case. Section 37 (Challenge to a judge by parties) provides for challenging a judge on the ground that he is not impartial. Therefore, a party who is dissatisfied with the result of examination by the Review Committee can file an application for challenge with the court. Provision of the examination system by the Review Committee is intended to simplify the challenge procedure and to accelerate the examination of a challenge by recognizing the exercise of the right to challenge the arbitrator by the parties. There has been no case where the party dissatisfied with the challenge examination took the matter to the court. There are no judgements rendered on the challenge of an arbitrator.

Section 797 of the CCP gives the arbitrator being challenged the right to continue examination of the case. There are hardly any cases where an arbitrator was challenged in a TOMAC arbitration. A challenge is made perhaps once in several years. The challenges that have been made were founded on the arbitrators alleged delay in the examination to show that the party was dissatisfied with the examination procedure. They were held not to have been made for a valid reason.

Section 12(1) of the UNCITRAL Model Law on International Commercial Arbitration[29] in an effort to prevent abuse of challenges by providing a so-called "system of disclosure", provides that;

> "When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall without delay disclose such circumstances to the parties unless they have already been informed of them by him".

This provision appears quite useful. The TOMAC Rules do not have this type of rule, but I believe that the disclosure system will be introduced by an amendment proposed for this year.

5. Ordinary Arbitration Procedure

The TOMAC Rules provide for a detailed arbitration procedure. A TOMAC Arbitration "proceeds by submission of written documents including documentary evidences and by appearances of the parties and the related parties (including witnesses) at the hearing".

The procedure starts with submission by the applicant of the application for arbitration and the documentary evidence, and continues with submission by the respondent of his defence and documentary evidence. The applicant may submit a statement if he is opposed

to the defence, and the respondent may also file a counterstatement if he is opposed to the application or to the statement. Thus, statements are exchanged between the parties through the arbitrators.

Hearings take place in between such exchanges. Since the system does not require representation by an attorney at law, the parties are asked to appear at the hearing through their representatives if they are corporations or through their employees who know best the details of the case in dispute, irrespective of whether lawyers have been appointed as their agents. Through the hearing, the arbitrators find out the background of the case and the grounds for claims by asking questions.

The above is provided in Section 794(1) of the CCP, which states that an arbitrator shall, if necessary, hear the parties and the factual relationship that caused the dispute prior to rendering an arbitration award, thus recognizing the authority of an arbitrator to investigate.

There are no legal provisions regarding the form of a hearing. Separate hearings may be held to allow the parties to become accustomed to them. If the other party requests to inspect the documents summarizing the hearings so far conducted, such requests granted as a rule. At any rate, the hearing is attended, in principle, by both parties.

In the case of a simplified arbitration, the arbitrators may hear one party alone, but the last hearing should be attended by both parties.

In practice, the volume of statements submitted by the parties as above mentioned decreases with each hearing, and submission ceases finally. Ordinarily, a hearing is held three or four times per case.

6. Construction, Effect and Cancellation of Arbitration Award

One of the reasons for cancellation of an award, which I shall discuss later, is Section 801 of the CCP: "where the parties were not heard in the arbitration procedure". It has been held that (a party) "cannot claim not to have been heard when the party did not respond to the summons of arbitrators without a valid reason".[30] The hearing is not only the most effective means for enquiry under Section 794 of the CCP but also a handy and effective opportunity for a party asserting or defending himself.

In another case[31], it was deemed sufficient if the arbitrators "gave an opportunity to the party for making a statement", and held that a party who did not utilize the opportunity of a hearing thus given to them is not entitled to argue that they were not heard.

An arbitration award contains the names, addresses, names of the representative of the parties, the result of the judgement (main text), the reasons for judgement, the date of judgement, and the signatures of the arbitrators. There is no standard for the degree of detail of the reasons.

Section 801 of the CCP recognizes the plea to cancel the arbitration award and cites as one of the requirements: "where the award does not show the ground on which the decision

was made".

Section 800 of the CCP stipulates that "an award has the same effect as the decision of the court that has been established between the parties". The successful party may ask for execution under Section 802 of the CCP if the losing party does not comply with the arbitration award. In return, the losing party often asks for a cancellation of the award by citing "inadequate reasons for the award".

A decision of the Supreme Court issued in 1904[32] states that "in addition to the case where no reason is given, the case where the reason is given without explaining or disclosing the ground for the award may be deemed as having not given the reason for the award", thus holding that the formalities alone do not suffice.

However, it may be said that arbitrators are not required to give as strict or detailed reasoning as a judge rendering a legal decision. In other words, as a 1933 decision of the Supreme Court[33] states:

> "unlike a judgement concluded by a court, an arbitration award can be rendered not necessarily supported by legal provisions alone but from a viewpoint of impartiality and equity by considering the facts and circumstances, and is not required to specifically cite evidences for the facts which it deemed to be the basis for the award; the award rendered without demonstration of the validity of the evidences for the basis of the award cannot be held as invalid for lack of reasons; so long as an arbitrator can explain the basis for an award, the justice of that basis should not be examined by a court. Even if the reason of the award is deemed unjust, it does not constitute grounds for cancellation of the award".

The reason why the court "should not examine the justice of the basis" is because the law, patterned after the laws of certain European countries, provides no means to ask the court to judge the legal justice of an arbitration award.

7. Execution by Virtue of an Arbitration Award

Section 802(1) of the CCP provides that "execution by virtue of an award can be carried out only when it is pronounced to be allowed by an execution-judgement[34]". Section 802(2) provides that "no such execution-judgement as is refered to in the preceding subsection shall be given, if there exists any ground upon which application for setting aside an award can be made". Opponents for the application for execution of an award quite often ask for cancellation by arguing that "they were not heard" or "the basis for the award is inadequate".

An example of a dispute under this Section involved a demand for execution in Japan of an arbitration award made in London wherein the charterparty specified "arbitration in London under the British Laws", and the bill of lading issued for the subject cargo included a provision to incorporate the provisions of the said charterparty. The holder of the bill of lading of the demandee in this case argued by citing Section 32 of the Japanese Constitution

that "no person shall be denied the right of access to the courts". The court denied the defense by stating that "the provision related to arbitration is a procedure consented by the parties, and it is sufficient for the Government to try to protect their people and others who are trying to defend their rights not by judicial proceedings but by arbitration so long as the Government is a party to "the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927."[35.]

In a case where the court allowed execution against a Japanese corporation who lost in an arbitration proceeding in New York by applying Section 4(2) of the treaty of Friendship, Commerce and Navigation between Japan and the United States of America, the Japanese court held that the said award was not against the public order and good morals of Japan, where the execution was to take place, because the requirements for execution by the New York State Supreme Court under the said Section were satisfied, the requirements being (1) that an effective arbitration agreement exists, (2) that an arbitration award is duly rendered under the arbitration agreement, (3) that an arbitration award is established irrevocably by the laws of the venue and can be executed, and (4) that it is not against the public order and good morals of the country in which the award is to be executed.[36.]

There are other decisions, but Japan may be described as positive in its understanding of such treaties and generous about the execution of foreign arbitral awards.

8. Conciliation During the Arbitration Procedure

Section 801(2) of the CCP provides that "where agreed otherwise between the parties, an award cannot be set aside for the reasons specified in subsections 4 and 5 of this section". Subsection 4 mentions a case "where the parties were not heard in the arbitration" and subsection 5 refers to the case "where the arbitration award does not show the ground on which the decision was made". If the parties have agreed to the arbitrators giving no grounds for the award, an arbitration award without reasons can be deemed legally valid under subsection 5.

When conciliation is reached under these subsections while the arbitration procedure is pending, the conciliation conditions can be described in the main text and the agreement of the parties for not writing the basis for the arbitration can be submitted; an award stating that the basis for award is not given because of an agreement between the parties is delivered by arbitrators in many cases.

This may most often be seen in cases where the parties are from Asian countries, and where, under the TOMAC procedures, the parties begin to appreciate the background and causes of the dispute more calmly as they write their arguments many times, and the parties either talk to each other directly or through arbitrators seeking conciliation during the process of arbitration. On an average of 7 out of 10 cases submitted for arbitration in Tokyo, conciliation is reached amicably often through arbitrators.

9. Preservative Measures

Whether or not to submit the case to arbitration after preservative measures have been taken is a matter left to the discretion of the parties. In actual cases, the vessel in question is arrested[37] and allocation of the moneys deposited for setting free the vessel is decided in the arbitration award. When Japan eventually establishes its arbitration law as a single law, it is expected that preservative measures will be provided.

10. Cost of Arbitration

Despite the keen interest of the parties in the costs of arbitration, detailed discussions have not been made so far. The CCP has no relevant provisions.

The financial burden imposed on the parties under the TOMAC Rules are, as a rule, the acceptance fee and the delivery fees. (Although there is a rule that stipulates payment of some special fees, they are hardly ever required). The acceptance fee is paid by the applicant. The delivery fees are decided based on the tariff of the charges depending on the total amount of the claim. At the first meeting of the board of arbitrators, each party is asked to pay the fees, and the total amount is paid by the loser, as a rule, at the time the arbitration procedure is completed.

TOMAC Arbitrations offer speedy and inexpensive arbitration since documentary evidence in English does not have to be translated into Japanese.

Compensation to the arbitrators are paid out of these fees under the internal rules. A case with a smaller amount of fees may require more time for examination, and occasionally there is no money left for administration after the compensation to the arbitrators is paid. As TOMAC accepts cases of various sizes and pools the money thus paid, it makes up for the differences in expenses incurred in different cases. This is possible only because of the relatively low compensation paid to its arbitrators.

Many TOMAC arbitrators are businessmen, and their compensation is set low partly because of the provision of Section 72 of the Law Concerning Lawyers which prohibits "those not qualified as a lawyer to act as an arbitrator as a profession". This issue may be worth our thought. Generally speaking, the average thoughts of an arbitrator himself regarding compensation are (1) since the work of an arbitrator is for the interest of the public, an arbitrator should offer his full knowledge and experience regardless of the amount of compensation, and (2) an arbitrator is not rendering public service and should therefore be paid the compensation comparable to the degree of difficulty of the case, but the arbitrator should be satisfied with the low compensation in order not to incur high costs for arbitration.

At any rate, TOMAC's system of establishing the arbitration costs is highly popular because it serves the interests of those applying for arbitration. However, the system does have limitations, particularly when complex cases increase and the costs of arbitrations radically rise.

Section II Substance of Maritime Arbitration

1. Shipping Business Practice

As for the substance of maritime arbitration in Japan, it is very helpful to know it for any parties who intend to submit their cases to TOMAC arbitration.

Therefore, on this occasion, I'd like to make some comments on the substance of maritime arbitration in Japan. Its substance can be divided into four parts:[38]

1) As a basic law, the 'Maritime Commerce' provisions of Book IV of the Commercial Code of Japan,
2) For international carriage of goods, the International Carriage of Goods by Sea Act is exclusively applicable,
3) International trade customs and business practice, and
4) Standard Forms of Contract enacted by the Documentary Committee of the Japan Shipping Exchange, Inc., the so-called "JSE Forms".

I shall have to point out, however, the fact that Book IV of Japan's Commercial Code is not popular in shipping circles. That is because the shipping business practice in Japan has been developing in accordance with the English system while the maritime commerce provisions of Book IV of the Commercial Code of Japan are based on the European Continental legal system.

Therefore, Japanese businessmen working in shipping or shipping-related companies are familiar with English and American law. As these businessmen are well trained in English and American law, they believe that their experiences are the law itself. So, they think the legal principles applied in Tokyo maritime arbitration are derived from the practical experiences of the arbitrators engaged in maritime businesses, and customs and practice of the maritime business now prevailing in world shipping, but not from the Commercial Code of Japan.

Under these circumstances, the JSE Standard Forms of Contract[22] have been developing in the maritime area and are playing the role of law in the real world. This fact has great significance in Tokyo maritime arbitration.

2. Role of JSE Contract Forms

Now, let me say something about the Japan Shipping Exchange, Inc. (JSE). The JSE was founded in 1921 as a non-governmental and non-profit association with shipowners, shipbrokers, marine underwriters, traders, shipbuilders and some industrial manufacturers as its members, and with its primary object being to serve the public interest.

Therefore, the JSE, having the before mentioned members in its organization, is considered to be an ideal organization to enact the standard contract forms and to conduct

TOMAC arbitrations.

Incidentally, the JSE's system of enacting the standard contract forms is as follows:

When it is thought desirable that a particular kind of contract form should be enacted, a sub-committee is set up. The members of such subcommittee are elected by the Documentary Committee of the JSE, and are composed of persons well versed in the business in respect of which the contract is to be enacted. They will meet together to discuss the matters and implement the results in a draft form of contract, which will be finally deliberated and adopted by the Documentary Committee.

At present, the standard forms of contract enacted by the JSE include agreements of demise charter, time charter, voyage charter, consignment of a ship, certain other maritime contracts regarding carriage of goods by sea, bills of lading, towage, salvage, and sale and purchase of a ship. The number of these standard forms counts more than 50, some of which are in use not only for trade with Japan but also for tripartite trade.

What I should like to say is that the JSE Standard Forms reflect the substantial degree of freedom of contract enjoyed by parties engaged in international sea-trades. This is attributable in large part to the comparative lack of legislation in Japanese maritime commerce.

In this connection, in the arbitration procedure of TOMAC most of the arbitrators are selected and appointed from among businessmen who have participated in drafting such standard contract forms.

So, each arbitration award rendered by them is well received by commercial interests because it reflects, so to speak, 'living law'.[39.]

In addition, the reasons for award are set out in the award by the arbitrators, thus giving opportunities to third parties to appreciate its fairness and justness and thereby improving the general reputation of TOMAC arbitration.

Conclusion

As discussed above,the Japanese legal system of arbitration is general and comprehensive, and lacks detailed rules. To make up for this deficiency, permanent arbitration organs have established arbitration rules which are supported by the legal decisions, and the arbitration procedure per se is guaranteed to be smooth.

In view of the further invigoration of international trade and commerce, Japan is faced with the need to have an independent "arbitration law". An "Arbitration Law Study Group" consisting of representative scholars of civil proceedings in Japan published a "Draft Text of the Law of Arbitration" in 1989,[40.] and appealed to the Government to establish the law proposed therein.

I would like to conclude my paper by pointing out that the proposed draft is basically composed of the principles incorporated in New York Treaty regarding the approval and

execution of foreign arbitral awards and the UNCITRAL Model Law in order that Japan's arbitration be internationally acceptable.

Footnotes:–

1. The Supreme Court, Meiji 33 (o) 431, Nov. 27, 1900
2. The Supreme Court, Taisho 1 (o) 89, Jan. 23, 1913
3. The Supreme Court, Taisho 5 (o) 1022, May 5, 1917
4. The Osaka High Court, Taisho 8 (ne) 20, Aug. 29, 1919
5. The Kobe District Court, Showa 5 (wa) 791, Mar. 6, 1931
6. Section 802 (Execution based on an award): Execution to be undertaken by virtue of an award shall be made only when an execution judgement has been rendered for the admissibility thereof. (2) The foregoing judgement shall not be rendered in case there exists a reason under which cancellation of award may be moved.
7. Mitsuo Ohashi, Maritime Arbitration in Tokyo — Its Legal Aspects, 1979, Chap VIII Sec. 2, PP60–66
8. Michael Pryles and Kazuo Iwasaki, Dispute Resolution in Australia-Japan Transactions, 1983, PP118–120
9. See 'A Guide to Tokyo Maritime Arbitration' issued by The Japan Shipping Exchange, Inc.
10. Mitsuo Ohashi, supra P10, the background of the enactment of 'the Law with respect to Maritime Arbitration (Law No. 221, 1948)'
11. The Yokohama District Court, Yokosuka Branch, Showa 25 (wa) 2, Oct. 25, 1950
12. Kazuo Iwasaki & Hironori Tanimoto, Hanrei Kara Manabu Chusai (Court Precedents relating to Arbitration in Japan), 1993
13. Mitsuo Ohashi, Supra PP6–12
14. Russel on Arbitration 19th ed., 1979, P48 See Definition of submission and arbitration agreement.
15. D. Mark Cato, Arbitration Practice and Procedure, 1992, P10 See Arbitration Agreement–Need for written
16. The Supreme Court, Shouwa 47 (o) 372, Oct. 12, 1972
17. The Tokyo High Court, Taishou 8 (ne) 472, Jun. 9, 1923
18. The Miyagi High Court, Shouwa 16 (ne) 108, Mar. 18, 1942
19. The Nagasaki High Court, Shouwa (ne) 171, Sept. 11, 1939
20. The Nagasaki High Court, Shouwa (ne) 225, Aug. 10, 1941
21. The Miyagi High Court, Shouwa (ne) 143, Mar. 11, 1943
22. Forms of Maritime Documents Issued or Adopted by The Japan Shipping Exchange, Inc. 1989.
23. The Baltic and International Maritime Conference (BIMCO) Documentary Council, General Council of British Shipping Documentary Committee 'Forms of Approved Documents'
24. The Supreme Court, Shouwa (o) 1125, July 15, 1975
25. The Tokyo High Court, Taishou (ne) 18, Mar. 15, 1916
26. D. Mark Cato, Supra, See The L.M.A.A. Small Claims Procedure 1989 and Commentary
27. Shortened Arbitration Procedure of The Society of Maritime Arbitrators, Inc. New York

28. Yearbook Commercial Arbitration Vol.XI-1986, P.384
29. Supra
30. The Kobe District Court (1911)
31. The Osaka High Court, Shouwa (ne) 1041, Feb. 24, 1933
32. The Supreme Court, Meiji 37 (o) 98, May 9, 1904
33. The Supreme Court, Shouwa 3 (o) 891, Oct. 27, 1928
34. Mitsuo Ohashi, Supra P44, See Forcible Execution of an Award
35. The Osaka District Court, Shouwa (wa) 5389, May 11, 1959
36. The Osaka District Court (Nov. 27, 1961)
37. Tameyuki Hosoi, Arrest of Ships, 1985, PP67-80
38. Mitsuo Ohashi, Supra PP11-12
39. Shuzo Toda, Kaisho-Ho, 1970, P82
40. Arbitration Law Study Group, Chusai-ho no Ripouronteki Kenkyu (NBL no. 25) 1993 ■

The Incorporation and Effect of Arbitration Clauses in Maritime/Shipping Contracts

Peter KOH*

1. CHARACTERISTICS OF MARITIME CONTRACTS

Maritime contracts include contracts for the carriage of goods by sea (whether involving charterparties or bills of lading), shipbuilding contracts and contracts for towage and salvage.

More often than not, the contracts are of an international nature. For example, the parties to the contract will often be from different countries and the performance of the contract may span over different jurisdictions. This gives rise to potential problems when it comes to the applicable law in the resolution of disputes and the enforcement of decisions (eg. judgments, awards) arising out of the resolution of disputes:–

Take for example a plaintiff who obtains a judgment or an award in Singapore. In maritime contracts, it is often the case that the defendant has few immovable assets worth proceeding against within jurisdiction. Bearing in mind the limited utility of a paper judgment or award if the defendant chooses to ignore the same, the plaintiff has the following options to protect his interests:–

a) Where the defendant's assets are out of jurisdiction, it is important to ensure that the any decision in Singapore will also be recognised and enforceable in the other jurisdiction.
b) Where there are assets belonging to the defendant within jurisdiction from time to time (eg. vessels coming into Singapore waters), it is important that the plaintiff can obtain some form of security for his claim.

It is with these considerations in mind that we turn to the incorporation and effect of arbitration clauses in maritime contracts and how well arbitration serves the above purposes when compared to litigation. In this article, we shall deal with in greater detail the issues relating to arbitration only in the context of maritime contracts. Where appropriate and relevant, we shall touch briefly on general principles relating to arbitration.

2. INCORPORATION OF ARBITRATION CLAUSES IN MARITIME CONTRACTS

2.1. PROBLEMS OF INCORPORATION

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From the number of reported cases in the English and Common law jurisdictions, it is apparent that only the incorporation of arbitration clauses of charter-parties into bills of lading are an enigma. As for the other maritime contracts, such as shipbuilding, towage/salvage and pilotage, the arbitration clauses are usually straightforward and are part of the contractual terms and conditions. The issue of incorporation simply does not arise.

As for contracts relating to international carriage of goods, the ultimate buyers may be the consignees or the receivers for value and they may not have an interest in the goods prior to shipment. The bill of lading evidences the contract of affreightment between the shipper and the shipowner. Subsequently, the contractual terms may be binding on the consignees by virtue of an endorsement.[1]

Sometimes, the terms and conditions of the bills of lading may contain a specific reference to the terms and conditions, including the arbitration clause, of a charter-party. The issuers of the bill of lading may be the owners or charterers of the vessel and they may or may not be parties to the charter-party. The situation can be further compounded by a series of charter-parties, sub-charterparties and sub-sub-charter-parties.

2.2. LEGAL CRITERIA FOR INCORPORATION

The criteria for the incorporation of the arbitration clause in the charter-party into the bill of lading contract have been established in the decisions of the English Court of Appeal in The Merak[2] and The Annefield[3]. They include, inter alia, the following:

(1) An arbitration clause is not directly germane to the shipment, carriage and delivery of goods.

(2) Such a clause can only be incorporated explicitly by clear words. For example, "including the arbitration clause as well as the negligence clause" or "any dispute arising out of this charter or any bill of lading issued hereunder shall be referred to arbitration" will suffice.

2.3. MANIPULATION OF ARBITRATION CLAUSE FOR THE PURPOSE OF INCORPORATION

Lord Justice Russell in The Merak expressed the view that a degree of verbal manipulation would be permissible to fit the wording of a charter-party to a bill of lading, provided the clause was one where the subject matter pertained to shipment, carriage and delivery. In the case of an arbitration clause, he said:

> "it is not permissible to construe general words of incorporation as extending to a clause which does not in terms relate to a bill of lading."[4]

However, if the usual general words of incorporation are followed by the specific words "including the arbitration clause", then the parties to the bills of lading must have intended the provisions of the arbitration clause in the charter-party to apply in principle to disputes arising under the said documents. It is permissible, in an obiter dictum of Brandon J (as he then was) in the case of The "Rena K", to manipulate or adapt the wording of the clause to give effect to such an intention.[5]

Two of the more recent authorities seem to put an end to the art of judicial manipulation. In The "Nai Matteini"[6], the vessel was the subject of two voyage charter-parties, which contained different arbitration clauses. A printed clause on the bill of lading in this case read:

> .....all the terms, conditions and exceptions (including but not limited to Due Diligence, Negligence, Force Majeure, War Liberties and Arbitration clauses) contained in which Charter-party are herewith incorporated and form part hereof.....

In this case, the charter-party was not identified. The Rena K could be distinguished as there was only one charter-party in that case compared to two in this case. Gatehouse J refused to apply manipulation in order to give effect to the arbitration clause in a charter-party, whether head or sub-charter, expressly mentioned by the incorporation clause in the bill of lading. Also, in The Miramar, the House of Lords decided, inter alia, that the word "charterer" in the demurrage clause could not be manipulated to embrace "consignee".[7]

In 1991, Webster J in The "Oinoussin Pride"[8] decided to follow The Rena K, as the charter-party was clearly identified in the incorporation clause of the bill of lading. The wording of the arbitration clause in the identified charter-party was manipulated to include the words "or shippers or receivers" after the words "between owners and charterers".

From these conflicting authorities, the following principles can be adduced:

(1) There can be an incorporation of the arbitration clause provided that there is only one charter-party or where the charter-party can be identified.
(2) Manipulation is desirable in order to give efficacy to the express intention of the parties to the bills of lading, namely to incorporate the arbitration clause.

3. STAY OF PROCEEDINGS IN MARITIME CONTRACTS

3.1 CAN THE PARTIES LITIGATE IN THE FACE OF AN ARBITRATION CLAUSE?

The fact that the dispute in question falls within an arbitration clause in the contract does not necessarily mean that the parties are precluded from bringing an action, including an admiralty in rem action, in court.[9] However, the effect of the arbitration clause on legal proceedings instituted in breach thereof is that the other party may ask the court to enforce the arbitration agreement negatively by suspending or granting a stay of the legal proceed-

ings.

This does not mean that the party instituting legal proceedings is incurring useless costs, as not all legal proceedings involving an arbitration clause will necessarily be stayed.

For example, the court will not grant a stay in the following circumstances:–

a) Where the other party does not apply for a stay,

b) Where the other party has "taken a step" in the legal proceedings,[10]

c) Where the arbitration agreement is for some reason void.

While prior to an application for a stay, there is nothing to prevent a party from instituting legal proceedings instead of proceeding with arbitration, a plaintiff may not rely on both an active prosecution of legal proceedings and arbitration at the same time, as such conduct would be regarded as vexatious. The court will then confine the party to only one set of proceedings.[11]

3.2 FACTORS AFFECTING THE GRANT OF A STAY OF LEGAL PROCEEDINGS

Briefly, there is a distinction between the treatment of domestic and non-domestic arbitration when considering whether legal proceedings should be stayed in favour of arbitration.

Non-domestic arbitration includes cases where the arbitration is to be carried out in any state other than Singapore or where at least one party to the arbitration agreement is a national of or habitually resident in a state other than Singapore.[12] It may be noted that as far as maritime contracts are concerned, most of them would fall within this category.

Domestic arbitration agreements cover the remaining cases.

There are certain common conditions relating to both domestic and foreign arbitration agreements which must be met before the courts will entertain any application for a stay of legal proceedings:–

a) The application to stay the proceedings must have been made after entering appearance but before "taking any steps" in the legal proceedings. The applicant would have taken a step in the proceedings when he conducts his case in such a way as to lead the plaintiff to believe that he will be carrying on with legal proceedings. The test is an objective one, such that the conduct of the plaintiff acting on a mistaken assumption that arbitration did not apply may still be relied on.

This emphasises the importance of finding out if arbitration applies, especially when arbitration confers an advantage in the enforcement of an award.

b) The arbitration agreement must have been a valid one.

Once these conditions have been satisfied, the court MUST grant a stay where a non-

domestic arbitration agreement is involved.[13]

In contrast, if domestic arbitration is involved, the court MAY choose to grant a stay.[14]

Here, there is a weighing of the relative advantages of one mode of dispute resolution against the other, although the court would tend to lean in favour of enforcing the agreement between the parties. Further, the court has a discretion as to the terms on which such a stay is granted.

The fact that the applicable law is foreign law does not affect the granting of a stay directly, unlike for example the nationality of the parties. However, it has an indirect effect insofar as the validity of the arbitration agreement falls to be decided on the basis of foreign law principles. The validity of the arbitration agreement will obviously affect the question of whether a stay would be granted.

3.3 EFFECT OF ARBITRATION CLAUSES ON ARREST OF VESSELS

Where parties agree to arbitrate instead of litigate in maritime contracts, they will often be concerned to know if their rights to arrest vessels as security for their claim is as extensive in arbitration as in litigation. As we have pointed out earlier, the question of security is crucial, due to the international nature of the contract.

Before considering this aspect, it is important at this stage to reiterate that the mere existence of an agreement, without more, does not preclude the plaintiff from issuing a writ in rem, obtaining a warrant of arrest and arresting a vessel.

The starting point lies in the general principle that in the absence of any statutory source of power, the purpose of an arrest is confined to only providing security for judgments and settlements, but not arbitration.[15]

This is a most unsatisfactory position because if taken to its fullest extent, it would do little to encourage commercial men to resort to arbitration. The rigours of this principle have been mitigated somewhat in the case of domestic arbitration agreements by the discretion of the court to impose terms before granting a stay of legal proceedings. In the case, of non-domestic arbitration agreements, The Rena K[16] principle has helped claimants to obtain security in the cases where security is most needed. We shall deal with each category in turn.

3.3.1 DOMESTIC ARBITRATION AGREEMENTS AND ARREST

Where the court, in the exercise of its discretion, grants a stay of legal proceedings in favour of domestic arbitration proceedings, it may in its discretion also impose conditions that have the effect of preserving whatever security the plaintiff has obtained by way of legal proceedings.

Such conditions may include, where a vessel has been arrested, that alternative security be provided. (NB. The court does not seem to have the power to allow the arrest to be

continued in the case of non-domestic arbitration agreements.[17]) Alternatively, where the warrant of arrest has been issued but the arrest has not yet been effected at the time of the application for a stay, the court may protect the security interests of the plaintiff by refusing to grant the applicant an order staying the execution of the warrant of arrest.

The underlying principle in preserving security as a condition for granting a stay seems to be to ensure that the Plaintiff, in being confined to one mode of dispute resolution (ie. arbitration) instead of another, is not unduly prejudiced in terms of his rights to security.

This approach may be gleaned from the cases relating to exclusive jurisdiction clauses, where the court decides whether or not to stay proceedings in local courts so that proceedings can be commenced in a foreign court as agreed between the parties. In The Atlantic Star[18], it was said that the right to arrest a ship was an advantage which the Plaintiffs were entitled to in order to obtain the necessary security. Lord Morris said, (at pg 201)

> "I would not regard a foreigner who arrests a ship in England as necessarily forum shopping. **The right to arrest a ship is an ancient right and often a necessary right.** Not only may there be difficulty otherwise in establishing jurisdiction in an appropriate forum, but the arrest gives to the arrester what may be a very necessary security."

The court starts from the position that because it is not a foregone conclusion that the plaintiffs are to be confined to arbitration or litigation in a foreign jurisdiction, the plaintiffs would have had a right to arrest a vessel had they been able to litigate in local courts. If the courts exercise their discretion so that the plaintiffs were to be so confined, the court would either make sure that the plaintiff is not deprived of that advantage, by for example granting a stay where the defendants have agreed to provide alternative security, or if no security has been provided by the defendants, this would be one of the factors against the granting of a stay. The interests of the plaintiffs are therefore largely protected.

3.3.2 NON-DOMESTIC ARBITRATION AGREEMENTS AND ARREST

As we have said earlier, most maritime contracts involve non-domestic arbitration agreements and that there is no general right to arrest a vessel for the purposes of securing an arbitral award.

The practical effect of The Rena K and subsequent decisions on the right of arrest is that there would be a limited right to arrest the vessel in non-domestic arbitration agreements, only where the Plaintiff can show that it is probable that:–

a) The award will be left unsatisfied, and that as a result, there would be a need to apply to court to lift the stay of legal proceedings,

and b) Any resulting judgment from the legal proceedings after the stay has been lifted will probably not be satisfied, in the absence of any provision by the defendants of

security.

Further, where at the time when the affidavit supporting the warrant of arrest is sworn, arbitration has already commenced, the plaintiff would have to disclose the fact that arbitration proceedings have already commenced, and also the existence of facts showing that the any judgment would be unlikely to be satisfied.[19]

The reasoning behind The Rena K is as follows:–

i) The court is not entitled to impose terms relating to security AS A CONDITION FOR a grant of stay in non-domestic arbitration, as the stay is mandatory and not discretionary. There is, however, nothing in that section of the Arbitration Act imposing the mandatory stay that prevents the court from taking steps to preserve the security obtained (eg. by refusing to release an arrested vessel, by ordering alternative security in lieu of release, or by refusing to stay the execution of the warrant of arrest where arrest has not yet been effected), provided the powers of arrest are invoked only for a proper purpose.

ii) When a vessel has been arrested, the court has a discretion, pursuant to the English equivalent of our Rules of the Supreme Court, Order 70 rule 12(4), as to whether to release the vessel at the instance of a party having an interest in the vessel. This discretion is to be exercised in accordance with the principle that the powers of arrest be exercised for a proper purpose.

iii) While the plaintiff is precluded from arresting the vessel for the purpose of securing an arbitral award, the plaintiff is perfectly entitled to do so for the purposes of securing a judgment arising out of court proceedings. An unsatisfied judgment, in the context of arbitration proceedings, is most likely to materialise where the stay is unlikely to be a final one. One of the most common situations where this would be the case would be where the defendants are unlikely to have sufficient resources to satisfy the arbitral award. The court would in such cases order that security be preserved.

While the right of arrest in non-domestic arbitration agreements seems to be somewhat restricted, yet practically speaking, the fact that The Rena K principle covers some situations where security is likely to be most crucial goes to some extent towards making arbitration as attractive an option as legal proceedings.

Having said that, it must be noted that the position in England has since changed through statutory reform. Section 26 of the Civil Jurisdiction and Judgments Act 1982 now provides that the court may order arrested property to be retained as security for arbitration proceedings.

The Rena K principle has been adopted as good law in Singapore in the case of The Evmar[20]. One interesting question which arises from that case is whether or not our position

differs from the English position before statutory reform insofar as there appears to be a right to impose terms and conditions in the case of a mandatory stay.

Section 4(3) of our Arbitration (Foreign Awards) Act reads:–

> "...the court to which an application (to stay the proceedings) has been made in accordance with subsection (2) SHALL make an order, UPON SUCH CONDITIONS OR TERMS AS IT THINKS FIT, staying the proceedings...."

This section does not go so far as to state expressly that the powers of arrest may be invoked for the purpose of obtaining security for arbitration proceedings, unlike the new English statute. The peculiarity of the section lies in the fact that the stay is mandatory; but at the same time, the court has power to impose terms on the stay. While it may be argued that this effectively brings the position of non-domestic arbitration agreements in line with domestic arbitration agreements, it is by no means clear that this is the position.

In The Evmar, the court did not direct its mind to the question because it said that any powers to impose conditions and terms would only be considered in connection with a stay, and that as there was no appeal against the stay of proceedings, the question of imposing terms for the preservation of security did not arise.

An argument may be made to the effect that any powers of the court to impose terms as to security in granting a stay in non-domestic arbitration agreements are to be exercised subject to The Rena K principle because the stay is mandatory.

Unlike domestic arbitration agreements where the stay is discretionary, one does not start with the position that the plaintiff has lost out by being confined to arbitration rather than litigation. The fact of the matter is, the plaintiff was never entitled to the right to arrest a vessel attached to in rem proceedings as legal proceedings were to be subjected to a mandatory stay.

Pending clarification of the position by the Singapore courts, the more prudent view seems to be that while there is a power to impose conditions preserving security in non-domestic arbitration agreements, such power may only be exercised in accordance with The Rena K principles.

3.4 ARBITRATION AGREEMENTS AND MAREVA INJUNCTIONS IN MARITIME CONTRACTS

The Mareva injunction prevents the person whose assets are being frozen from removing the same out of jurisdiction.

The utility of the Mareva injunction in the context of maritime contracts lies in the following:–

a) In shipbuilding contracts, the purchaser often injuncts the amount paid to the seller as purchase price when there is a danger that a probable claim against the seller for

damages for a defective vessel is likely to remain unsatisfied.

b) The Mareva injunction can even be used to prevent vessels from leaving the jurisdiction where there are no other substantial assets of the Defendants within jurisdiction.[21] Having said that, it must be borne in mind that the courts will be reluctant to grant or continue an injunction if third party rights are affected. This will be so, for example where the detention of the ship results in the breach of charterparties.

The fact that parties have opted for arbitration would not affect these rights because the Arbitration Act makes provision for the preservation of these rights.[22]

4. STIPULATIONS AS TO TIME WITHIN WHICH ARBITRATION HAS TO BE COMMENCED AND ITS EFFECT ON THE HAGUE/HAGUE-VISBY RULES

The presence of time limits within which arbitration must be commenced in maritime contracts and the extent to which these may be relaxed are considered in this section.

The time when arbitration is deemed to have commenced is crucial in determining whether a claim is barred. While the position for legal proceedings is clear, it is less obvious where arbitration is concerned.

For arbitration to commence, the following elements have to present:–

a) There must be in existence a dispute that falls within the scope of the arbitration agreement,

b) Written notice of one party's intention to submit the dispute to arbitration and a request to the other party to do something on his part in that regard must be given to the other. (eg. to appoint or agree to appoint an arbitrator.)

The notice should preferably be unequivocal, even though the courts do strive not to be overly technical in the construction of such notices. For example, a request to settle the matter or to appoint an arbitrator has been construed to be sufficient to amount to a commencement of arbitration.[23]

It is clear that provisions for time bar imposed by statute apply equally to arbitration proceedings as in litigation proceedings.[24] If arbitration is commenced after the statutory time limit has expired, the claim fails.

It is therefore a logical extension of this principle that where the Hague Visby or Hague rules apply as a matter of law, (ie. through some statute making the same compulsory, such statute being analogous to the Limitation Act), the one year time bar would also be strictly observed in arbitration proceedings. While the court has power pursuant to Section 27 of the Arbitration Act to extend the time for commencing arbitration proceedings, this provision will not be available to relieve a claimant falling foul of the one year time bar even in cases of undue hardship because the power of the court is stated to be without prejudice to statutory time limits.[25]

Although there is no way out once a claim is barred by the Hague/Hague Visby Rules where the same apply as a matter of law, there is nevertheless a corresponding advantage in that if the arbitration agreement purports to introduce a contractual time limit for the commencement of arbitration proceedings that is shorter than the one year time bar, and the plaintiff is in breach of this provision, this will not operate to bar the claim. This is because under Article III Rule 8, any provision shortening the one year time bar is void, as its effect would be to limit the carrier's liability to a greater extent that provided for in the rules.

In Singapore, Section 3(1) of the Carriage of Goods By Sea Act gives the Hague Visby Rules the force of law in the case of voyages from Singapore to any place within or outside Singapore. Although the position is not entirely clear, there may also be a possible argument that the Hague Visby Rules apply as a matter of law where the voyage is from a contracting state to Singapore.

Where neither the Hague Rules nor the Hague Visby rules apply through the force of law, but are nevertheless incorporated in the contract of carriage through contract, the court would have power under Section 27 of the Arbitration Act to extend the period of time within which arbitration has to be commenced.[26]

5. APPOINTMENT OF AN ARBITRATOR WHERE THE ARBITRATOR IS REQUIRED TO BE WITHIN THE CATEGORY OF "SHIPPING MEN"

Arbitration clauses in maritime contracts often stipulate that the arbitrator appointed must fall within the category of "shipping men".

Care must be taken to ensure that the arbitrator appointed has practical shipping experience. For these purposes, it would seem that full time maritime arbitrator would satisfy the requirement. In contrast, a lawyer practising shipping is not considered, without more, a person with practical shipping experience.[27]

If the arbitrator is incorrectly appointed, this may affect the enforceability of any resulting award.

6. RIGHTS OF APPEAL FROM A MARITIME ARBITRATION AWARD

It is useful first of all to set out the general principles pertaining to the right of appeal in arbitration proceedings and then to examine if the position is any different for maritime contracts.

The right of appeal to courts from an award of an arbitrator is a limited one. This is the result of legislative policy to introduce a measure of finality in arbitration awards. Whether or not a dissatisfied party may be appeal against an arbitration award depends on the following:–

a) Agreement of the parties: If all parties agree to appeal to the court, then leave to appeal will be granted. This would rarely be the case unless both sides are appealing

on different aspects of the award.

b) Whether a request was made to the arbitrator for a reasoned award and whether reasons were in fact given. If the no request was made by either party for the arbitrator to give reasons for his award and no reasons were in fact given, the court cannot order reasons to be given. This in effect makes it impossible for the appeal to take place. A party who intends to appeal should therefore take the preemptive measure of requesting for reasons.

If, however, the arbitrator does go on to give reasons for his award despite not being asked to do so, the court has the power to order further reasons to be given, if the same are inadequate.

The remaining factors come into play where in the absence of an agreement between the parties, leave to appeal has to be sought from the court.

c) If the question is one of fact, the arbitrator's decision is final.

d) If the question is one of law, or one of mixed fact and law, the degree of stringency applied by the court in granting leave to appeal depends on whether the question is one pertaining to standard clauses. If so, the court will grant leave where there is a **strong prima facie case** that the arbitrator was wrong. For questions relating to "one off" situations, the court will only grant leave where the arbitrator's decision is **obviously wrong.**[28]

Where the parties agree that the arbitrator's decision is to be final and that there is to be no right of appeal to the court, (ie. an exclusion agreement) and where the claim falls within the admiralty jurisdiction of the court (which probably includes most maritime contracts) the term excluding recourse to the courts will only be given effect to in cases where:–

a) The agreement was entered into AFTER the arbitration has commenced.

or b) The contract is expressed to be governed by a law other than Singapore law.[29]

Where the arbitration arises from a domestic arbitration agreement, the right to enter into an exclusion agreement is likewise restricted.[30]

The policy behind this is probably to relieve a party in a weak bargaining position from the consequences of contracting on standard terms before being in a position to assess whether it would be in his interest to exclude recourse to the courts.

Finally, as a matter of procedure, the notice of appeal from an arbitration award in Singapore has to be given within 21 days after the award has been made and published to the parties or if reasons for the award are only given after the publication of the award, the 21 days shall run from the date on which reasons are given.[31]

6. ENFORCEMENT OF ARBITRAL AWARDS

Once an award has been given, the Defendant is obliged to comply with the award. If he does not do so, the Plaintiff may take steps to enforce the award. The arbitral award must be converted into a judgment before it may be enforced. This conversion may be done in two ways:–

a) An action in common law for the breach of an implied promise to comply with the terms of the award.

b) An application under Section 20 of the Arbitration Act.

If there is no reason to suppose that the award is unenforceable, the court will give judgment in terms of the award.

The difference between the two procedure is that b) is a summary form of procedure and that unlike a), the full formalities of a trial such as pleadings and discovery are dispensed with. Instead, affidavit evidence is acceptable. The debtor may apply to set aside the order giving leave to enforce the award 14 days after service of the same on him.[32] However, it is only available where the action can properly be disposed of without a trial—for example where there are no disputes of facts.

Both foreign and domestic arbitration awards are subject to the same enforcement procedures.

There are two main categories of foreign arbitral awards in Singapore; those falling within the New York Convention, to which Singapore is a signatory, and those that do not. There is no substantial difference between the two categories when one is enforcing the awards in Singapore, as there is no substantial difference between the requirements of the Convention and Singapore law when it comes to enforcing foreign arbitral awards. The difference begins to matter where the plaintiff in Singapore seeks to enforce an award made in Singapore in another jurisdiction. Where the other country is not a party to the Convention, there is no guarantee that the pre-requisites for enforcement of arbitral awards under their laws would be likewise similar.

The function of the Convention is therefore to provide some uniformity in that regard. In other words, where one has dealings with Convention countries, one may rest assured that as long as certain known criteria are satisfied, the award may be enforced. Further, the number of states that are parties to the Convention is very large, and even exceeds the numbers that are parties to reciprocal enforcement of judgments conventions.

This is precisely why arbitration proceedings have an advantage over enforcement of judgments.

The grounds for refusing to enforce the arbitration award revolve around showing any of the following, having regard to the proper law of the arbitration agreement:–

a) The incapacity of the parties, or other factors making the agreement invalid,

b) The improper appointment of and constitution of arbitrators,
c) The dispute falling outside the scope of the arbitration agreement,
d) The non-binding nature of the award or the suspension or setting aside thereof by the court in which or under the law of which the award was made.

Steps should be taken within 6 years of the award to enforce the award otherwise the enforcement proceedings would become time barred.[33]

The fact that judgment in a foreign court has been given on a foreign award does not preclude the foreign award from being enforced in Singapore Courts.

Once the award has been converted into a judgment, the usual proceedings for the execution of judgment may apply, (eg, Writ of seizure and sale, garnishee proceedings etc.) With particular reference to admiralty claims, it is pertinent to note that a vessel may not be arrested after liability has been determined as arrest is not part of execution proceedings.[34] In contrast, the Mareva injunction may still be employed as a means of execution.

7. CONCLUSION

We have seen that arbitration proceedings are particularly advantageous in the context of maritime contracts because:–

a) The international nature of such contracts makes the ability to enforce any resulting awards very important,
b) The enforcement of foreign arbitral awards is facilitated by the New York Convention to which many countries are parties. In fact the number of parties are more so than in the case of reciprocal enforcement of judgments. The Convention provides a framework of certainty within which parties to that framework may rest assured that the awards will be enforced in known circumstances. This is especially important where different countries may have different rules about recognising foreign judgments and arbitral awards.

The practical effect of arbitration proceedings on the right of arrest may be summarised as follows:–

a) Where the arbitration agreement is domestic, the rights of arrest remain substantially unchanged. The court has the power to allow arbitration to proceed only on the condition that alternative security is provided.
b) Where the arbitration agreement is non-domestic, and the circumstances are such that any award or judgment is likely to be satisfied, there would not be much point in effecting an arrest, unless it is clear that the claimant is perfectly entitled to carry on with legal proceedings and that an application for a stay of the proceedings is too late or unlikely to succeed. A right to proceed with court action also entails a right to arrest a vessel for security.

If the claimant has nevertheless a vessel, AND where the other party has applied to have the action stayed, there may be an argument (though in our opinion not at all a strong one) to the effect that based on our statute, the Singapore court may impose a condition as to retention of or the provision of alternative security as a condition of the mandatory stay.

c) Where the arbitration agreement is non-domestic, and there is evidence to show that an award or judgment is unlikely to be satisfied, the plaintiff may exercise his rights of arrest, provided that if on the date when the affidavit supporting the warrant of arrest is sworn, arbitration proceedings have already commenced, both this fact and the facts supporting the application of The Rena K principle are disclosed.

In contrast, the use of a Mareva injunction over the vessel may not pose the same problems, although in practice, it is more difficult to Mareva injunct a vessel because of third party rights.

Finally, parties to admiralty proceedings have a limited right to exclude the right of appeal in that the exclusion agreement is only valid after the commencement of arbitration proceedings.

FOOTNOTES

1. Section 1 of the Bills of Lading Act, 1855.
2. THE MERAK [1964] 2 LL REP 527.
3. THE ANNEFIELD [1971] 1 LL REP 1.
4. Supra note 2 at pg 537.
5. THE RENA K [1978] 1 LL REP 545 at pg 551.
6. THE NAI MATTEINI, [1988] 1 LL REP 452.
7. THE MIRAMAR, [1984] 2 LL REP 129.
8. THE OINOUSSIN PRIDE [1991] 1 LL REP 126.
9. THE VASSO [1984] 1 LL REP 235.
10. See section 3.2 where this concept is dealt with.
11. THE CAP BON [1967] 1 LL REP 543.
12. Section 4(1) of the Arbitration (Foreign Awards) Act Cap 10A.
13. See Section 4(3) of the Arbitration (Foreign Awards) Act Cap 10A.
14. Section 7(2) of the Arbitration Act, CAP 10.
15. Supra note 11.
16. Supra, note 5.
17. See THE GOLDEN TRADER, [1974] 1 LL REP 379, 382 where cases such as THE ATHENEE were discussed.
18. THE ATLANTIC STAR [1973] 2 LL REP 197.
19. THE VASSO, supra note 9.
20. THE EVMAR [1989] 2 MLJ 460.

21. THE RENA K, supra note 5.
22. See Section 27(1) of the Arbitration Act, Cap 10, read with Schedule 2, clauses 6 & 8.
23. See THE AGIOS LAZAROS [1976] 2 LL REP 47.
24. See Section 30(1) of the Limitation Act.
25. See THE ANTARES NOS. 1 & 2 [1987] 1 LL REP 424.
26. See THE AGIOS LAZAROS, supra note 23.
27. PANDO COMPANIA NAVIERA S.A. v FILMO S.A.S [1975] 1 LL REP 560.
28. THE NEMA [1981] 2 LL REP 239.
29. See Section 31(1) of the Arbitration Act.
30. See Section 30(6) of the Arbitration Act.
31. Order 69 rule 4(2) of the Rules of the Supreme Court.
32. Order 69 Rule 7(6) of the Rules of the Supreme Court.
33. Section 6(1) (c) of the Limitation Act, Cap 163.
34. See THE ALLETTA [1974] 1 LL REP 40.

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