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THE JAPAN SHIPPING EXCHANGE, INC.

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CONTENTS

Action Claiming Judgment of Execution

Heisei 2 (1990), (wa) 103 **(hereinafter referred to as Case A); and,**

Cross Action Claiming Cancellation of Arbitration Award

Heisei 2 (1990), (wa) 147 **(hereinafter referred to as Case B)**

JUDGMENT

Parties:

Plaintiffs in Case A and Defendants in Case B (hereinafter called Plaintiffs):

Masaru Yamashita d.b.a. Yamashita Shipping

Defendants in Case A and Plaintiffs in Case B (hereinafter called Defendants):

Tomishima Transport Co., Ltd.

TEXT OF JUDGMENT

1. Leave is granted for the plaintiffs to enforce against the defendants the arbitration award in respect of the disputes about bareboat charterparties for the tugboat Ohtori and two other vessels. Said arbitration having been conducted at The Japan Shipping Exchange, Inc. by a tribunal consisting of three arbitrators (Takashi Kojima, Yoshio Oka and Akira Ueno) on the 20th of November, Heisei 2 (1990), as mentioned in the attached documents.
2. Cross action by the defendants is dismissed.
3. Costs of the action and the cross action are to be paid by the defendants.

FACTS

No. I Judgments sought by the parties:

(Case A)

I. Plea:

1. Same as the text of judgment 1.
2. Costs are to be paid by the defendants.
3. Declaration of provisional execution.

II. Answer:

1. Claim by the plaintiffs is to be dismissed.
2. Costs are to be paid by the plaintiffs.

(Case B)

I. Plea:

1. Discharge items 1 and 3 of the arbitration award referred to in paragraph 1 of the text of judgment above.
2. Costs are to be paid by the plaintiffs.

II. Answer:

1. Cross claim by the defendants is to be dismissed.
2. Costs are to be paid by the defendants.

No. 2 Arguments by the parties:

(Case A)

I. Statement of claim:

1. In the case of bareboat charterparty disputes between the plaintiffs, as the claimants, and the defendants, as the respondents, as regards the tug boat Ohtori and two other vessels (hereinafter called the respective vessels), arbitrators Takashi Kojima, Yoshio Oka, and Akira Ueno (hereinafter called the arbitrators) of The Japan Shipping Exchange, Inc. (hereinafter called the Exchange) rendered an arbitration award on the 20th of November, Heisei 2 (1990) as attached below (hereinafter referred to as the award). Thereafter, authentic copies of the award were duly served on the plaintiffs and the defendants.
2. Accordingly, the plaintiffs seek an execution judgment by virtue of the award.

II. Answer to the plaintiffs' claims:

Statement of claim paragraph 1 admitted.

III. Affirmative Defenses:

1. Arbitration procedure not to be allowed (the Code of Civil Procedure art. 801-1-1):

(1) Prejudicial expert opinion:

With respect to the drawing up of the written statement of expert opinion dated the 13th of August, 1988 (hereinafter referred to as the expert opinion), upon which the award is dependent an early draft of the expert opinion was first presented to arbitrator Oka and then completed in accordance with arbitrator Oka's comments.

(2) Perusal of written evidence having been rejected:

(a) Section 29 of the rules of maritime arbitration of the Exchange provides "Only the parties to the dispute or their agents, but no other persons, may for a due cause be permitted to inspect the documents relating to the arbitration between the parties."

(b) In conformity to the said rules, the defendants applied to the arbitrators on the 11th of July, Showa 63 (1988) for inspection of the inquiry record of Masayoshi Miyagi who had been deeply involved in the conclusion of the bareboat charterparties of the respective vessels. The arbitrators, however, refused the defendants' application on the 4th of November, Showa 63 (1988) on the ground that there was no precedent for granting the application.

(c) The defendants' counsel was justified in making application to peruse the inquiry record in question in preparation for pleadings requisite to the arbitration proceedings since the

statement of Masayoshi Miyagi had important bearing on determining which party shall bear repair expenses under the relevant terms of the bareboat charterparties of the respective vessels. The refusal by the arbitrators of the defendants' request has clearly given rise to an infringement of the rules mentioned above and can best be described as ignoring the fundamental doctrine of open (to the parties) dispute settlement.

Accordingly, the award such as this founded upon a gross violation of procedure, must not be upheld.

(3) Reasons for challenging the arbitrator:

(a) On the 6th of September, Heisei 1 (1989), after the closure of hearings in the arbitration proceedings arbitrator Oka suggested through Sakuya Tochigi of Tochigi Shipping Co., Ltd., by whom the defendants were apt to be influenced as a subcontractor, that the defendants not complain about forthcoming award, even if it proved to be unfavorable, and when the defendants rejected his suggestion arbitrator Oka repeated himself through Tochigi on the 17th of October, Heisei 1 (1989).

(b) This sort of activity by arbitrator Oka casts grave doubts on the neutrality of the Dispute Settlement Organization and because it interferes with the neutrality of the arbitrator, his conduct is among those which justify the disqualification/recusation of the arbitrator. Accordingly, this arbitration award must not be upheld.

2. Prohibited action by the law (the Code of Civil Procedure art. 801-1-2):

The award ignored the facts and clearly erred, as mentioned in 3.-(1) below, in imposing the obligation on the charterer defendants to restore the vessels at the time of redelivery to pre-charter condition for reasons impossible themselves; its content is extremely improper and runs counter to public order and good custom (the Civil Code art. 90.) Accordingly, the award consists of action which should be prohibited by the law.

3. Deficient reasons (the Code of Civil Procedure art. 801-1-5):

(1) Imposition of the obligation to restore the vessels to pre-charter condition:

(a) The award admits in its reason that some terms of the charterparties for the tug boat Ohtori (hereinafter called the Ohtori) and the other vessels are contradictory or irreconcilable to one another and adjudges that the charterer defendants shall bear the obligation to restore the respective vessels at the time of redelivery to pre-charter condition assuming the contradictory terms to be interpreted by reference to the bareboat charterparty form of the Exchange, which is described as stipulating commercial custom, and rejects the defendants' submission that the owner plaintiffs should bear the obligation in question.

(b) By contradictory terms the award seems to mean however, to take the bareboat charterparty of the Ohtori for example, Clause 3-4 (Expenses to be borne by the Charterers) where appears the stipulation that, "and other expenses which shall be borne by the Charterers according to the custom of maritime commerce" and Clause 4-1 (Expenses to be borne by the Owners) where are enumerated, inter alia, several items related to

repair expenses. If those clauses are contradictory to each other Clause 4-1, with unequivocal enumeration, world properly apply in preference to Clause 3-4. There can be no room for a construction that would allow this award to subsist with its ill founded reasoning.

(c) Apart from this point, it is also clear and manifest in the present case that the owner plaintiffs should bear the obligation to restore the respective vessels to pre-charter condition at the time of redelivery under the special circumstances as mentioned below and there cannot be any room for the award holding as such to subsist and so its reasonings are ill founded.

① The plaintiffs bought the Ohtori from the defendants in October, Showa 57 (1982) for the large amount of 6 million yen and chartered her back to the defendants at a high rate of hire (31.8 million yen in the aggregate) as mentioned below. The plaintiffs recovered the purchase price in only two years and earned five times the price of the vessel in five years while the charter remained effective. If the restoration expenses were to be borne by the defendants, the charterers, excessive profit would unreasonably accrue to the plaintiffs, the owners. Such being the case, the intention of the parties when they concluded the charter is clearly inferred to have been to exclude the application of trade custom as stipulated as in the form mentioned in 3.(1)(a) above.

Schedule

4.8 million yen during the period November, Showa 57 (1982) through October, Showa 58 (1983).

7.2 million yen during the period November, Showa 58 (1983) through October, Showa 59 (1984).

7.2 million yen during the period November, Showa 59 (1984) through October, Showa 60 (1985).

6.6 million yen during the period November, Showa 60 (1985) through October, Showa 61 (1986).

6 million yen during the period November, Showa 61 (1986) through October, Showa 62 (1987).

② And, in the memorandum of agreement dated 10th of November, Showa 57 (1982), with regard to the lease of the Ohtori, it is provided that only petty repairs are to be paid for by the lessee defendants and the lessor plaintiffs shall bear the costs of annual survey and repairs. The memorandum thus clearly purports to the effect that the lessor plaintiffs shall bear the obligation of restoring the vessel to its former condition. Clause 4 of the bareboat charterparty of the Ohtori also provides that repair expenses are to be borne by the plaintiffs and that, in effect, maintenance expenses, other than petty repairs, are for the account of the plaintiffs during the period of the contract.

③ The plaintiffs submit in the arbitration proceedings that the Ohtori was more than 10

years old at the time of the contract and so it was hardly possible to estimate how much it would cost at annual and special surveys for maintaining the seaworthiness of the vessel at the expense of the owners. Plaintiffs further submit that owners, usually at the time of purchase, calculate in advance the profit and/or loss of the operation of the vessel taking into account such expenses as owners' expenditure for repairs in annual survey. Plaintiffs in effect, admit their obligation to maintaining the seaworthiness of the vessel, or in other words, to keep the vessel well maintained.

(d) In its reasoning the award construed the purport of Clause 4-1 of the bareboat charterparty of the Ohtori as providing the owners' obligation to bear such money as was directly expended for repairs incidental to special and annual surveys, but the award none the less rejected the submission of the defendants, assuming that the owners only shared partial expenses of the vessel's maintainance, and so the obligation of restoring the vessel to the former condition lied with the charterer defendants. However, but for special accidents such as stranding or collision, repairs for maintaining the seaworthiness of tug boats like the Ohtori are on the whole performed on the occasion of their special or annual surveys, and the fact that the owners bear the costs of the repairs at annual and special surveys therefore implies the plaintiffs' obligation of maintaining the seaworthiness of the vessel and keeping her well maintained. Such being the case, the construction given by the award to the effect that the defendants bear the obligation of restoring the vessel to pre-charter condition at the time of redelivery cannot be logically reasoned.

(e) The award, on the other hand, also rejected the defendants' claim, as regards the barges Asahi Maru No.36 (hereinafter called the Asahi Maru) and Tomishima Maru No.17 (hereinafter called the Tomishima Maru) that the obligation of restoring the vessels to their former condition lies with the owner plaintiffs in the same way as with the Ohtori. Clause 4 of the respective bareboat charterparties for both these barges enumerates repairs in the drydock as one of the expenses to be borne by the owner plaintiffs, and makes it clear that the owner plaintiffs bear the obligation of maintaining the seaworthiness of the barges and keeping the barges well maintained. And further, as the award recognizes, the barges in question are not required under the regulations to get and pass special or annual surveys. Therefore, the construction that the expenses of repairs incidental to special and annual surveys (which were as a matter of fact non-existent) are to be for the account of the owner plaintiffs and that the remainder are to be borne by the charterer defendants is logically inexplicable and therefore not a good basis for the award.

(f) As described above, the award holding the charterer defendants liable for restoring the respective vessels to their pre-charter condition is unjustified and therefore texts 1 and 3 of the award shall be cancelled on account of their ill founded logic.

(2) Even conceding that the obligation of restoring the vessels to pre-charter condition lies with the charterer defendants, the award is nevertheless ill founded as stated below.

(a) Painting expenses:

The award considers in its reasoning that the defendants are disallowed from asserting that the vessels were actually not seaworthy at the beginning of the bareboat charter on the ground that, prior to the term of the charter the vessels were owned solely by the defendants. The award holds that the defendants bear the obligation to repair the vessels to the extent that they recover seaworthiness, and rejects the defendants' submission that this obligation utterly ambiguous with respect to the degree of restoration required since the relevant charters are not for the newly-built vessels. The award determines that the extent of restoration required is that which is necessary to recover seaworthiness. Yet on the other hand the award follows undiscerningly the expert opinion and judges that painting expenses (750,000 yen for the Ohtori, 1,510,000 yen for the Asahi Maru and 1,280,000 yen for the Tomishima Maru), though totally irrelevant to seaworthiness, belong to the account of the defendants. However, the respective vessels were in fact not repainted at the time of delivery and, accordingly, the award indisputably contradicts itself in its reasonings and is thereby ill founded.

(b) The seaworthiness of the Ohtori:

The defendants entrusted Kobe Marine Survey Co., Ltd. with the condition survey of the vessel immediately after redelivery and their survey report dated the 2nd of November, Showa 62 (1987) states that as a result of the survey, the hull, machinery and other parts of the vessel are found to be satisfactory and that dents to the hull, etc., will not in any way hamper the seaworthiness of the vessel. However, the award fails to evaluates said survey report in the least, relying instead, undiscerningly, on the expert opinion which fails to consider seaworthiness, and makes the defendants bear the cost of restoration to its former condition. It is apparent that the arbitrators failed to notice the survey report and the award was rendered in reliance on alleged facts not based on sound evidences and is therefore ill founded.

(c) Issues with respect to the expert opinion:

Although the expert opinion was not supposed to directly refer to seaworthiness, it gives an opinion as to whether the restoration repairs have actually been effected as the defendants assert and also as to the proper cost of those repairs assuming them to be performed. The expert opinion further classifies the repairs under (A) certified already done, (B) uncertain if done, (C) apparently for the account of the owners, and (D) apparently not done. The expert Mr. Tadashi Morita explains that he has appraised the repair expenses on the premises that all the repairs except category (C) are prima facie for the charterers' account. If such is the case, it follows that the expert opinion has never determined the appropriate share of expenses according to the standard of "restoration to the extent of recovery of seaworthiness." Accordingly, the award having relied on the above expert opinion, clearly erred on the merits of the evidence and so therefore ill

founded.

(d) Issues with respect to the boiler:

Although the award reasons that the expense of replacing water tubes in the Ohtori's boilers are to be borne by the defendants, Mr. Morita states in his additional expert opinion dated the 20th of October, 1987 that the expense of replacing water tubes caused by usual wear and tear are not to be borne by the charterer defendants. Now, when the defendants brought an action of objection against the writ of provisional seizure issued by the plaintiffs to secure the repair expenses of the above-mentioned boiler, the plaintiffs submitted clearly in those proceedings that the reason for replacing the water tubes was their ordinary use by the defendants. Accordingly, this award, having relied on the expert opinion as regards the issue of the boiler repairs clearly erred in evaluating the merits of the evidence and so is consequently ill founded.

(e) Issues with respect to the bottom plates of the hull:

According to the award, the repair expenses of the bottom plates of the Ohtori are to be borne by the defendants. But no repairs were actually carried out on the bottom plates of the hull. And once the facts became known, the plaintiffs changed their assertion to the effect that they had not repaired the bottomplates but had instead repaired the upper portion of the side plates on the vessel's starboard. In fact the upper portion of the starboard side plates were ascertained by the defendants to be free from defects at the time of redelivery. As for the other two vessels considering the facts of the Ohtori as we now know them, it is doubtful whether the plaintiffs actually replaced bottom plates in those cases either. Accordingly, this award, which finds that repair expenses, to restore the respective vessels to their former conditions, are to be borne by the defendants is clearly ill founded.

4. Pleading of setoff:

(1) While the annual insurance premiums of the Ohtori were ¥266,750 per quarterly installment for the year Showa 59 (1984), the premium was less in subsequent years, e.g., ¥179,250 per quarterly installment in Showa 60 (1985), ¥182,375 per quarterly installment in Showa 61 (1986) and ¥185,625 per quarterly installment in Showa 62 (1987) respectively. The plaintiffs, never the less, remained silent about the decreasing insurance premiums and continued to claim and receive from defendants payment in the amount of ¥266,750 per quarterly installment yen each in the succeeding three years. As a result, plaintiffs earned an undue profit of 1,012,000 yen over the 3 year period. The undue profit consisting of the difference between the actually incurred premiums and falsely claimed premiums.

(2) At the in the court hearing on the 25th of December, Heisei 2 (1990), the defendants declared their intention to setoff the right of claiming recovery of the above-mentioned undue profit in the amount of 1,012,000 yen against their obligation, if any, to pay under

the present execution suit by virtue of the award in the equivalent amount.

IV. The plaintiffs' case against the defendants' plea:

1. Plea 1.-(1) is denied.
2. Plea 1.-(2) (a) is admitted. (b) is unknown. (c) is disputed. The phrase "when the arbitration procedure is not warranted" (the Code of Civil Procedure art. 801-1-1) applies to cases where the arbitration procedure is as a whole unwarranted, but does not apply to cases where an application to peruse a witness inquiry record is denied.
3. Plea 1.-(3) (a) is unknown. (b) is disputed.
4. Plea 2. and Plea 3. are denied or disputed.
5. Plea 4. (1) the facts are admitted but the wrongfulness is disputed. (2) is disputed.
   With respect to the proceedings of action claiming judgment of execution, or the action claiming cancellation of the arbitration award, by virtue of the fact that the obligation was destroyed upon the closure of the arbitration hearings the plea should not be allowed. Such a pleading must be made in a separate action of exception disclaiming the obligation.

V. Plaintiff's Reply

1. As against plea 1.-(2)

(1) In arbitration proceedings, unlike actions in court, arbitrators are entitled to gather evidence irrespective of the intentions of the parties (the rules of maritime arbitration sec. 19). Some witnesses may object to having the evidence they have given disclosed to the parties. If evidences so gathered was open to perusal by the parties, the arbitrators freedom in gathering evidence might be hindered. Accordingly, it is within the discretion of the arbitrators to permit or reject the perusal of evidence by the parties. Where it is adjudged that the arbitrators freedom is likely to be hindered the arbitrators have good cause to reject the parties application to inspect the inquiry record.

(2) There is no reference to the inquiry record of Masayoshi Miyagi in the list of evidence and consequently the rejection of inspection is not regarded as of breach of significant procedure equivalent to other causes of cancellation and does not, therefore, constitute a cause for cancellation of the award.

(3) There is no sign that the defendants raised any objection to the arbitration commission and consequently if there were any defects in the procedure they have been cured by waiver of the right of inquiry.

2. As against plea 1.-(3)
   The defendants did not challenge arbitrator Oka in the arbitration proceedings but rather made statements in his presence, and consequently the right of challenge has been lost.
3. As against plea 4. "pleading of setoff"

(1) Since the defendants agreed to bear the hull insurance premiums in the bareboat charter-party of the Ohtori, the defendants should have secured an insurance policy themselves. However, the defendants did not do so and so the plaintiffs were obliged to have the

vessel insured under the policy dated the 12th of January, Showa 59 (1984) with the insured amount of 20,000,000 yen (by the annual premiums of 1,067,000 yen in quarterly instalments of 266,750 yen each.)

(2) The plaintiffs were again obliged to arrange for the vessel to be insured in the following year, Showa 60 (1985), and informed the defendants that the annual premiums would amount to 1,434,000 yen for the same insured amount of 20,000,000 yen. Since the defendants did not agree to the increased insurance premium, the plaintiffs were obliged to conclude an insurance contract for coverage in the lesser amount of 10,000,000 yen, so that the premiums might fall within the amount the plaintiffs expected to be able to collect from the defendants. This arrangement was done at the plaintiffs' own risk and has nothing to do with the defendants' obligation to bear the insurance premiums under the above-mentioned contract.

(3) Since the defendants had agreed to bear the premiums of the hull insurance with the insured amount of 20,000,000 yen in the bareboat charterparty mentioned (1) above, the plaintiffs' gain accrued by virtue of legal cause and is not to be deemed as undue profit. Accordingly, no claim arises entitling the defendants to setoff.

VI. The defendants' answer to the plaintiffs' reply:

1. Reply 1. is denied or disputed.
2. Reply 2. is denied or disputed.
3. Reply 3. are in every respect denied or disputed.

(Case B)

I. Statement of claim:

1. Same as cause of claim 1. in Case A.
2. Same as plea 1. through 3. in Case A.
3. Accordingly defendants seek a cancellation of texts 1. and 3. of the award as against the plaintiffs.

II. The plaintiffs' reply to the defendants' statement of claim:

1. Cause of claim 1. is admitted.
2. As for cause of claim 2., same as the plaintiffs' case against the defendants' plea 1. through 3 in case A.

III. Pleading and Answer:

Same as the plaintiffs' reply 1. and 2. and the defendants' case against the plaintiffs' reply 1. and 2. in Case A.

No.3 Evidence:

Refer to the lists of documentary evidence and witness records.

REASONING:

No. 1 (Case A)

I. The facts in statement of claim 1 are undisputed

II. The Pleadings

1. Plea 1. (Discharge of the arbitration procedure)

(1) There was insufficient evidence to demonstrate fact (1) (unfair expert opinion).

(2) Plea (2) (perusal of written evidence having been rejected)

(a) The facts of (2)-(a) are undisputed.

(b) The facts of (2)-(b) are verified by the evidence (B32, 33-1).

(c) About (2)-(c) (refusal of inquiry record and reason of cancellation)

① The facts and the evidence (B1 through 2) which are undisputed between the parties show that they agreed in the bareboat charterparties for the respective vessels as to the arbitration to the effect that all the matters shall be settled in accordance with the rules of maritime arbitration of the Exchange (hereinafter called the rules.) The rules provide in Section 29 that only the parties or their agents may for a due cause be permitted to inspect the documents relating to the arbitration. We will, then, examine below whether the refusal by the arbitrators of the defendants' application to inspect the inquiry record of a witness, Masayoshi Miyagi, (hereinafter called Miyagi) is justified by reason of the said due cause.

② It is recognized by the evidence (B12) that neither of the parties were present when the arbitrators interviewed Miyagi in the exercise of their office. And that Miyagi had been involved in the sale purchase of the Ohtori and the Asahi Maru from Tochigi Shipping Co., Ltd. to the defendants and then from the defendants to the plaintiffs and also that Miyagi was involved in the conclusion of the respective bareboat charterparties in his capacity as manager of the Kobe branch office of the said former owners, and that as a result Miyagi was interviewed as a witness.

Whenever an important witness is examined in the absence of the parties, it is necessary, as a procedural guarantee, that the parties be given access to the evidence acquired through examination. Further, if in response to this evidence either party requests an opportunity to examine the witness themselves, every means must be taken to insure the opportunity to carry out an aggressive defense. As a collarateral to this principle, however, the other party must be given the opportunity to review the reveal of the former parties examination of the witness. (refer the Code of Civil Procedure art. 801-1-4.) Accordingly, the application by the parties for inspection of the examination record of important witnesses and the like is as a general rule warranted. On the other hand, we do not recognize in the present case the existence of any such special circumstances as are likely to hinder the proceedings of the

arbitration as a result of the parties' being granted access to the examination record as the plaintiffs plead in their reply 1.-(1). It naturally follows that the arbitrators' rejection of the parties application for access to the witnesses' examination record was an abuse of their discretion and the flaw in the procedure by a breach of the rules are recognized.

③ Now, therefore, we will examine whether or not the above-mentioned procedural flaw justifies cancellation of the award.

(i) An arbitration award is given the same effect as a final judgment of the court by reason of the parties' agreement and the assurance by the arbitrators of due process in the proceedings. Proper construction of the law allows for cases where not only the whole award must be canceled because it is flawed, but instead when individual flaws in the procedure may on occasion constitute sufficient error that the entire award must be disallowed. But in view of the purport of the Code of Civil Procedure art. 801-1 enumerating salient procedural flaws which constitute cause for cancellation, it is proper to construe that only such procedural flaws as are serious enough to be equivalent to the enumerated causes shall amount to cause for cancellation.

(ii) And, judging reply 1.-(2) and (3), the evidence (A1) shows that there is no reference to the examination record of Masayoshi Miyagi in the evidence list. The rejection by the arbitrators of the application by the defendants' attorney to inspect the examination record of Miyagi is hereby deemed not to be a serious procedural flaw. Furthermore, there is insufficient evidence that the defendants expressed any objection as regards the above-mentioned inspection. Accordingly, the procedural flaw in question has been properly cured by waiver of the right of examination in that the defendants failed to raise any objections (the Code of Civil Procedure art. 141). Therefore, the defendants' assertions are unfounded.

(3) About (3) (reasons for challenging the arbitrator)

As regards the facts of (3)-(a), the evidence (B34 and the defendants' representative in person) is consistent with the defendant's assertions, but in view of the entire purport of the arguments, this evidence is not borne out by any other evidences sufficient to establish the alleged facts. Accordingly, the defendants' assertions are unfounded.

2. About plea 2. (prohibited action by law)

As regards the defendants' plea 2., the award does not, in our opinion, infringe public order and morals as determined in 3.-(1) below, and so the defendants' assertions are unfounded.

3. About plea 3. (deficient reasons)

(1) (imposition of the obligation to restore the vessels to their pre-charter condition)

The evidence (A1) establishes that the award of the present arbitration acknowledges

the following reasons to for imposing on the defendants the obligation, at the time of redelivery, to restore the vessels to their pre-charter condition.

(a) First, as for the Ohtori, examining who shall bear the cost of restoring the vessel to the former condition at the time of redelivery, the arbitrators clearly take the position in the award that while they rely primarily on the construction of the bareboat charterparty concluded between the parties, they will seek the intention of the parties, in respect of contradictory or irreconcilable terms, by way of supplementing the said charterparty with the bareboat charterparty form of the Exchange which is described as stipulating commercial custom in the coastal maritime industry (hereinafter called Exchange Form). Then, the arbitrators take note of Clause 3 providing that expenses are to be borne by the defendants, Clause 4 providing that expenses are to be borne by the plaintiffs and Clause 5 providing for the defendants' obligation to restore any defects caused by their fault, and determine as follows:-

① Clause 3 provides for, among other things, "expenses to be borne by the charterer defendants, in accordance with commercial custom" (section 4) to be for the charterers' account, and so it naturally follows that all the repair expenses shall be borne by the defendants by virtue of article 8 section 1 of the Exchange Form. This construction may seem irreconcilable with Clause 4 of the bareboat charterparty which provides in section 1 that repair expenses (confined to expenses incurred in drydock for the purpose of the hull survey, but the time used for intermediate drydock, annual survey and periodical survey shall count as on-hire and hire shall be paid by the charterers, the defendants) are for the account of the owner plaintiffs, in that those clauses are contradictory to each other as regards who shall bear the repair expenses. However, it is recognized that at the time the defendants were financially so distressed that they could ill afford to purchase the Ohtori and still bear the cost of repairs without recourse to such special arrangements, such as adopting Clause 4(1) and further fixing the amount of charter hire inclusive of survey expenses. Accordingly, we can assume that the defendants impliedly agreed to refund the survey expenses in installments by means of hire in exchange for the plaintiffs' undertaking to make disbursements. On this assumption, it can be construed that the plaintiffs did not undertake the management itself of the Ohtori but only made temporary disbursements for such expenses as were required by the defendants in maintaining the Ohtori, which was in the possession of and employed by the defendants. Practically considered, the plaintiffs could inspect the vessel only once a year at the time of intermediate drydock, as a matter of course by the nature of the bareboat charter, then, the defendants keep an eye on the vessel daily and arranged for repairs as necessary. Accordingly, a true construction of Clause 4(1) purports that the plaintiffs bear the expenses required for special and annual surveys and repairs directly incidental thereto, while the defendants

bear all the other expenses including those necessary for the purpose of restoring the vessel to the former condition at the time of redelivery (recovery of seaworthiness) by virtue of Clause 3(4).

② Furthermore, on the premises of the above-mentioned construction, Clause 5 of the bareboat charterparty is to be construed as corresponding to Clause 9 of the Exchange Form with the mere exception of negligent liability and to provide for such extraordinary expenses as be different from daily maintenance expenses, judging from the wording in the said Clause 5 "accidents recognized to be caused by the charterers' fault excepting an act of God."

③ Having found that the arbitrators interpreted the reasonable intentions of the parties in the foregoing way, reconcilable among Clauses 3, 4 and 5, it is quite proper to construe that the defendants assume the obligation of restoring the vessel to the former condition and bear the expenses incurred therefrom.

④ The award goes on to find that the Ohtori had been owned and employed by the defendants before the commencement of the bareboat charter between the plaintiffs and the defendants and it is clear that she was seaworthy after her annual survey on the 17th October, Showa 57 (1982) immediately after the de facto delivery under the bareboat charter on the 10th of October. As a matter of fact, the Ohtori was purchased from Tochigi Shipping Co., Ltd. and then sold to the plaintiffs but was all the while in the possession and under the employment of the defendants. Under these circumstances, the defendants are assumed to have pledged themselves, even impliedly, to maintaining the seaworthiness of the Ohtori on the occasion of the transfer of the vessel to the plaintiffs.

⑤ Consequently, the award concludes that the defendants had assumed the responsibility of restoring the vessel to a seaworthy condition at the time of redelivery.

(b) And then, as regards the Asahi Maru and the Tomishima Maru the award judges as follows: –

① Clauses 3, 4 and 5 of the respective bareboat charterparties of the Asahi Maru and the Tomishima Maru, which provide that the parties' share in expenses correspond in both context and arrangement to Clauses 3, 4 and 5 respectively of the Ohtori as mentioned above and so interpretations in respect of those clauses are same as for those of the Ohtori.

② The two vessels are oil barges and not legally obliged to be examined by surveyors. They had been owned and possessed by the defendants and concurrently with the transfer of title to the plaintiffs the bareboat charterparties were concluded as the defendants being the charterers and so the vessels remained in the possession of the defendants. A contract of sale and purchase of barges is dependant in practice on mutual reliance and unless the trading history is suggestive of any problems the vessels

are usually delivered - so to say "as is" - without examination of the underwater part of the hull subject to the sellers' implied warranty of seaworthiness. Even in their respective memorandums of agreement about the sale and purchase of the two barges, the seller defendants, are not exempted from their obligation to keep the vessels seaworthy. Furthermore, it is clear that the employment of those vessels started, for the defendants' own reasons, immediately after the commencement of the bareboat charter without leaving any space of time for underwater inspection. Accordingly it can be construed that the defendants assured the plaintiffs of seaworthiness of the vessels in the sale and purchase agreements which preceded the bareboat charterparties and the defendants are not permitted therefore to assert otherwise.

③ Consequently, the award concludes, the defendants assumed the obligation to restore the Asahi Maru and the Tomishima Maru to a seaworthy condition at the time of redelivery.

(c) In our judgment, arbitrators may properly render an award, unlike a judgment in court, based principally on equitable considerations with due allowance for all the circumstances that are deemed in their discretion to be concerned with a particular case in question. Arbitrators need not even make recourse to a certain provisions of the law, and what is more need not in law especially point out particular evidence of the facts upon which they have relied. An award may have no statutory basis in its reasoning and may lack evidence to support its findings of fact. Be that as it may, it does not necessarily follow that the award is illegitimate for want of reasonings. In so far as the arbitrators manifest certain reasons from which it can be easily inferred how they have come to their conclusions, the court is not properly to decide whether their conclusion is right or wrong, much less cancel the award for reasons of impropriety, if any be observed. (Ref. Judgment of Daishin-in, 27th October, Showa 3 (1928), Civil Court, 7 Minshu 848)

In view of the above doctrine, the present arbitration award gives manifestly in its reasoning an outline of the process of decision and does not contain any irrationality or contradictions and its reasoning does not fall short in any way. The defendants' assertions are nothing but censure with regard to the adequacy and appraisal of the evidence and the propriety of the reasoning and are after all proved ill founded.

Accordingly, the defendants' assertions are unfounded.

(2) (Painting expense, seaworthiness of the Ohtori, Issues with respect to the expert opinion, and Issues with respect to the boiler and bottomplates of the hull)

The award, on the premise that the defendant assumed the obligation to restore the Ohtori to a seaworthy condition at the time of redelivery (as acknowledged in its reasoning in (1) above), recognizes the propriety of the expert opinion as regards the items, the extent and the cost of repairs to be borne by the defendants and the basis of the arbitrators' findings during their on-the-spot inspection, exercised in their own discretion, the award

then orders the defendants to bear the relevant expenses. The award is not irrational or contradictory in its reasoning and does not fall short in any way. The defendants' assertions are nothing but censure as regards the adequacy or appraisal of evidence and the propriety of the reasoning and are after all proved ill founded.

4. Plea 4. (pleading of setoff)

(1) Before examining the facts raised in pleading setoff, we will consider whether the assertions of the setoff are to be admissible as an effective defence.

(2) (admissibility of setoff)

(a) The defendants declared setoff after the closure of the present arbitration and assert that the amount claimed by the plaintiffs in Case A has ceased to exist in such part as corresponds to the amount of the setoff. The plaintiffs, on the other hand, assert that the averment of setoff is a matter to be raised in a separate action of exception disclaiming obligation and that, therefore, those averments are not admissible as an effective defence in an action of execution judgment.

(b) While we show deference to an arbitration award, similar to a final judgment of the court (as a means of settling disputes voluntarily between parties (the Code of Civil Procedure art. 800)), it must be admitted that an award is, compared with a judgment, liable to be flawed by one or another procedural defect. In our judgment, in view of the provision in the law that an arbitration award needs endorsement by a final judgment in order to be effective as a legal means of compulsory enforcement (the Code of Civil Procedure art. 802-1, the Code of Civil Enforcement art. 22-6), the award is not automatically granted with the right of compulsory enforcement through the exercise of public power, but is instead only to be conferred with such right by the court after it has made a examination for the presence of procedural flaws. Consequently, in an action claiming compulsory enforcement of an arbitration award, the scope of examination is limited to the conditions of the suit, the existence of a lawful award rendered with due regard for proper procedure, and the existence of any reasons for the cancellation of the award. It is proper that the examination by the court not look into the propriety of the substantive arbitration judgement.

(c) It follows, that the plaintiffs' assertion that they be allowed to raise setoff after the closure of the arbitration proceedings as their defence in an action of execution judgment runs in effect counter to the above-mentioned purport of the regime in which the court pays deference to arbitration as a voluntary means of settling disputes between parties and tries to immediately render the power of execution. The plaintiffs' attempt to raise the defence of setoff is not, therefore, admissible. The relevant facts are properly to be asserted separately in an action of exception disclaiming obligation which the law contemplates (the Code of Civil Execution art. 35) after the final judgment of execution.

(3) Accordingly, the defendants' assertions are unfounded, without regard to the facts of

their plea on which it is now unnecessary to decide.

III. We take the view therefore that the plaintiffs' claim in Case A is well founded.

No. 2 (Case B)

I. The facts in the statement of claim 1 are undisputed.

II. Cause of claim 2. is unfounded as determined as regards the respective facts in No. 1 I(1) through (2) above.

III. We take the view therefore that the defendants' cross action is ill founded, without regard to the plaintiffs' case on which it is now unnecessary to decide.

No. 3 Conclusions

Our conclusions are therefore that, for the reasons which we have given the plaintiffs' action is allowed and the defendants' cross action must be dismissed. As for the costs we decide as Text 3. applying the Code of Civil Procedure art. 89. (we do not attach a declaration of provisional execution because it is irrelevant.)

Kobe Court of District, No. 5 Civil Department

Chief Judge Judge Kazuo Tastumi
Judge Hiroshi Ishii
Judge Tadashi Yamada

Attache Documents:

Claimants • Respondents in cross claim: the Plaintiffs (hereinafter called X)
Respondents • Claimants in cross claim: the Defendants (hereinafter called Y)

TEXT OF AWARD

1. The respondents Y shall pay the amount of 11,967,000 yen to the claimants X.
2. The respondents in cross claim X shall pay the amount of 5,075,345 yen to the claimants in cross claim Y.
3. The respective claims in 1. and 2. above shall be offset each other in the corresponding amount and Y shall pay the amount of 6,891,655 yen to X.
4. Costs of the award are 1,430,000 yen and shall be paid severally by each of the parties half the amount each.
5. The remainder of the claims by the parties shall be dismissed.
6. Jurisdiction of the present award lies with the Kobe District Court. ■

Conciliation or Mediation during the Arbitral Process

— Is it possible ?
How should it be done ? — * **

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This article was first presented by the author as a paper for the 11th meetings of the ICMA (International Congress of Maritime Arbitrators) held in Hong Kong in May, 1994.

Introduction

In Asian countries, especially in Japan and China, an arbitrator does not hesitate to settle the disputes before him through conciliation or mediation[1] during the arbitral process. However, in Western countries, an arbitrator is not always active in doing so. How can this difference be explained?

I believe we are accustomed to hearing that Japanese people do not like litigation, arbitration and even argument. Some commentators or philosophers in our country explain, with somewhat of a feeling of superiority, that the reason why we do not like controversies is because Japanese people highly respect the idea of peace, unity and harmony[2]. Others find their reasons concerning this characteristic of Japanese people in shyness, communication problems (specially concerning language in international cases), poor training in the art of argument and even in a high appreciation of the virtue of silence. These different explanations represent some part of the reality of this phenomenon[3]. However, to me, they seem to be too sophisticated or too commonly reasoned, and to contain some feeling of inferiority, and are thus unsatisfactory.

As for the issue of conciliation or mediation during the arbitral process, it seems to me that the majority of the ideas or reasoning regarding their efficacy are mainly related to the Asian (especially Japanese) thoughts of compromise, concession or amicability[4]. However, I think it should be noted that as far as commercial transactions are concerned, disputes

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** The opinions or ideas expressed in this article are those of the author and do not necessarily represent those of the Japan Shipping Exchange, Inc. or other.

could arise unavoidably in every international transaction, and most of the parties want to resolve their disputes through a system which is consistent with the standards of trading, i.e., "efficiency of the process"[5]. Although we Asian practitioners understand there are quite different concepts of arbitration and conciliation or mediation between Asian practitioners and those of other countries, I would like to discuss the possibility of using conciliation or mediation during the arbitral process, and show its effectiveness to the users of ADR with the hope that this article could be of some help to them in choosing a better way to resolve their disputes[6].

Grounds for demand of conciliation or mediation during the arbitral process

1. General

First of all, I need to emphasize that whether a demand for conciliation or mediation is made during the arbitral process will basically depend on their characteristics; informal procedure compared with litigation and arbitration and thus usually inexpensive and speedy. Moreover, a settlement by conciliation or mediation does not show who is a winner and who is a loser. Thus, in many cases, it is amicable. Also, it should be noted that a conciliator may not necessarily be bound by legalistic arguments. These characteristics are usually attractive to the parties[7].

2. Parties' point of view

(1) Parties

At the sentimental level, some parties are ready to compromise and others are not. It totally depends on the parties' intention or "feeling". However, I think there are some cases in which the issues relating to the disputes are too complicated in theory for the parties to find a reasonable solution, or the parties feel some difficulty with continuing negotiations because of communication problems. At this time they may demand a session where they can discuss with cool heads under the auspices of a reliable third party, i.e. the conciliator.

In these cases, in my view, what the parties try to do is to reserve an opportunity to negotiate even after they are involved in arbitration, once they become aware of their weak points which will be considered by the arbitrator and possibly turn out to be adverse to their case. They even might wish the arbitrator who understands all the relevant facts and the parties' contentions in the case to become the conciliator in the course of arbitration.

I understand that there are some parties who prefer peace and harmony and always try to avoid controversy and battle as their policy even after they are involved in litigation or arbitration[8]. I highly respect such an attitude. However, most parties prefer to win or not to lose and they would like to reserve their right to settle their disputes amicably when they

are becoming aware that there is some possibility of losing in battle[9].

At the business, when the parties take all factors such as costs, speed and their reputation in the business community into consideration, there will be some cases where they are better off settling their disputes as soon as possible, or where they do not have to or should not win they may negotiate for an amicable settlement even though they believe they are right and will surely win.

In some cases, a party gives priority to winning even when there is little possibility for him to obtain recovery because of an adverse party's financial distress, his intention being to prove the justice of his position to the business community, e.g. banks, customers or prospective customers, etc.

However, I think the parties usually make an estimate of the costs and time associated with arbitration, and also estimate their expected recovery and always compare the former with the latter in the course of the arbitral process. When the estimate of expenditure (both in costs and in time) for arbitration and their estimate of the benefit of the award are well-balanced, they may continue the process. But when the former will be more than the latter, the parties may lose their interest in continuing the process. There may be the case where a claimant, who is sure he will win in arbitration, would like to use the arbitral process as a tool to negotiate with a respondent who refuses to sit at the negotiation table, although he does not necessarily desire to win after taking into account his future business with the respondent[10]. In all these cases, I think the parties hope, more or less, to seek time for negotiation even during the arbitral process.

(2) Attorneys: lawyers

Attorneys are inherently obliged to win or not to lose. At the negotiation level, they may experience some difficulty trying to persuade their clients to accept their ideas, which are based on a legal point of view. (In particular, some clients do not like to listen to their attorneys' negative opinions.) And they may think that they would like to make it clear to their clients that they are right and to encourage their clients to refer their disputes to litigation or arbitration. In this situation, if they could predict that their clients are unlikely to be successful in the litigation or the arbitration, they also may recommend to the clients that they reserve their right to settle disputes amicably even after they become the claimants or defendants in the litigation or the arbitration. Also, there is the case where the lawyers think that their clients will lose if they file the case in court because there is no evidence to prove their case, and they refer their dispute to arbitration with the hope of having an opportunity to negotiate, not to win.

3. Other considerations

To avoid the time bar, the parties may file their case in arbitration although they still intend to proceed in their negotiations[11].

It seems that the arbitrator sometimes feels that he has hit on the idea of an amicable settlement and he wants to show this idea of settlement to the parties in a business mind-set. In that situation, the arbitrator may give priority to the more practical (or business) solution, not to the legal solution. I will discuss below the issue whether an arbitrator can become a conciliator or a mediator.

When and how conciliation or mediation is proceeded with during the arbitral process

1. General

It is needless to say that every ADR procedure should be based on the parties' intention. Thus, whether or not the conciliation process should be employed solely depends on the parties' autonomous agreement. Accordingly, any attempt by a third-party including an arbitrator to settle a dispute in an amicable setting without the parties' consent should be unacceptable.

2. Conciliation or mediation and arbitration are proceeded with in separate proceedings

We had an experience relating to the attempt of conciliation in a separate proceeding from arbitration. One of the parties was a Japanese company and the other was an American company. Their contract (a charterparty) included a law and litigation clause which provided "[t]his charter shall be construed and the relations between the parties determined in accordance with the law of England. Any dispute arising under this charter shall be decided by the English Courts to whose jurisdiction the parties agree whatever their domicile may be: Provided that either party may elect to have the dispute referred to the arbitration of a single arbitrator in London in accordance with the provisions of the Arbitration Act, 1950, or any statutory modification or re-enactment thereof for the time being in force." At the first moment, the parties decided to refer their dispute to arbitration, and they filed their case in London arbitration. Afterward, considering costs and time, they thought better of their original way of resolution, and they agreed to stay the arbitral process and settle their dispute through conciliation by the Tokyo Maritime Arbitration Commission (TOMAC) of The Japan Shipping Exchange, Inc. (JSE). In this case, the arbitral procedure was started first and then was followed by the conciliation.

In another case, conciliation or mediation was started, but one of the parties applied for arbitration separately because the opposing party did not agree to another six months time

extension. Then the claimant soon requested a stay of the arbitral proceedings during an attempt at conciliation. In this case, the conciliation was ahead of the arbitration.

In either case, the parties still tried to resolve their dispute through conciliation not only because they preferred an amicable settlement for the future relationship, but also because they were considering the costs, time and benefits of the arbitral proceedings.

3. Conciliation or mediation and arbitration are proceeded with in the same proceedings

This issue is closely related to the question of whether an arbitrator can become a conciliator or a mediator, or in another words, whether the arbitrator has power to attempt conciliation. I think there are two situations when conciliation or mediation is started in the same proceedings as arbitration: firstly, where the parties make a motion to the arbitrator to stay the arbitral proceedings and start conciliation by the arbitrator; secondly, where the arbitrator feels that he has already found the relevant facts to understand the factual background of the case, thinks that the opportunity for an amicable settlement is ripe after the arbitral proceedings are proceeded with to some extent (say, a certain number of oral hearings are held or a certain amount of evidence has been taken) and so recommends that the parties attempt conciliation, to which the parties agree. In the latter case, needless to say, the arbitrator should not force the parties to attempt conciliation.

There are some rules which provide the arbitrator's power or authority to conciliate or mediate the dispute before him.

The Rules of Maritime Arbitration of The Japan Shipping Exchange, Inc., Section 21 [Mediation] provides as follows:

> "(1) The parties do not lose their respective rights to settle the dispute amicably even after the application for arbitration has been filed.
> (2) The Board may, at any stage of the arbitration proceedings, mediate between the parties for the whole or a part of the dispute".

Also, China Maritime Arbitration Commission, Rules of Arbitration, Article 37 provides as follows:

> "The Arbitration Commission and the arbitration tribunal may conciliate cases under their cognizance. In case a settlement agreement is reached through conciliation, the arbitration tribunal shall make an award in accordance with the contents of the settlement agreement reached by and between both parties."

In Japan and China, there are the same kinds of provision in their civil procedure codes. The Japanese Code of Civil Procedure, Article 136 [Attempt of compromise] reads:

> "[1] The court may, whatever stage the suit may be in, attempt to carry out compromise or have a commissioned judge or an entrusted judge try the same.
> 2. The court, a commissioned judge or an entrusted judge may for compromise order the principal party or his legal representative to appear before court"[12].

The Chinese Code of Civil Procedure, Article 6 reads:

> "In trying civil cases, the People's courts should stress mediation; when mediation efforts are not effective, the court should issue its decision in a timely manner"[13].

Concerning the issue whether an arbitrator can be a conciliator in the same proceedings, I will discuss this in the following part.

Who can become a conciliator or mediator

1. General

If there is an agreement between the parties on this matter, it should be followed unless such agreement is null and void according to the applicable law.

When the parties agree to conciliation according to certain rules, e.g., UNCITRAL Conciliation Rules, they need to appoint the conciliator according to those rules[14].

2. Whether arbitrator can become a conciliator or mediator

(1) General

It seems to be clear that an arbitrator can become a conciliator or a mediator of a dispute which is not in all respects related to the arbitration in which he is involved.

However, it is less clear whether the arbitrator can become a conciliator or a mediator of the same dispute in which he is involved. I think there are two situations relating to this issue: firstly, there is the situation where the arbitrator becomes a conciliator or a mediator in the same proceedings; and secondly, there is the situation where the arbitrator becomes a conciliator or a mediator in separate proceedings.

(2) Can an arbitrator become a conciliator or mediator in the same arbitration proceedings

This question may directly be related to the authority or the power of the arbitrator in

the process. Thus, the rules relating to conciliation may not necessarily be applied to the question[15]. However, if the parties agree to stop the arbitration proceedings and attempt conciliation according to certain conciliation rules under the auspices of the arbitrator, two different proceedings according to their respective rules should be used to strike a balance[16].

Concerning "conciliation and duty to apply the law" (this issue is also related to the later discussion of which law, rules, customs, usages or norms are to be applied to the subject-matter of conciliation in the same arbitration proceedings), Mustill & Boyd, *Commercial Arbitration*, reads as follows:

> "English law does not recognise conciliation as a formal institution, in the context of private arbitration, and in practice it is rarely encountered.
> Nor is it usual to find that the arbitrator is empowered to act as amiable compositeur or to decide according to 'equity and good conscience'. It is indeed far from clear whether a reference conducted under an agreement containing such a provision is an arbitration at all, for the purpose of the acts and the principles established by the common law"[17].

Regarding also the power of the arbitrator to attempt conciliation, Prof. Bernini states:

> "The arbitrator(s) should never force upon the parties conciliation attempts and amicable settlements which are not sought after. If it were otherwise, both neutrality and impartiality could be affected if a party were put in a position to reject a proposed conciliation and/or settlement which the other party was inclined to favour. Furthermore, should the arbitrators' attempt to conciliate fail, neutrality and impartiality could be seriously damaged if the proceedings were resumed under the aegis of the same arbitrators. It is indeed most likely that the arbitrators-conciliators have prejudged the case to varying degrees during their attempt to settle it amicably. An arbitrator can hardly remain independent after prejudging the case"[18].

As regards whether a conciliator can become an arbitrator when the preceding conciliation attempt fails, Dr. Herrmann explains as follows:

> "Even more important than this question of simultaneous proceedings is whether anything that happened during unsuccessful conciliation proceedings may have an impact on any adversary proceedings about the same dispute. In order to enhance the willingness of the parties in conciliation, any undesirable 'splashing over' of information should be prevented. Here, a double-barreled approach seems best which is to exclude the conciliator from later involvement and to exclude certain informa-

tion from later use.

The conciliator acquires, in the course of the conciliation proceedings, an intimate knowledge of the dispute at issue, including the strengths and weaknesses of each party's case. Therefore, the willingness of parties to conciliate and, in particular, to confide in the conciliator might be adversely affected if it were possible for the conciliator, in arbitral or judicial proceedings about the same dispute, to act in a capacity where his knowledge could be prejudicial to the interests of a party. To free the parties from such fears, the conciliator should be precluded from performing certain functions in such adversary proceedings.

The first function, prohibited by many conciliation rules, is to act as arbitrator. Here, the above concern about the parties' possible fears seems particularly relevant in view of the inherent danger that the conciliator, in making his binding decision as an arbitrator, would take into account information given to him in the frank and friendly spirit of conciliation. The prospects of his acting as an arbitrator could, thus, make a party less willing to 'open up' and 'let down his hair' which, in turn, would hamper the conciliation effort"[19].

These comments on this subject are negative to the idea of an arbitrator becoming a conciliator or a mediator, or an arbitrator playing the roll of a conciliator or a mediator. The reasons for these opinions may relate to the infringement of independence, impartiality, and fairness of the arbitrator acting also as the conciliator or the mediator. As well, it may be pointed out that "the parties' possible fears" about the arbitrator's prejudiced mind or knowledge after conciliation fails are a real concern.

I agree with these opinions to the extent that there happens to be such disadvantageous outcome or there is some possibility of such an unfavorable situation arising. However, I do not think the parties' right to resolve their dispute freely according to their autonomy should be limited even in this case; i.e., if the parties agree to appoint the arbitrator as a conciliator or to ask the arbitrator to settle their dispute amicably in the course of the arbitral proceedings, their intentions should be followed[20]. In this case, the parties may think that the particular arbitrator has ability as a conciliator, or they may think they can save costs and time to explain the background of the dispute. Accordingly, they think it is efficient for them to settle their dispute through conciliation by the arbitrator. I once again would like to recall the importance of efficiency in dispute settlement systems. In many cases, what the parties expect from these systems seems to be to conclude the dispute. If the party wins the case, but spends a lot of money and spends much time, it is a victory in a sense although it is not efficient. Although I understand that such a victory may be given the first priority by a party in some cases and the party may prefer the adversary system, still in other cases there should be some allowance for flexibility in using these systems as far as the flexibility

does not adversely affect the "raison d'etre" of these systems.

I think the general requirements of the arbitrator's becoming a conciliator may be that there is an agreement of the parties and the arbitrator's consent to the agreement which is based on the cognition of a ripe opportunity for conciliation by him and his ability as a conciliator.

The ideas of independence, fairness, and impartiality are relative concepts, and, in fact, should be construed relatively according to the facts of each individual case. The arbitrator's subjective, malicious or prejudiced behavior and the parties' subjective or suspicious thinking should be resolved case by case.

The challenge to an arbitrator may be regarded as one solution. However, since the reasons or requirements and the construction of them concerning the challenge to an arbitrator should also be relatively understood on a case by case basis, and the parties in this case agree with the arbitrator-conciliator, who ultimately seems to know more about the dispute than the usual arbitrator, if one of the party trys to use the challenge to an arbitration as a delaying tactic and makes a motion for challenge with the reasons which might be accepted in the usual arbitration or conciliation proceedings, the reasons he submits should be narrowly accepted. The parties' satisfactory or unsatisfactory feeling toward the conclusion of the dispute resolution systems totally depends on their subjective behavior.

Thus, in my view, the "fear" which is pointed out by Dr. Herrmann could also be solved by the parties' careful consideration of the merits and demerits of their case to determine whether the arbitrator-conciliator is preferable, and the arbitrator or the institution needs to help the parties in their deliberations in this context. It is needless to say that the arbitrator-conciliator should be of high quality both in knowledge and in personality, i.e., well-balanced in both ways.

(3) Can an arbitrator become a conciliator or mediator in separate arbitration proceedings[21)]

For example, when the arbitral tribunal is composed of three arbitrators, the parties may agree to stop the arbitration, start conciliation according to (say) UNCITRAL Conciliation Rules, and appoint one of three arbitrators as the conciliator. In this case, I think, as far as the conciliation procedure is concerned, the agreement of the parties can be accepted without difficulty. However, in the context of the arbitration procedure, the agreement may raise some problems. If the conciliation procedure fails, the arbitration should be proceeded with and the arbitrators should render the award. In this situation, there may happen to be a disparity in conviction among the arbitrators and this will affect their discussion based on their unequal positions. However, I do not think it becomes a crucial problem for the equality and the independence of the arbitrators if the arbitrator (the former conciliator) explains relevant information, which is not touching on a matter of confidentiality relating to the conciliation proceedings, to the other arbitrators, or he recommends to the parties that they

open the facts stated in the conciliation session to the tribunal to the extent that all the facts relevant to the award are made clear.

This question may also be related to the ethics of the arbitrator and may be too narrow an issue for the purposes of this article[22].

3. Standards of behavior of arbitrator-conciliator; how should conciliation be proceeded with in the same arbitration proceedings

(1) General

As I stated above, if there is an agreement between the parties concerning the procedure of conciliation, it should be followed. For example, if the parties agree to attempt conciliation according to AAA Commercial Mediation Rules and appoint the arbitrator as conciliator by written consent of all the parties, firstly, the proceedings should be conducted according to those Rules.

However, a special consideration should be required in this case because conciliation during the arbitration procedure is different from conciliation in a separate procedure and it should be conducted without prejudice to the arbitral procedure.

(2) How should conciliation be proceeded with in the arbitral process

Basically, the arbitrator is obliged to render the arbitral award, so he can not attempt conciliation to avoid his obligation to render the award[23].

Since whether or not compromise can be attempted should depend on the parties' autonomy, the arbitrator can not force them to start or proceed with conciliation without their consent[24]. Accordingly, the arbitrator, if he thinks fit, can recommend without forcing the parties to attempt conciliation at any stage, and he can start and proceed with conciliation at any time as far as the parties agree to it.

The arbitrator should be careful to see whether a party trys to delay both the arbitral and the conciliatory process. If he finds that one of the parties seems to be using delaying tactic, he should be ready to regard such attempt as an intention of that party not to go further and to declare a failure of conciliation because his first obligation is to proceed with the arbitration and render the award, as I stated above.

The arbitrator should be careful when he is asked to open his idea of settlement because his ultimate obligation is to render the award if an attempt at compromise fails and he will practically be bound in the arbitration by his idea of compromise. Although both of the parties should be invited to the hearing session[25], especially a conciliatory session, as long as an attempt of compromise is valid, the arbitrator may hear one party in the absence of the other and he can conduct the process of concession between the parties. In this process, he should not necessarily reveal his idea for settlement. In practice, some parties hide their

real idea of settlement and submit much higher or lower ideas than their real one just to find out what kind of arbitral award the arbitrator might have in mind. And some parties try to concede, but they do not know how much they need to hold back their submission. In either case, the parties ask the arbitrator to show his idea for their assessment. In these cases, as far as the parties seem to try to compromise, the arbitrator may reveal his idea after he notifies the parties that his idea is just tentative and it will not bind him when he renders the award.

The arbitrator-conciliator and the parties can agree not to rely on or introduce what is adduced, submitted, suggested and so on by the arbitrator or the parties, whether oral or written, as evidence in the arbitral proceedings in case the conciliation attempt fails[26].

According to our practice, if the parties come to a settlement agreement, they may have three choices to terminate the arbitration; firstly, the claimant can withdraw his claim with the consent of the adverse party; secondly, they may put a special clause in the settlement agreement, which provides that in case the debtor defaults in his obligation under the settlement agreement, the arbitration proceedings shall be started again and the arbitrator can render an award which binds the debtor to the same obligations as the settlement agreement; thirdly, they may ask the arbitrator-conciliator to render an award on the same terms as the settlement agreement without giving reasons for the decision[27]. The settlement agreement itself does not have the binding power of the arbitral award, and thus parties seldom choose the first way. The second way to terminate the arbitration is not a true termination of process, but it is an agreement to terminate the arbitral proceedings on the condition that the settlement agreement is fulfilled by the parties. The third way is preferred most by the parties because it is convenient for the creditor party if he needs to enforce his right under the award or the settlement agreement.

Relationship between the conciliation or mediation procedure and the arbitral procedure

1. Which rules will govern procedure

Generally, it seems that the choice of the parties is to be given effect[28].

If there is no explicit choice of procedural rules by the parties, the conciliator needs to investigate the parties' implicit choice. For example, when conciliation is attempted in the same arbitration proceedings by the arbitrator-conciliator, the parties are silent concerning the rules of conciliation, and the arbitral proceedings are administered by a certain institution, the rules applied to conciliation in this case could be the that of the institution if the institution has its own rules for conciliation.

When conciliation is attempted in the same arbitration proceedings, the discretion of the

arbitrator-conciliator in construction or implementation of the rules to strike a balance between two different procedures should be allowed even though the parties agree to certain conciliation rules being applied.

While conciliation is attempted, should arbitral proceedings be stayed? Basically, this may be decided according to the parties' intention. However, I think the arbitral proceedings should be stayed for the arbitrator as well as the parties can save costs and time for the arbitration, and, especially when arbitration and conciliation are proceeded with separately, dual efforts required from the parties to the respective proceedings may be avoided.

2. Which rules will be applied to the subject-matter

When conciliation or mediation is proceeded with in the same arbitration procedure, there is a question whether the arbitrator-conciliator can apply a system of law other than the system of law which is already being applied in the arbitral proceedings to form his idea for the settlement as conciliator[29].

Practically speaking, the possibility of compromise may arise at the stage where the arbitral proceedings have proceeded to the extent that the argument of the parties and the taking of evidence are expedited, and the detail and the factual background become considerably clear[30]. At this stage, the parties as well as the arbitrator may have an idea of the likely outcome of the case based on the law and commercial practices submitted by the parties or decided by the arbitrator. Accordingly, if the parties or one of them insists on legal and commercial standards other than those of the arbitration, the arbitrator-conciliator and the other party may feel some difficulty and be discouraged from compromising because there may not be a common ground for all the parties involved. Thus, in my view, basically the standards applied to the subject-matter of the arbitration should be given a priority[31]. However, the flexibility of compromise by the parties may still lie, for example, in the assessment of damages or the concession concerning the facts underlain by uncertain elements.

Conclusion

A Japanese certified public accountant, who works in an international accounting company with colleagues from other countries, has said, "It does not matter where he [a colleague] is from to work with, but it really matters what personality he has".

As I already pointed out in the very beginning, many practitioners and commentators, especially in Western countries, tend to attribute the preference of conciliation or mediation to the adversary systems to certain national characteristics or traits. I know there is a diversity

of social systems, of rules, of particular patterns of behavior underlain by the historical experiences of each country and even a certain tendency of peoples. And in many cases, the difference of languages becomes a serious problem in ADR systems. I am, thus, ready to accept the opinion of those practitioners and commentators to some extent.

Yet, I think ADR systems should be relied on according to the parties' intention and needs everywhere, irrespective of countries, and be continually reformed to cope with the dynamism of the business world. Moreover as I have emphasized many times in this article, efficiency as well as fairness and impartiality should be given the first priority. Accordingly, if the parties intend to try some new or "mixed" forms of dispute resolution, the persons or institutions whom are entreated to solve the dispute should devote themselves to create any and whatever system will satisfy the parties' preference as much as possible.

Needless to say, if the problems of the system can be solved by training the arbitrator or the conciliator, or by explaining or educating the parties, such problems cannot, in my view, be any obstacle to limit the parties' real convenience. ■

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1) The difference in the definition between "conciliation" and "mediation" seems to be less than clear and appears to vary from commentator to commentator. It is explained, for example as follows: "[w]hile the terms 'conciliation' and 'mediation' are often used interchangeably, the terms are in fact distinct. In mediation, the mediator's role is to assist the parties in reaching their own solution for their dispute. A conciliator acts more as an adviser, evaluating a dispute and then proposing the terms of an agreement based on the evaluation" (M. Scott Donahey, "Mediation and Conciliation in the Asia/Pacific region: sites, centres and practices", Doyle (ed.), *Doyles Dispute Resolution Practice*: Part of Asia-Pacific, 85-000), or "Mediation and conciliation are terms which are often used interchangeably, but there is a distinction. In mediation, the mediator actively participates in resolving the dispute, then gives a decision (or opinion, since it is not binding) on how the dispute should be resolved. A conciliator participates only in the preliminary steps of facilitating discussion between the parties, and, perhaps, helps them frame issues for discussion" (Thomas Oehmke, *Commercial Arbitration*, p.16).
However, at least at the practical level, these definitions may be neither effective nor satisfactory.
Commercial Mediation Rules of American Arbitration Association, "Introduction" provides "[t]he mediator may suggest ways of resolving the dispute, but may not impose a settlement on the parties". This means that the mediator can show the parties his own opinion or a concrete idea for the settlement.
In Japan, I think a conciliator is required to show his decision for the settlement although the decision does not have binding effect (unlike an arbitral award), while a mediator's role is only to encourage discussion between the parties.
According to Conciliation Rules of The Japan Shipping Exchange, Inc. Part I, Section 14 [Settlement agreement] (1) provides, following UNCITRAL Conciliation Rule, Article 13, "[w]hen it appears to the conciliator that there exist elements of a settlement which would be acceptable to the parties, he shall formulate the terms of a possible settlement and submit them to the parties for their observations. After receiving the observations of the parties, the conciliator may reformulate the terms of a possible settlement in the light of such observations." It seems to me that a conciliator would be bound by the conciliation agreement to draft the settlement agreement for the parties.

Needless to say, the settlement agreement is composed not only of the parties' ideas, but also those of the conciliator. I think that in conciliation proceedings, a conciliator is totally free to voice his concrete ideas for settlement, and it is desirable for him to do so, while in mediation during the arbitral process, according to The Rules of Maritime Arbitration of The Japan Shipping Exchange, Inc. Section 21, a mediator does not necessarily have to mention his ideas, but he should rather be a wise man who listens to the parties' submissions carefully and encourages them to communicate further for the purposes of amicable settlement. Thus, I treat these two terms as the same for the purpose for this article since the differences between these terms are generally owed to the wording or stipulations of the relevant national code or private conciliation rules.

2) Concerning Chinese thoughts on this matter, see Johannes Trappe, "Conciliation in the Far East", Arbitration International, Vol.5, No.2, 1989, at p.177. In this article Dr. Trappe points out the Chinese philosophy of harmony, peace, and compromise.
Japan and Korea have been deeply influenced by Chinese philosophy for long centuries. Thus, more or less, we have the same background regarding philosophical ways of thinking.

3) Today, we frequently come across these kinds of explanation even in articles by Western writers (for example, see Charles R. Ragan, "Arbitration in Japan: Caveat Foreign Drafter and other Lessons", Arbitration International, Vol.7, No.2, 1991, at p.97).

4) See generally, Trappe, note 2) supra, and Gerold Herrmann, "Conciliation as a new method of dispute settlement", in ICCA Congress Series No.1.

5) The author is strongly inspired by the lecture entitled "When business is dynamic and intense, disputes are unavoidable. The challenge is to settle them in an effective way and to the same standards of efficiency as are applied to other business activities", presented by Dr. Lucio Stanca, president of IBM SEMEA, at the Conference of International Federation of Commercial Arbitration Institutions held in Milan on June 11, 1993. He referred to dispute resolution through arbitration from the users' point of view. He wisely pointed out the merit of the arbitral procedure from which the users usually expect speed, a business mind-set, and neutrality; he says, "[s]ome state courts may be hostile to foreign firms, some legal systems may be difficult to understand: in all these cases, a neutral or otherwise 'balanced' arbitral panel gives a more solid guarantee of a fair solution of the issue". And he concluded that all these characteristics are basically derived from efficiency of the dispute resolution process.

6) See J. Mark Ramseyer, *Ho to Keizaigaku* (Law and Economics), Dai- 2-Sho (Chapter 2). In the preface to this inspiring book, the author outlines the purpose of the book; he "trys to criticize the common or prevailing opinion relating to the legal behavior of Japanese people, instead, to establish the hypothesis on this subject based on Economics, and to prove its validity positively" (tentatively translated into English by the author of this article).

7) Concerning "potential drawbacks and disadvantages" of conciliation, see Herrmann, note 4) supra, pp. 150-151.
Concerning characteristics and functions of conciliation in Japan, see Takeshi Kojima (ed.), *Perspectives on Civil Justice and ADR: Japan and the U.S.A.*, at p.56 and p.284. Concerning an American lawyer's view of conciliation, see Kojima (ed.), ibid., p.285, by Dan Fenno Henderson.

8) See Trappe, note 2) supra.

9) One might say that if the parties could demand conciliation during the arbitral process, they could use it as a tactic for delaying the arbitral process by not making an early decision and pretending they were having difficulty accepting the conclusion of the conciliator, or by indicating that they would be bankrupt sooner or later to discourage the other party to give up the conciliation attempt and proceed with the arbitral process. I think this could hardly happen in practice. A conciliator usually has broad discretion over the process, and he may have the right to give up the process at any time and at any stage if he considers the attempt of

conciliation has become ineffective. See UNCITRAL Conciliation Rules, Art.15 (b); AAA Commercial Mediation Rules, Section 10; ICC Rules of Optional Conciliation, Art. 7 (b). Thus, the arbitrator-conciliator may also have such a discretion because his basic obligation is to render the award.

10) See Ramseyer, note 6) supra, Dai-2-Sho (Chapter 2). See also Herrmann, note 4) supra, p.154.

11) See UNCITRAL Conciliation Rules, Art.16. and JSE Conciliation Rules, Section 19.

12) Translation is from EIBUN-HOREI-SHA (ed.), Law Bulletin Series, *The Code of Civil Procedure*.

13) See Trappe, note 2) supra, p. 180; Dr. Trappe also points out that the German code of Civil Procedure, in Section 279, contains a similar provision.

14) See UNCITRAL Conciliation Rules, Art.4. See also AAA Commercial Mediation Rules, Section 4 "Appointment of Mediator" and Section 5 "Qualifications of Mediator" which is related to the issue whether the arbitrator can be the conciliator in the same proceedings, i.e., whether such an arbitrator can be construed as the "person has any financial or personal interest in the result of the mediation", and whether he can become a conciliator if there is "the written consent of all parties".

15) See Trappe, note 2) supra, p.187. Dr. Trappe says "One thereby can clearly see that settlement discussions and negotiations within the frame of arbitration proceedings are really something other than conciliation".

16) Concerning "concilio-arbitration", ibid. it is explained that "[t]here remains the combination of arbitration and conciliation, recently called concilio-arbitration. Above all, Chinese experts emphasise this method to be followed in arbitration proceedings. Of course, these instruments – arbitration and conciliation – can be combined to bring about the best possible results".

17) Michael J. Mustill & Stewart C. Boyd, *Commercial Arbitration (2ed. 1989)*, p.19.

18) Giorgio Bernini, "The Ethical Implications of the Arbitral Functions: Standards of Behaviour of Arbitrators", Comparative Law Review (in Chuo University) [Vol. XXIII-3, 1989].

19) Herrmann, note 4) supra, p.161.

JSE Conciliation Rules, Section 19 provides as follows:

"[t]he parties shall not initiate any arbitral or judicial proceedings in respect of a dispute that is the subject of the conciliation proceedings during the conciliation proceedings (except for the arbitral proceedings mentioned in Section 16 above). However, any party may initiate such arbitral or judicial proceedings that are necessary for preserving his rights against prescription and the like". And Section 16 provides as follows:

"(1) In case all the parties, after reaching a settlement agreement, agree to convert the settlement agreement to an arbitral award in order to secure that settlement of their dispute, the conciliator shall terminate the conciliation proceedings immediately:

(2) In the case of Sub-section (1) above, the parties shall make an arbitration agreement by signing the form provided in the Schedule and shall appoint the conciliator as the arbitrator;

(3) The arbitrator shall commence the arbitration proceedings immediately upon appointment by the parties, and shall make an arbitral award in the terms of the settlement agreement of the parties". The purpose of Section 16 is to alter the settlement agreement into the arbitral award to give binding power.

See also Herrmann, ibid., p.162; he states "[a]lso, parties may agree that the conciliator perform any of these functions [including acting as an arbitrator]. They may do so, for example, where the conciliation attempt has failed at an early stage of the proceedings without much involvement of the conciliator or where the conciliator's familiarity with the dispute is regarded as an asset rather than a disadvantage". Concerning the (non-)enforceability of the settlement agreement, see Herrmann, note 4) supra, pp. 163-165.

20) See Rules of Optional Conciliation of ICC, Art.10. This provision is deemed to reserve the right of the parties to agree that the conciliator becomes the arbitrator by expressing "[u]nless the parties agree otherwise".

21) See Herrmann, note 4) supra, p.161, which reads ".....where parties to an arbitration resort to separate conciliation proceedings a stay of the arbitration proceedings might help to enhance the prospects for an

amicable settlement".

22) See Bernini, note 18) supra, pp. 57-58.

23) Concerning conciliation by the court according to the Japanese Code of Civil Procedure, Article 136, referred to in the preceding part, see Koji Shindo, *Minji-Sosho-Ho* (Law of Civil Procedure) (2nd ed.), p.254 provides; "the reason why an attempt of compromise is permitted [by law] is that when such attempt turns out to be successful, the parties to the dispute can settle their dispute in an autonomous and amicable manner and, at the same time, the court can conserve its time and judicial resources. However, it should be noted that if a court forces the parties to compromise according to a belief in the omnipotence of compromise, and, in fact, delays rendering the judgment by continuously fixing a date for the session for compromise even when the time for the judgment is ripe and the parties prefer to proceed with the court procedure, the court can be regarded as refusing its proceedings.....

However, it is usually the case that the possibility of compromise comes out at the stage where the argument of the parties and the taking of evidence are expedited, and the details and the factual background of the case become clear to some extent; since the court can make proposals for a settlement of the dispute at this stage, the attempt of compromise should depend on the appropriate conduct in the proceedings by the judge. Nevertheless, [it is so], the court is required to make a careful consideration whether or not it should attempt compromise" (tentatively translated by the author of this article).

24) Ibid. See also Herrmann, note 4) supra, pp.154-157; Dr. Herrmann explains "freedom and willingness of the parties" as one of the "salient features of promising conciliation".

25) See Mustill & Boyd, note 17) supra, p.15 and pp.309-310; at p.15, it reads "[t]here are, it is true, certain procedural requirements which are usually regarded as fundamental, such as the principle that the arbitrator should not hear one party in the absence of the other, but even these will yield to express consent, or waiver". Concerning separate meetings between the conciliator and a party, see UNCITRAL Conciliation Rules, Art.9. See also Herrmann, note 4) supra, p.157 and p.159.

26) See UNCITRAL Conciliation Rules, Art. 20.

27) The Japanese Code of Civil Procedure, Section 801 (1) provides "[a]pplication to set aside an award may be made in any of the following cases:.....5. where the award does not show the ground on which the decision was made.....", and (2) provides "[w]here otherwise agreed between the parties, an award can not be set aside for the reasons specified in 4. and 5. in the preceding sub-section" (translation is from EIBUN-HOREI- SHA (ed.), note 12) supra).

28) See Herrmann, note 4), p.152. Dr. Herrmann suggests the UNCITRAL Conciliation Rules could be regarded as the parties' implicit choice of the procedure in case they do not explicitly choose any rules although he states "[t]his does not mean that other sets of rules would be neglected". In my view, the intention of the parties should first be investigated in every case. In this context, if the UNCITRAL Rules become the prevailing rules relating to conciliation, his suggestion is valid. JSE referred to the UNCITRAL Rules in many provisions when it was drafting its rules, yet it has some provisions different from those of UNCITRAL. Thus, in maritime cases, it is not necessarily true that the parties implicitly choose the UNCITRAL Rules for their conciliation attempt, and, as Dr. Herrman pointed out correctly, JSE Rules could also be regarded as the parties implicit choice of the rules as far as the venue of conciliation is in Japan.

29) See Mustill & Boyd, note 17) supra, p.19, pp.74 et seq.

30) See Shindo, note 23) supra.

31) See Herrmann, note 4) supra, pp.157 and 158. ■

The Implied Indemnity for Loss of Round Logs Carried on Deck under the NANYOZAI and BEIZAI Forms of Charter and the Unenforceability of Express Undertakings in Side Letters of Indemnity

Robert MARGOLIS*

It commonly happens that a deck cargo of logs being imported into Japan is lost overboard as a result of the unseaworthiness and uncargoworthiness of the carrying vessel or the improper stowage, handling and care of the logs themselves.

In such a case the consignee as holder of the bill of lading will usually have a good claim for damages against the shipowner under the Hague-Visby Rules as they apply in Japan.[1] However, the consignee's successful claim will prove a hollow victory if the carrying vessel was voyage chartered to a subsidiary of the consignee, as is often the case, and if the shipowner is able to establish that, despite his failure to exercise due diligence to provide a seaworthy vessel or his failure to stow the cargo properly, for example, he is entitled under the charterparty to an indemnity or compensation from the charterer.

The shipowner's call to the voyage charterer for an indemnity or compensation can be expected as a matter of course in this kind of case, and will probably come first at the time the consignee makes a demand for security and again during settlement negotiations or trial.

However, most cargoes of logs are carried into Japan under the NANYOZAI[2] or BEIZAI[3] form of voyage charterparty and the corresponding SHUBIL[4] bill of lading and, as we shall see, under this combination of documents a shipowner's claim for an indemnity or compensation from the charterer in respect of loss of deck cargo will usually be unfounded.

Moreover, we will see that the express letter of indemnity commonly given by the charterer or shipper to the master in exchange for clean bills of lading in respect of logs carried on deck is invalid and unenforceable.

The Usual Facts

In the typical case, common to the four major importers of logs into Japan, a local subsidiary of the Japanese consignee trading company will voyage charter a vessel under

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NANYOZAI or BEIZAI terms for carriage of the logs to Japan.[5] The carrier will issue bills of lading in the SHUBIL form for the cargo of logs, part of which will invariably be carried on deck. The bill of lading will not be claused to reflect the fact of the deck carriage, usually because the financing credit will stipulate for unclaused bills.

Often enough during the voyage, or, indeed, even before commencement of the voyage but after loading[6], the deck cargo will be lost overboard in expectable weather because the vessel is overloaded, either by reference to the strength of her bulwarks and stanchions or by reference to her stability, or perhaps because the deck cargo was improperly lashed, or the lashing chains and wires were insufficiently strong, or the tension of the lashing was not properly maintained during the voyage.

The Carrier is Liable to the Consignee

Under Articles 5(1) and 3(1) of Japan COGSA respectively, the carrier will be liable to the consignee for loss overboard due to any of these causes either because he failed to exercise due diligence to provide a seaworthy and cargoworthy ship or because he failed properly and carefully to load, stow, carry, keep and care for the cargo.[7]

Clause 13(3) of the SHUBIL-1994(B) bill of lading provides that:

> (3) The Carrier shall not be liable in any capacity whatsoever for any non-delivery, misdelivery, delay or loss of or damage to the Goods which are carried on deck and specially stated herein to be so carried, whether or not caused by the Carrier's negligence or the Vessel's unseaworthiness.[8]

However, where a clean bill of lading is issued C1.13(3) is not applicable and therefore the first requirement for a claim by the carrier for an indemnity or compensation from the charterer is met: the carrier is liable to the consignee for breach of the bill of lading contract.[9]

Two Further Requirements for an Indemnity

In order for the shipowner in the case now posited to be entitled to an indemnity from the charterer or to damages for breach of the charterparty contract, he must show three things, the first of which we have already considered:

1. that he is liable to the consignee for breach of the bill of lading contract;

2. that he would not have been liable for the loss under the charterparty; and

3. because there is no relevant express provision in the charterparty,[10] that a) from the wording of the (NANYOZAI or BEIZAI) charterparty the shipowner's right to an indemnity from the charterer will be implied in the circumstances of the particular case, or that b) the charterer was in breach of an implied term of the charterparty by tendering clean bills of lading for on deck cargo.

Regarding the first requirement, on the facts as posited, the shipowner as carrier will be liable to the consignee.

Regarding the second requirement, this is a matter which depends as much upon the facts of the case as the wording of the charterparty, and therefore it is difficult to review in just a few words the shipowner's liability for loss of deck cargo under the NANYOZAI and BEIZAI forms.

I will remark only that by Cl. 5 of the NANYOZAI form and Cl. 9 of the BEIZAI form, charterers are to load, stow and discharge the cargo free of risks and expenses to the owners, with the BEIZAI form further providing that the charterers are to lash, unlash and trim the cargo and set up and down stanchions and catwalk and put dunnage; that by Cl. 7 in the NANYOZAI form and Cl. 13 in the BEIZAI form, owners are to load cargo on deck at charterers' risk within the limit of the vessel's seaworthiness, in which case owners are not to be responsible for wash away and/or any other damage to deck cargo; and that the Owners' Responsibility and Exemption Clause in both forms in general reiterates the obligations and exemptions in the Hague Rules except that, consistent with Cl. 5 and Cl. 9 of the NANYOZAI and BEIZAI forms, respectively, the owners are under no obligation to load, stow and discharge the cargo properly and carefully.

Therefore, if the loss is due to the failure of the shipowner to exercise due diligence to make the vessel seaworthy for carriage of the deck cargo, he will be liable under both the charterparty and the bill of lading, such that a claim for indemnity or compensation will not succeed.

However, if the loss is due to bad stowage, a claim for an indemnity or compensation from the charterer would look better, since the owner would be liable under the bill of lading but not under the charterparty.

Nevertheless, even if the second requirement for an indemnity or compensation is met, that is, even if the shipowner would not have been liable for the loss under the charterparty, it is the thesis of this paper that under the NANYOZAI and BEIZAI forms of charterparty, coupled with the SHUBIL bill of lading, the shipowner's claim for an indemnity or compensation ought invariably to fail as the third requirement will not be met in the case now posited.

Let us therefore assume, for present purposes, that the owner would be liable under the bill of lading but would not have been liable under the charterparty.

The first question then is, to quote Bingham J. in *The C. Joyce* [1986] 2 Lloyd's Rep. 285 (Q.B., Com. Ct.) at 289:

> Is it necessarily to be implied from these terms [in the charterparty] that, if the owners should become liable to a bill of lading holder on grounds which would not make them liable to the charterers under [the charterparty], they should be entitled to be indemnified by the charterers against liability?

"I do not think so" was his Lordship's immediate reply. That is, notwithstanding that the first two of the above-noted three requirements are met, an indemnity will not *automatically* be implied.

The second question is, was the charterer necessarily in breach of an implied term of the charterparty by tendering clean bills of lading for on deck cargo?

The General Law Regarding the Shipowner's Right to an Indemnity or to Damages from the Charterer under the NANYOZAI and BEIZAI Forms

Clauses 16 and 25 of the NANYOZAI and BEIZAI forms, respectively, provide:

> 16. The Captain to sign Bills of lading at such freight as presented without prejudice to this charterparty...
>
> 25. The Captain or any other person authorized by the Owners shall sign and issue Bills of Lading as presented without prejudice to this Charter Party.

According to *Scrutton on Charterparties* (1984, 19th ed) at p.72, it is now clear that this standard form of clause deprives the master of the authority to vary the contract between the shipowner and the charterer by issuing a bill of lading in terms different from the charterparty. For example, in the presence of this clause the master has no authority to issue a bill of lading subject to the Hague-Visby Rules when the charterparty provides that the charterer, not the shipowner, is responsible for loading and stowing the cargo.

Moreover, where, as in the case now posited, the charterparty expressly provides that the master is to sign bills of lading "as presented without prejudice to the charterparty", the charterer *may* be liable to indemnify or compensate the shipowner for the consequences of the master or his agent signing non-conforming bills, that is, bills which impose more onerous obligations on the shipowner than he has under the charterparty.

There are, according to Robert Goff J. in *The Garbis* [1982] 2 Lloyd's Rep. 283 (Q.B., Com. Ct.) at 288, two views as to the nature of this liability:

> If the master does sign a bill of lading as presented which does impose on the shipowner more onerous obligations than the charter, the charterer has to make good any expense suffered by the shipowner in consequence; there are two views as to the nature of such liability, one being that it arises from an obligation of the charterer to indemnify the shipowner against the consequences of the master acting at his request, and the other being that the charterer's liability is a liability for damages for breach of contract.

However, while this passage from *The Garbis* is generally true, it has been superseded in important respects by the Court of Appeal decision in *The Nogar Marin* [1988] 1 Lloyd's Rep. 412, as we shall see.[10a]

The Charterer is not Liable for Damages for Breach of Contract

Let us first consider the view that the charterer's liability for the master signing non-conforming bills of lading is a liability for damages for breach of contract.

Under this view it is supposed that charterers, by tendering non- conforming or inaccurate bills, are in breach of the charterparty if it contains a "master to sign bills as presented without prejudice to the charterparty" clause. The breach is of an implied term, because most charterparties, NANYOZAI and BEIZAI included, do not contain an express provision obliging the charterer to tender accurate bills.

Prior to the decision in *The Nogar Marin* it was believed that the presentation by the charterer of an inaccurate bill of lading was a breach of such an implied term. Indeed, in *The Nogar Marin* itself the charterers, who had tendered clean bills of lading in respect of a rusted cargo of wire rods in coils, conceded that they were in breach by tendering inaccurate bills.

However, in *The Nogar Marin* the Court of Appeal re-examined the issue of whether the charterer's tendering of non-conforming bills is in every case a breach of an implied term of the charterparty and concluded that it was not.

The Court of Appeal made the distinction, crucially important for our purposes, between the case where the charterer tenders bills of lading containing terms which impose on the shipowner more burdensome obligations than those contained in the charterparty, and the case where the bill of lading contains not a non-conforming contractual provision but a representation of fact which is not an accurate statement of the true condition of the cargo.[11]

The Court of Appeal concluded that, at least in the case where the representations on the face of the bill of lading were not in respect of facts uniquely within the knowledge of the charterer, no term that the charterer must present bills of lading with accurate representations of fact would be implied.

The rationale for this is that, if by reasonable investigation the master could have discovered the true facts, he is obliged to issue a qualified bill notwithstanding that a clean bill of lading was tendered. According to Mustill L.J. at 421:

> The making of a proper inspection is not just a matter between the master and his owners; it affects the transferees as well. We see no reason to imply a term which takes the ultimate financial responsibility for this task, away from the master's employers and places it on the shoulders of the charterer.

In the case now posited, clean bills of lading are issued when the master or his/the owner's agents have every opportunity to clause them to reflect that goods are stowed on deck. If the bills are so claused, the shipowner will not, under Japan COGSA, be liable to the consignees for the loss of such cargo, as we have seen.

That is, the liability of the shipowner results from the master signing clean bills rather than bills which accurately reflect the state of the cargo. According to *The Nogar Marin*, the charterer is not in breach of an implied term in tendering clean bills, and therefore the shipowner cannot recover from the charterer damages for breach of the charterparty contract.

The Charterer is not Liable to Indemnify the Shipowner

Let us now consider the charterer's liability to indemnify the shipowner for the consequences of the master signing a clean bill of lading as presented.

The charterer's implied indemnity arises when the charterer requests the shipowner to act in a particular way. Implicit in the request is a tacit offer by the charterer to indemnify the shipowner for any adverse consequences of his so acting. By responding as asked, the shipowner is regarded as having accepted the offer.

This analysis of the implied indemnity, provided by Mustill L.J. in *The Nogar Marin* at 422, is fundamental to understanding why the shipowner is not entitled to an indemnity from the charterer in every case where the shipowner becomes liable to the consignee but would not have been liable under the charterparty: the implication of an indemnity in each case depends on and is limited according to what exactly was requested.

In *The Nogar Marin* the charterparty in the Gencon form contained a clause for all purposes identical to Cl. 16 in the NANYOZAI form and very similar to Cl. 25 in the BEIZAI form (set out supra). The charterers tendered clean bills of lading to the master when the goods were obviously damaged and the bills were signed as presented although the owners through their agents had every opportunity to investigate the true state of the facts represented on the bills.

Therefore, *The Nogar Marin* is in its important respects directly on point for the case

now posited; in fact, its ratio applies to the on deck cargo case *a fortiori*, because not only will the owner's agents in such a case have the opportunity to investigate the true facts but they will invariably have actual knowledge of them.

It would thus pay to quote the judgment of Mustill L.J. at 422 at length:

> It seems to us plain and the authorities leave us in no doubt that the implication of an obligation to indemnify is not automatic. It must always depend on the facts of the individual case, and on the terms of any underlying contractual relationship. The first step is always to [identify] the express or implied request by the person called upon to indemnify. Here, if the request is to be understood as meaning: "Kindly sign this bill, just as it stands, with its acknowledgement of receipt in apparent good order and condition", the claim for an indemnity must be sound, for the agents did precisely what they were asked; and the defence based on an intervening act must fail, since no act intervened, or ever could intervene, in such a situation. In the present case, we do not regard this as the correct reading of what happened. Everyone in the shipping trade knows that the master need not sign a clean bill just because one is tendered; everyone knows that it is the master's task to verify the condition of the goods before the signs. This being so, we cannot understand the request implicit in the tender as being more than this: "The charter requires you to bind your owners to the contract of carriage contained in the bill of lading, and please do so. The bill of lading also constitutes a receipt, and please sign it as such, with whatever appropriate qualification you may think fit". If this is a right account of the transaction, as we believe it to be, the claim for an indemnity must fail.

In the on deck cargo case, the "implicit request" made to the master by the charterer upon tendering the bills of lading for signature must be the same: "please sign them as a receipt with whatever appropriate qualification you may think fit".

As in *The Nogar Marin*, in the on deck cargo case there is no implied promise by the charterer that he will indemnify the shipowner in all cases where the owner becomes liable under the bill of lading where he would not have been liable under the charterparty. The promise to indemnify is limited to cases where the owner becomes liable under the bill of lading because the bill tendered imposed contractual obligations not present in the charterparty. Where the more burdensome obligations are the result of the master failing to clause the bills properly, no indemnity is to be implied.

Therefore, even if the loss is one for which the owner was not liable under the charterparty, he will not be entitled to an indemnity from the charterer, for if he had properly clausedthe bills of lading by noting that part or all of the cargo was carried on deck, he would not have been liable to the holder of the bill of lading since Cl. 13(3) thereof, which

provides that "The Carrier shall not be liable ... for ... loss of or damage to the Goods which are carried on deck and specially stated [on the face of the bill of lading] to be so carried", would have been valid and determinative, as we have seen.

The Express Letter of Indemnity Against the Consequences of Signing on Inaccurate Bill of Lading is Invalid and Unenforceable

It is perhaps because of his uneasy trust in the implied indemnity under these forms of charterparty that the shipowner in this trade will almost invariably require a letter of indemnity from the shipper or charterer in exchange for the master signing clean bills of lading, that is, bills of lading not claused to indicate that part of the cargo is being carried on deck.

An LOI in common use provides:

> To the Master
> In consideration of your signing Clean Ocean Bills of Lading Mates Receipt of which is claused as follows:
> B/L NOS. : _____
> MARKS : _____
> DESCRIPTION : _____
> QUANTITY OF GOODS : _____
> CLAUSE ON MATE'S RECEIPT : _____
> (1) ... Pieces stowed on deck at shipper's and consignee's risk.
> (2) Shipper's load, count and measurement, ship is not responsible for split, crack, stain, breakage, shortage, discoloration and erased marks.
> We hereby undertake to indemnity you against all the consequences of your doing so. Should only claim arise in respect of the above mentioned goods covered by this Letter, we hereby authorized you and/or your agents to disclose this Letter of Indemnity to the underwriters concerned.

There does not appear to be any Japanese authority on the point, but under English law such an agreement is unenforceable in all circumstances because it is made for an illegal consideration.

According to *Scrutton on Charterparties* (1984, 19th ed) at p.112,

> "If the master or agent issues bills of lading containing representations which he knows to be false, in return for an agreement by the person tendering the bill for

> signature to indemnify him for any liability which may ensue, the indemnity is unenforceable, for the issuing of the bill in such circumstances is fraudulent."

The leading English case is *Brown, Jenkinson & Co.* v. *Percy Dalton* [1957] 2 Lloyd's Rep. 1 in which the Court of Appeal held that an indemnity given by shippers to shipowners in exchange for the latter issuing clean bills of lading in respect of apparently damaged goods was unenforceable on the ground that the consideration for the agreement was a tortious misrepresentation.

It was irrelevant that in the *Brown, Jenkinson* case the original purchaser, though not his bank or the ultimate consignee, was aware of the true condition of the goods, and, indeed, that it was he who required clean bills to be issued. Nor was it important that in this case neither the bank nor the ultimate consignee suffered any loss, the bank having been paid when the goods were sold on and the consignee having recovered from the shipowner.

Moreover, in answer to the argument that it is somehow improper for the makers of the LOI later to argue that their promise to indemnify is unenforceable, Morris L.J. responded that although such plea came with "singular ill-grace", the legal issue to be determined transcended any considerations as to the relative merits of the attitude of the parties (at 6); and then, quoting the famous judgment of Lord Mansfield in *Holman* v. *Johnson* (1775) 1 Cowp. 341, 343, he said at 12:

> The objection, that a contract is immoral or illegal as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I may so say. The principle of public policy is this; ex dolo malo non oritur actio. No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise ex turpi causa, or the transgression of a positive law of this country, there the Court says he has no right to be assisted. It is upon that ground the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff.

In the *Brown, Jenkinson* case at 11 Morris L.J. listed the elements necessary in order that a letter of indemnity given by the charterer to the master in exchange for a clean bill of lading be unenforceable by the shipowner against the charterer:

> (a) the making of a representation of fact (b) which was false (c) which was known to be false (d) with intent that it should be acted upon. If the consideration for the

> promise was the making of such a representation, then the unlawful consideration made the contract unenforceable whether or not damage resulted to someone who acted on the representation and therefore had a cause of action.

All these elements are present in the case here posited.

Failing to clause the bills appropriately is tantamount to stating that the goods are carried under deck (see Tetley, *Marine Cargo Claims* (1988, 3rd ed) at p.651 and the cases cited at fn.2 thereof).

The (implied) representation that the goods are carried under deck is false and is known by the master to be false.

The misrepresentation is made with the intent that it should be acted upon. There is little doubt of this. According to Morris L.J. in *Brown, Jenkinson* at 7:

> A shipowner clearly intends that the bill of lading he issues should be relied upon. He intends that it should be relied upon by those into whose hands it properly comes: consignees, bankers and endorsees must be within his contemplation. A bill of lading is issued with the purpose that it should be relied upon.

Therefore, we may conclude that this sort of LOI is unenforceable, whether or not the consignee has knowledge of the true state of the cargo and whether or not he knows that a clean bill of lading will be issued for on deck cargo. It need only be shown by the issuer of the LOI (the charterer or the shipper) that the above-listed four elements are present for the LOI to be unenforceable, at least under English law.

Finally, it is irrelevant that such LOIs may be commonly given in the log carriage trade. On this point Morris L.J. said in *Brown, Jenkinson* at 9:

> There was evidence that the practice of giving indemnities upon the issuing of clean bills of lading is not uncommon. That cannot in any way alter the analysis of the present transaction, but it may help to explain how the plaintiffs came to accede to the defendants' request.

Conclusion

The shipowner who becomes liable to the holder of a clean bill of lading for damage to or loss of round logs carried on deck will have no recourse against the charterer: no indemnity will be implied from the terms of the NANYOZAI and BEIZAI charterparties and an express indemnity is invalid and unenforceable.

Moreover, even if an indemnity were to be implied under the NANYOZAI and BEIZAI

forms, because, for example, it can be said that the charterer requested the master to sign unqualified bills in disregard for the truth, it would seem from an application of the *Brown, Jenkinson* decision that such an implied indemnity would be unenforceable in any event.

It could hardly be that an express promise by the charterer to indemnify the shipowner for the consequence of the master dishonestly signing clean bills of lading is unenforceable whereas an implied promise by the charterer to do so would be binding.

To succeed in a claim for damages against the carrier the consignee must still prove the shipowner's liability as carrier under the bill of lading, but if the foregoing analysis is correct, the consignee need not be concerned with the possibility that his subsidiary company may be obliged under the charterparty to indemnify or compensate the shipowner for such liability. ■

Endnotes

1. International Carriage of Goods by Sea Act of Japan (Law No. 172, 1957 as amended June 1, 1993), hereinafter "Japan COGSA".
2. NANYOZAI CHARTER PARTY (Codename: NANYOZAI 1967), published by The Japan Shipping Exchange, Inc. and generally used for the carriage of logs from Southeast Asia.
3. BEIZAI (American Logs/Lumber) CHARTER PARTY (Codename: BEIZAI 1991), published by The Japan Shipping Exchange, Inc. The original version of this form, BEIZAI 1964, was in substantially the same terms as NANYOZAI 1967. For a commentary on the 1991 revision of the BEIZAI form, see Tottori, "Notes on BEIZAI (American Logs/Lumber) CHARTER-PARTY" (1993) 25 Bulletin of the Japan Shipping Exchange, Inc. 65.
4. SHUBIL BILL OF LADING (Codename: SHUBIL-1994(B)), published by The Japan Shipping Exchange, Inc.
5. Occasionally the consignee will himself voyage charter the vessel, and if the voyage charter is made with the issuer of the bill of lading (either the shipowner or a time charterer) the contract of carriage will be the charterparty such that the possibility of the shipowner claiming an indemnity for the master signing bills of lading as presented cannot arise: see *President of India* v. *Metcalf Shipping Co.* [1969] 2 Lloyd's Rep. 476 (C.A.).
6. As in *The Stranna* [1938] 60 Ll.L.R. 51 (C.A.).
7. Japan COGSA is applicable because Cl. 2 of the SHUBIL bill of lading stipulates that the bill of lading "shall be governed by Japanese law"; by its first Article, Japanese COGSA applies to the carriage of goods by ship when either the port of loading or the port of discharge is outside Japan.
8. It will be noted that earlier versions of the SHUBIL form provided in Cl. 2 that "Goods shipped on deck are solely at the risk of the shippers, consignees or owners of the goods". When clean bills of lading were issued, such a clause was properly void by operation of Articles 15(1) and 18(1)-(2) of Japanese COGSA.
9. Under English law, if goods are carried on deck under a bill of lading not claused to that effect, the Hague-Visby Rules apply to define the obligations of the carrier; moreover, in such circumstances it is arguable that the carrier is not entitled to rely on the defences and package or weight limitations otherwise available to him. See *The Chanda* [1989] 2 Lloyd's Rep. 494 (Q.B., Com. Ct.) and the New Zealand High Court decision in *The Pembroke* LMLN 370 (unrep., 10 August 1993). Cf. *The Antares* [1987] 1 Lloyd's Rep. 427 (C.A.), in which it was held that the one year time bar for cargo claims applied even when, because

the cargo had been carried on deck, there had been a breach of the contract of carriage. This case is sometimes taken as authority that, by analogy, the package or weight limitations apply even when cargo is uncontractally carried on deck; however, it was expressly distinguished in both *The Chanda* and *The Pembroke*. In America, where, unlike in England, the concept of quasi-deviation subsists, the rule is that when there has been carriage on deck without this fact being declared on the face of the bill of lading, if the carriage on deck is held to have been unreasonable such carriage is a quasi-deviation and the carrier is deprived of any defenses or limitations provided in the contract of carriage or the Hague Rules: see *Leather's Best International* v. "*Lloyd Sergipe*" 1991 AMC 1929 (SDNY) at 1943-44.

10. Clause 22 in the NANYOZAI charterparty, which provides that "Indemnity for non-performance of this Charter shall be proved damages", is not an express contractual undertaking. A very similarly worded provision in BIMCO's Gencon form of charter was described by Bingham J in *The C Joyce* [1986] 2 Lloyd's Rep. 285 (Q.B., Com. Ct.) at 288 as a "somewhat anaemic clause" which would not give rise to an express indemnity in the circumstances of the case now posited. The so-called Indemnity Clause was deleted from the BEIZAI form when it was revised in 1991.

10a. See also *The Island Archon* [1994] 2 Lloyd's Rep. 227 (C.A.)

11. In *The Nogar Marin* the master issued clean bills of lading for goods in apparently damaged condition whereas in the case now posited the master is signing bills of lading which do not indicate on their face that part of the cargo is being carried on deck. It is suggested that a bill of lading which is not claused to indicate that goods are carried on deck contains an implied representation that the goods are carried below deck, just as a "clean" bill of lading contains an implied representation that the goods are in apparent good order and condition: see, for example, Tetley, *Marine Cargo Claims* (1988, 3rd ed) at pp. 651-52.
Therefore, the principle in *The Nogar Marine* applies equally to both situations. ■

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