THE BULLETIN OF
THE JAPAN SHIPPING EXCHANGE, INC.

No. 32

March 1996

CONTENTS

Sky Reefer[1] — Enforceability of Foreign Arbitration Clauses in COGSA Governed Bills of Lading

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SCOPE: This short article does not deal with all of the issues raised by *Sky Reefer*. Rather it focuses on (1) the scope of this court's express overruling of *Indussa*, (2) the scope of *Sky Reefer* including issues left unresolved, and (3) practitioner oriented anecdotal information relevant to maritime arbitration in Japan in the context of *Sky Reefer*.

SUMMARY OF HOLDING: Foreign arbitration clauses contained in bills of lading covered by the Carriage of Goods by Sea Act (COGSA), 46 U.S.C. §§ 1300 et seq., (1936, as amended) will be enforced unless the court can be persuaded that a combination of choice-of-law and choice-of-forum clauses act together to emasculate petitioner's right to a statutory recovery, in which case the arbitration clause may be invalidated on public policy grounds.

BACKGROUND

The case in question involved a cargo of oranges and lemons shipped by Moroccan fruit supplier Galaxie Negoce, S.A. (Galaxie) from Agadir, Morocco to receivers Bacchus Associates (Bacchus) in New Bedford, Massachusetts, U.S.A. on board the 6,049 ton motor refrigerated cargo vessel SKY REEFER. Upon opening her hatches at the port of New Bedford the cargo was discovered to have shifted within the holds during ocean carriage, resulting in over US$1,000,000 in damages. Allegedly the shifting was caused by inadequate stowage for a winter passage of the Atlantic.[2] As is typical in this sort

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1 Vimar Seguros y Reasuguros, S.A., Petitioner v. M/V SKY REEFER, her engines, etc., at al., 1995 AMC 1817; 115 S. Ct. 2322 (19 June 1995).

2 "The apparent cause of the damage was the crew's failure to lash and brace the cargo sufficiently for a trans-Atlantic crossing in mid-winter." Petitioner's Brief (at page 9) dated 12 January 1995 to the U.S. Supreme Court on Writ of Certiorari to the United States Court of Appeals for the First Circuit in the matter of *Vimar Seguros y Reseguros, S.A., Petitioner, v. M/V Sky Reefer, Her Engines, Etc., and M.H. Maritima, S.A., Respondents* (Hereinafter, Petitioner's Brief at __). This point is critical because Bacchus alleges that under the Japanese Hague Rules the carrier would be exempt from liability for improper stowage by shipper appointed stevedores, whereas under U.S. COGSA, Bacchus alleges that the carrier's duty to properly stow the cargo is non-delegable.

of case, a series of charterparties[3] linked M.H. Maritima (Maritima), the Panamanian[4] shipowner of the carrying vessel, and the receiver Bacchus. The bill of lading in question was issued to Galaxie by Nichiro Corporation[5] (Nichiro), the second sub-charterer under Maritima. Bacchus (charterer) entered into a charterparty with Nichiro (charter owner) for the full carrying capacity of the SKY REEFER for one voyage from Agadir to New Bedford. The bill of lading named Galaxie as Shipper, Bacchus as both consignee and notify party,[6] contained a "local law" clause, and provided for arbitration in Tokyo with the application of Japanese law.[7] As purchaser of the cargo Bacchus took possession of

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3 *See*, Respondents Brief (at at footnote 1) dated 21 February 1995 to the U.S. Supreme Court on Writ of Certiorari to the United States Court of Appeals for the First Circuit in the matter of the *Sky Reefer*,. (Hereinafter, Respondent's Brief at __). The headcharter was a time charterparty on the "BALTIME 1939" form between Maritima (as owners) and Honma (as time charterers). Honma (as charter owner) in turn sub-chartered the vessel to Nichiro (as time charterer) on the "BALTIME 1939" form. Finally, Nichiro (as charter owner) sub-chartered the vessel to Bacchus (as voyage charterer) on 1 February 1991. Thereby, Bacchus became entitled to the full carrying capacity of the SKY REEFER for one voyage from Agadir, Morocco to New Bedford, Massachusetts. Nichiro issued a bill of lading to Galaxie (shipper) who, it appears, was responsible for stowing the cargo onboard the vessel. As a matter of course in selling the shipment of fruit, Galaxie transferred the bill of lading to Bacchus. It is this bill of lading that contractually binds Bacchus (as consignee) and Maritima (as owner) and forms the basis for Bacchus' suit.

4 With respect to the matter of ownership, note that the SKY REEFER is no longer the "SKY REEFER," presently she sails as the SUN BIG No. 1 (*see,* Lloyd's Register of Ships (LRS) 1995-96 at "Former Names of Ships" at p. 1950). LRS 1995-96 lists "Sun Big Shipping S.A." as owners of the SUN BIG No. 1; the "Sun Big Shipping S.A." entry makes reference to "Phoenix Ocean Systems," who have a Tokyo address and are described as "Managers" of the SUN BIG No. 1. (*see*, LRS, List of Shipowners (LSO) 1995-96) The LRS 1994-95 entry for the SKY REEFER shows M.H. Maritima S.A. as the registered owner, but refers to "Honma Senpaku," also with a Tokyo address (*see*, entry in LRS, LSO 1994-95), which makes no mention of the SKY REEFER, *see*, LRS, LSO 1994-95. The above offers a glimpse at the ownership and management relationships of the ex SKY REEFER and perhaps sheds some light on the reason "Panamanian" owners included Japanese law and forum clauses in their bills of lading; this short hand analysis also hints at the difficulties parties encounter identifying the "actual" vessel owner.

5 Variously referred to as "Nichiro," "Nichiro Corp.," and/or "Nichiro Gyogyo K.K." *See*, Lloyd's Register of Shipping, List of Shipowners 1994-95 and 1995-1996.

6 Respondent's Brief at page 6.

7 Id. at page 7, indicating that Clause 3, titled "Governing Law and Arbitration," provides as follows: (1) The contract evidenced by or contained in this Bill of Lading shall be governed by the Japanese law. (2) Any dispute arising from this Bill of Lading shall be referred to arbitration in Tokyo by the Tokyo Maritime Arbitration Commision (TOMAC) of The Japan Shipping Exchange, Inc., in accordance with the rules of TOMAC and any amendment thereto, and the award given by the arbitrators shall be final and binding on both parties. Note that this is a standard form clause promulgated by the Japan Shipping Exchange, Inc. (JSE) for use in maritime contracts, being incorporated, for instance, into the JSE Reefer BILL OF LADING (JSE Reefer B-L), *See*, Forms of Maritime Documents Issued or Adopted by the Japan Shipping Exchange, Inc., 1989 at page 9.

the bill of lading on which their suit was based. Spanish cargo insurer Vimar Seguros y Reaseguros. S.A. (Vimar)[8] compensated Bacchus for part of the damage and subrogated thereby to the claim *pro tanto* in the amount of US$733,442.90.

Bacchus brought suit under the bill of lading in U.S. Federal District Court (Massachusetts) against Maritima, *in personam*, and the SKY REEFER, *in rem*. Maritima answered with a motion to compel Tokyo arbitration and stay plaintiffs' action in federal district court. Maritima's motion was founded on clause 3 of the bill of lading and relevant sections of the FAA[9]. Bacchus opposed this motion on grounds that the arbitration clause was "unenforceable under the FAA" for two reasons. First, Bacchus claimed the arbitration clause was a "contract of adhesion," and as such unenforceable. Second, Bacchus claimed that the arbitration clause violated COGSA 3(8) by lessening the carrier's liability. With regard to the contract of adhesion argument, Bacchus relied on federal case law to the effect that, "the FAA does not require parties to arbitrate when they have not agreed to do so..."[10] Bacchus further cited authority to the effect that, "almost all bills of lading are boilerplate contracts of purest adhesion; all the statutory law dealing with them starts from the policy premise that their holders need protection from the overreaching of their utterers."[11] Secondly, Bacchus argued that enforcing the Tokyo arbitration clause would lessen the carrier's liability in violation of COGSA 3(8)[12] by

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8 Hereafter, references to Bacchus in the capacity of petitioner include Vimar as well.

9 *See*, Respondent's Brief at page 4. Federal Arbitration Act, 9 U.S.C. §§ 1, 2 et. seq. Respondents cited § 1 of the FAA as providing, "in pertinent part:" 'Maritime transactions', as herein defined, means charter parties, bills of lading of water carriers, ... or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations ... Respondents also cited § 2 of the FAA "in pertinent part" as follows: "A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction...shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." Further, in regard to TOMAC arbitration procedures, in the current session the Japanese Diet will consider legislation to allow foreign attorneys to represent clients before arbitration panels in Japan, *see* also Takao Tateishi at the end of this edition of the JSE Bulletin.

10 Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University, 489 U.S.468, 478 (1989).

11 Petitioner' brief at footnote 28 and accompanying text, quoting Charles L. Black, Jr., The Bremen, COGSA and the Problems of Conflicting Interpretation, 6 Vand. J. Trans. L. 365, 368 (1973). But note the comments of Mr. Philip J. Lorre, *infra*, at note 59 and accompanying text.

12 46 U.S.C. § 1303(8) provides in pertinent part that, "[a]ny clause, covenent or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault or failure in the duties and obligations provided in this section, or lessening such liability otherwise than as provided in this chapter, shall be null and void and of no effect."

increasing the costs and difficulty of pursuing their claim.[13]

The District Court was not receptive to either argument.[14] First, with regard to Bacchus' argument that the arbitration clause was an adhesionary contract and hence unenforceable, the district court found that: (1) Congress had included maritime bills of lading in section 1 of the FAA; and, (2) petitioner was sufficiently sophisticated[15] to bargain with the carrier. Second, the court held that Tokyo arbitration, in compliance with clause 3 of the bill of lading, did not act to lessen liability in a way prohibited by section 3(8).[16] Having rejected both of Bacchus' substantive arguments, the court granted Maritima's motion to stay the action in their court and compel arbitration in Tokyo.[17] The district court retained jurisdiction, however, pending the conclusion of Tokyo arbitration and certified for interlocutory appeal the issue of whether section 3(8) of COGSA acts to nullify an arbitration clause contained in a bill of lading governed by COGSA.

Assuming, arguendo, that a foreign arbitration clause lessened the carrier's liability in a manner proscribed by COGSA 3(8), the First Circuit Court of Appeals analyzed the conflict thereby raised between section 2 of the FAA and COGSA 3(8).

Finding the FAA to be the more specific and later enacted statute, and therefore con-

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13 Bacchus did not specifically allege how much more they expected it would cost to arbitrate in Japan than to litigate in the U.S. federal courts. Note that the TOMAC arbitration fee for a claim in the amount of ¥108,000,000 (the equivalent of US$1,000,000 as of 1 February 1996) would be ¥1,250,000 (US$11,574). *See*, The TOMAC Tariff of Fees for Arbitration Costs attached to the Rules of Maritime Arbitration of the Japan Shipping Exchange, Inc. [Ordinary Rules], ("The amount of the arbitration fee to be paid by each party shall be as follows. When the amount of claim is Yen 15,000,000 or less, the fee is Yen 350,000. When the amount of claim exceeds Yen 15,000,000 but does not exceed Yen 100,000,000, the fee is the fee to be paid for 15,000,000 plus Yen 10,000 for each additional Yen 1,000,000. When the amount of claim exceeds Yen 100,000,000, the fee is the fee to be paid for 100,000,000 plus 20,000 for each additional 10,000,000.") According to TOMAC Arbitration Regulations, the petitioner must pay this amount at the time TOMAC takes reference of the claim. The question of which of the parties will eventually bear the burden of this fee is left to the discretion of the arbitration panel. Although the losing party is often required to pay, TOMAC arbitration panels respect agreements between the parties concerning the allocation of arbitration costs. See also, the JSE Arbitration Procedures Guidebook (はやわかり仲裁手続マニュアル-*Hayawakari Chusai Tetsuzuki Manual*), which the writer understands is scheduled for publication in English translation within the year.

14 *Sky Reefer*, 1995 AMC 1817, 1818.

15 Bacchus subchartered the SKY REEFER for the voyage in question, *see* footnote 3, and accompanying text, *supra*. At the time of fixing the voyage charter it may have been possible to negotiate for terms in the bill of lading favorable to Bacchus' interests. In relative terms, it would seem safe to say that, as the voyage charterer of the entire vessel, Bacchus was better positioned to negotiate for advantageous bill of lading terms than a shipper/consignee of part shipment on a liner vessel.

16 46 U.S.C. §1303(8)

17 *Sky Reefer*, 1995 AMC 1817, 1819.

trolling over COGSA 3(8), the First Circuit Court of Appeals affirmed the District Court's order to compel Tokyo arbitration.[18] Attorneys for Bacchus appealed the decision of the First Circuit Court of Appeals and the U.S. Supreme Court granted certiorari, "to resolve a circuit split[19] on the enforceability of foreign arbitration clauses in maritime bills of lading."[20]

In their briefs to the court, both Bacchus and Maritima addressed the issue of statutory construction.[21] Bacchus proposed that the relevant provisions of section 3(8) of COGSA and section 2 of the FAA, although apparently in conflict, are reconciled[22] by the so-called "savings clause" of the FAA. The FAA savings clause requires the enforcement of arbitration agreements, "save upon grounds as exist at law or in equity for the revocation of any contract."[23] Bacchus concluded that if a contract is indeed a "contract of adhesion," that alone is grounds for revocation, and the contract must be void and within the FAA savings clause.[24]

Finding that it was their duty, "absent a clearly expressed congressional intent to the contrary,"[25] to interpret both statutes as effective, the Supreme Court reduced the statutory construction question to a non-issue. Regarding whether COGSA or the FAA controlled, the majority held that "[t]here is no conflict unless COGSA by its own terms nullifies a foreign arbitration clause."[26] The Supreme Court went on to hold that COGSA does not per se invalidate foreign arbitration clauses. In reaching this conclusion the court expressly overruled *Indussa*[27] and its progeny.

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18 Vimar Seguros y Reaseguros, S.A., v. M/V SKY REEFER, 29 F.3d. 727, 733 (1994).

19 *Compare*, State Establishment for Agriculture Product Trading v. M/V Wesermunde, 838 F 2d. 1576 (CA11) (declining to enforce arbitration clause because that would violate COGSA), with the decision of the 1st Circuit Court of Appeals in the *Sky Reefer* case, below.

20 *Sky Reefer*, 1995 AMC 1817, 1819.

21 Petitioner's Brief at section B(1); Respondent's brief at ARGUMENT Section B.

22 This reading of COGSA and the FAA would allow the court to enforce both statutes and would avoid an exercise in statutory construction and analysis that would seem to favor Maritima. Although the supreme court did not decide this issue, it seems likely that if COGSA and the FAA were found to be in conflict, the FAA, being the later enacted statute would probably govern, at least this is how the court of appeals held, *see*, 29 F.3d. 727, 731 (1994).

23 9 U.S.C. § 2.

24 Petitioner's Brief at footnote 22 and accompanying text, quoting Southland Corp. v. Keating, 465 U.S. 1, 20 (1984), Steven, J. concurring and disssenting, ("A contract which is deemed void is surely revocable at law or in equity...").

25 Id. at 8, quoting Morton v. Mancari, 417 U.S. 535, 551 (1974); Pittsburgh & Lake Erie R. Co. v. Railway Labor Executives' Assn., 491 U.S. 490, 510 (1989).

26 *Sky Reefer*, 1995 AMC 1817, 1819.

27 Indussa Corp. v. S.S. Ranburg, 377 F. 2d 200 (1967) (en banc).

INDUSSA OVERRULED

For nearly 30 years cargo interests suing under COGSA and seeking to avoid the effect of foreign forum selection agreements have relied on the doctrine developed by the Second Circuit Court of Appeals in *Indussa*. *Indussa* involved a shipment of nails from Antwerp to San Francisco by a Belgian shipper to a New York consignee (Indussa).[28] Indussa sued the Norwegian carrier under the bill of lading, which provided for the jurisdiction of the country where the carrier had its principal place of business and the application of the domestic enactment of the Hague Rules of the country of shipment, unless the carriage was subject to COGSA, in which case COGSA would apply during the entirety of the period the cargo was in the custody of the carrier.[29]

The Second Circuit Court of Appeals reversed the decision of the District Court to dismiss the suit for lack of jurisdiction. The Court of Appeals reasoned that COGSA 3(8) disallowed foreign forum selection clauses in cases governed by COGSA on the following grounds: (1) foreign judicial forums constituted a "high hurdle" for the plaintiff creating pressure to settle claims for less; (2) there was no guarantee that a foreign tribunal would apply COGSA; and, (3) even if COGSA were applied, there was no guarantee of uniform interpretation because foreign tribunals are not subject to the supervision of the U.S. Supreme Court. The *Indussa* Court concluded that the above effects constituted a "lessening" of the carrier's liability in a manner disallowed by COGSA 3(8).

Indussa did not directly address arbitration agreements,[30] but subsequent decisions extended the reach of *Indussa* to invalidate both domestic[31] as well as foreign[32] arbitration clauses contained in bills of lading. Even within the Second Circuit, however, the rule does not appear to have been uniformly enforced, as courts came down on both sides of the fence with regard to the validity of foreign arbitration clauses in cases brought under bills of lading.[33] Although *Indussa* was strictly speaking a foreign forum selection clause

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28 Id. 377 F.2d at 201.

29 Id. at 200 - 201.

30 In fact, commentators have pointed out that the *Indussa* court expressly excluded foreign arbitration clauses from the scope of its holding. The *Indussa* court reasoned that, were there found to be a conflict between COGSA and the FAA, the latter, as the later enacted statute, would govern. See, Alan Nakazawa and B. Alexander Moghaddam, *COGSA and Choice of Foreign Law Clauses in Bills of Lading*, 17 Tul. Mar. L.J. 1 at footnote 35, (1992).

31 Scherk v. Alberto-Culver Co., 417 U.S. 506, 519 (1974).

32 *See*, e.g., M/V Wesermunde, 838 F 2d. 1576 (11th Cir. 1988); Organes Enter v. M/V Khalij Frost, 1989 AMC 1460 (S.D.N.Y. 1989) (holding foreign arbitration clause unenforcable)

33 *Compare*, for instance, Organes Enter v. M/V Khalij Frost, 1989 AMC 1460 (S.D.N.Y. 1989) (holding foreign arbitration clause unenforcable), with Travelers Indem. Co. v. M/V Mediterranean Star, 1988 AMC 2483 (S.D.N.Y. 1988) (finding a foreign arbitration clause valid).

decision, commentators have found it nonetheless relevant to the issue of foreign law clauses.[34] One reason was the importance *Indussa* placed on the possibility that COGSA might not be applied — which was a central part of Bacchus' argument in *Sky Reefer.*

Explicitly overruling *Indussa,* a seven to one majority of the *Sky Reefer* Court held that: (1) foreign arbitration clauses in bills of lading are not violative of section 3(8) of the U.S. Carriage of Goods by Sea Act (COGSA) prohibition against clauses that lessen the liability of the carrier; and (2) the provisions of the FAA and COGSA are not in conflict and that therefore the issue of which of the two controls need not be decided.

THE RULE OF *SKY REEFER*

One lesson of *Sky Reefer* is straightforward. Foreign arbitration clauses contained in bills of lading covered by COGSA will be enforced unless the court can be persuaded that a combination of choice-of-law and choice-of-forum clauses act together to emasculate petitioner's right to a statutory recovery, in which case the clause may be invalidated on public policy grounds. No longer will COGSA 3(8) lessening of liability be interpreted to include increased arbitration costs incurred by the parties as a result of arbitration in a foreign forum.[35] Writing for a 7-1 majority, Justice Kennedy relied on three distinct lines of reasoning in reaching this conclusion. First, the court cited the "unwieldy" task that would befall the courts were they forced to "tally the costs and burdens to particular plaintiffs in light of their means, the size of their claims, and the relative burden on the carrier." Moreover, the court noted that invalidating arbitration clauses on the grounds of increased cost and inconvenience would provide "no principled basis for distinguishing national from foreign arbitration clauses." After *Sky Reefer,* plaintiffs who argue that the increased burden of litigation in a distant forum lessens the carrier's liability under COGSA 3(8) can expect to be disappointed. Second, the court cited the desirability of harmonizing the interpretation of COGSA[36] by American courts with the interpretations by foreign courts of their domestic enactments of the Hague Rules.[37] Noting that none of the sixty-six sovereign states which had enacted the Hague Rules into domestic law disallowed foreign

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34 *See,* e.g., Nakazawa and Moghaddam, 17 Tul. Mar. L.J. 1, 4 (1992).

35 *Sky Reefer,* 1995 AMC 1817, 1826. *See* also Note 13 and accompanying text, supra, for a discussion of the costs of TOMAC arbitration.

36 Id., The court noted that COGSA (46 U.S.C. ∫ 1300, et. seq) was modeled on the Brussels Convention for the Unification of Certain Rules Relating to Bills of Lading, 51 Stat. 233 (1924) (popularly known as the "Hague Rules") and that "sixty-six countries, including the United States and Japan, are now parties to the Convention."

37 *Sky Reefer,* 1995 AMC 1817, 1823.

forum selection clauses on the basis of Section 3(8),[38] the Court "declined to interpret [the American] version of the Hague Rules in a manner contrary to every other nation to have addressed the issue."[39]

As the third and final reason offered by the majority for disallowing the future use of COGSA 3(8) as a shield against inconvenient or expensive forums, the Court indicated their unwillingness to "interpret COGSA to disparage the authority or competence of international forums for dispute resolution."[40] Whether *Sky Reefer* will lead to increased reliance by U.S. courts on foreign maritime decisions remains uncertain.[41] But litigants who argue for insular interpretations of U.S. maritime law may be disappointed. Litigants have been forewarned that the court will be less tolerant of arguments against foreign arbitration agreements that rely on a negative prejudice against the capability or reliability of foreign arbitration organs. Barring evidence to the contrary, confidence in foreign arbitration would seem to be presumed under *Sky Reefer*.[42]

UNRESOLVED ISSUES

1. ARE CARRIER'S COGSA DUTIES NON-DELEGABLE?

Bacchus' question whether Japanese arbitrators would apply COGSA raised "a concern of substance."[43] Bacchus alleged that the Japanese Hague rules provide the carrier with

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38 *Sky Reefer*, 1995 AMC 1817, 1823.

39 Id. at 1824.

40 Id.

41 Maritime transactions and maritime law are inherently international. The majority opinion in *Sky Reefer* cited two foreign decisions. First, *see*, Maharani Woollen Mills Co. v. Anchor Line, [1927] 29 Lloyd's List L. Rep. 169 (C.A.) (holding forum selection clauses permissable under COGSA), cited at *Sky Reefer*, 1995 AMC 1817, 1823, but note the concurrance by Justice O'Conner objecting to the majority's wholehearted approval of an old English case as support for overruling *Indussa*. Second, *see* the Hollandia [1983] A.C. 565, 574-575 (H.L. 1982) (in support of the proposition that internationally courts have interpreted COGSA 3(8) as not invaliding forum clauses), cited in *Sky Reefer*, 1995 AMC 1817, 1826.

42 It is interesting to note, however, that the Supreme Court placed some importance on the fact that the district court had retained jurisdiction and the power thereby to review any eventual arbitral award. It could be argued that hinging the validity of foreign arbitration clauses upon the retention of jurisdiction by the lower courts constitutes only a half-hearted endorsement of foreign arbitration.

43 *Sky Reefer*, 1995 AMC 1817, 1825. In the end, the court declined to answer Bacchus' question, redefining instead the relevant inquiry. Where Bacchus had wondered *whether COGSA would be applied*; the court asked themselves whether "*the substantive law to be applied will reduce the carrier's obligations below what COGSA guarantees* (emphasis added) [,]" a fundamentally different inquiry. With a stroke of the pen, the prospectively unanswerable question of whether a foreign arbitration panel would apply COGSA was reduced to a non-issue. The court had a novel response for the issue poised by Bacchus' argument that

a defense for acts and omissions of stevedores hired by the shipper, a defense which Bacchus asserted was unavailable under COGSA. Bacchus asserted that Japanese COGSA makes the "carrier liable when he or the persons employed by him fail to take due care[;]"[44] but COGSA makes "non-delegable the carrier's obligation to properly and carefully stow the goods carried."[45] The court, however, did not rule on this "concern of substance." Instead they concluded that the issue was premature because it remains unclear how the arbitrators would rule.[46] In this regard the court of appeals was more straight-forward. They held that "only the validity of the arbitration clause [was] at issue on [the] interlocutory appeal. [And that, i]n light of [their] holding, the choice-of-law question must be decided, in the first instance, by an arbitrator."[47] The statutory provisions referred to by the Supreme Court in considering whether a carrier's duties to stow the cargo are delegable under COGSA, on the one hand, and under the Japanese Hague Rules on the other, were as follows:

The Japanese Carriage of Goods by Sea Act, 1992[48]

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

(1) The carrier shall be liable for loss, damage or delayed arrival of the goods which are caused by his own or his servant's negligence for the receipt, loading, stowage,

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there was no guarantee that foreign arbitrators would apply COGSA — they dodged it. After *Sky Reefer*, the cargo lawyer seeking to invalidate an onorus foreign arbitration clause has one less arrow in his quiver. *Sky Reefer* warns litigants that choice-of-law arguments will run up against a stone wall. The court can always fall back on the response that, having retained jurisdiction, the district court has the power to review subsequent awards for fairness.

44 *Sky Reefer*, 1995 AMC 1817, 1825.

45 Id. at 1825-26, citing Associated Metals & Minerals Corp. v. M/V Arktis Sky, 1993 AMC 509, 513; 978 F.2d 47, 50 (2 Cir. 1992).

46 Id. at 1826.

47 *Sky Reefer*, 29 F.3d 727 at footnote 3.

48 *See, Kazuo Iwasaki*, Revision of Japanese COGSA - Adoption of the Hague Visby Rules - The Bulletin of the Japan Shipping Exchange, Inc., March 1993, No. 25 at page 1. (Professor Iwasaki of the Nagoya Univeristy Law Faculty translates Japanese COGSA into English and highlights changes scheduled to go into effect on 1 June 1993. *Writer's note: although this was not the precise version of COGSA in effect at the time of the Sky Reefer shipment (February 1991), the relevant portions of the text are identical.) See* at page 1, "[t]he Japanese present Carriage of Goods by Sea Act (COGSA) was enacted in 1957 when Japan ratified the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading of 1924 (the Hague Rules). Since the Hague Rules have been revised twice first by the 1968 Protocol to Amend the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading of 1924 (the Visby Rules) and by the 1979 Protocol Amending the International Convention fort the Unification of Certain Rules of Law relating to Bills of Lading, 25 August 1924 as amended by the 1968 Protocol (the SDR Protocol). The Hague Rules amended by the Visby Rules and the 1979 Protocol are called the Hague-Visby Rules.

carriage, custody, discharge and delivery of such goods.

COGSA 46 U.S.C. §1304(2)(i)

§1304. Rights and immunities of carrier and ship

(2) Uncontrollable causes of loss. Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from —

(i) Act or omission of the shipper or owner of the goods, his agent or representative;

Although the court reached no conclusion, it suggested that the *prima facie* effect on carrier's liability for acts or omissions of stevedores hired by the shipper is the same under both statutes. Albeit in dictum, the court implied that even assuming the arbitrators follow the Japanese Hague Rules,[49] the outcome would be the same under COGSA.[50] In the view of this writer, however, this question may not be so simple. Both English[51] and American[52] courts have considered an analogous issue; whether F.I.O.[53] clauses can be construed to limit the carrier's liability for damage done to the cargo by stevedores hired

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49 Because the shipment in question took place in February 1991, *see* SKY REEFER, 29 F.3d 727, if the Japanese Hague Rules are found to apply at all, the applicable law will be that which was effective in February 1991.

50 *Sky Reefer*, 1995 AMC 1817, 1825-26.

51 Perhaps the leading English case on this issue is the Coral [1993] 1 Lloyd's Rep. 1, 5 (C.A) (Holding that with regard to losses incurring during stevedorage, the carrier cannot be exempt from his duties to the holder of the bill of lading under the Hague Rules). And *see*, The Aliakmon, [1983] 1 Lloyd's Rep. 203, 208. (Stating, albeit in dicta, that while the court will respect freedom of contract between owner and charterer, the carrier must fulfil his duties under the English COGSA Rules.)

52 The *M/V Arktis Sky*, 1993 AMC 509, 513 (cited for the proposition that carrier's obligations to stow carefully under COGSA are non delegable.) And *see*, Nichimen Co. v. M/V Farland, 462 F.2d 319, 330 (2 Cir. 1972); 1972 AMC 1573, 1587 ([i]n any event, under §3(2) of COGSA, the carrier's duty to 'properly and carefully load...[and] stow... the goods carried' is non-delegable.") But compare, Sigri Carbon Corp. v. Lykes Brothers Steamship Co., Inc., 655 F.Supp. 1435 (Dist. Ct., Western Dist. Kentucky 1987); 1988 AMC 1787, 1795 (holding that, under COGSA 4(2)(i), a common carrier is "not responsible for improper stowage undertaken by a shipper pursuant to a F.I.O.S. term in a bill of lading.") The writer is of the view that although *Sky Reefer* represents a narrowing judicial view of COGSA 3(8) it does not go so far as to implicitly favor the reasoning of *Sigri Carbon* over that of *Arktis Sky*. The split in the circuits remains; but even after *Sky Reefer* this writer considers *Arktis Sky* as representative of the majority view with regard to F.I.O. clauses.

53 *See*, Eric Sullivan F.I.C.S., The Marine Encyclopaedic Dictionary, Lloyd's of London Press, 1988. (at page 176: "**Free in & Out** All expenses in regard to the loading and/or unloading of merchandise are borne by the shippers and/or receivers and free to the ship. Today the common insertion of FIOS or F.I.O.S. or f.i.o.s. is to be seen meaning Free In and Out and Stowed. The word 'Stowed' is added to emphasise that even the stevedorage expenses which are paid on Liner Terms, *q.v.*, are to be free to the ship. *Abbrev.* FIO or F.I.O or f.i.o.")

by a party other than the carrier. If indeed *Sky Reefer* left this issue undecided, the majority rule today under both English and American law with respect to cargo damage incurred under a bill of lading incorporating F.I.O. terms would still seem to be that carrier's duties under COGSA 3(8) are non-delegable.

2. WHAT CIRCUMSTANCES WOULD OFFEND PUBLIC POLICY?

The court's reliance on the reasoning in the *Mitsubishi Motors*[54] decision left a chink in the stone wall blocking COGSA 3(8) choice-of-law arguments. *Sky Reefer* reserves leeway for the litigant to persuade the court that "choice-of-forum" and "choice-of-law" clauses, taken together, act as "a prospective waiver of a party's right to pursue statutory remedies."[55] But *Sky Reefer* provides no standards to determine whether a particular set of facts satisfies the criteria for the *Mitsubishi Motors*, choice-of-forum, choice-of-law one-two public policy punch. And *Mitsubishi Motors*, which is not a maritime case, offers little relevant guidance.

3. WHAT IF THE DISTRICT COURT DOES NOT RETAIN JURISDICTION?

As pointed out in Justice O'Conner's concurrence,[56] the importance placed by the majority on the ability of the district court to review the arbitration award suggests that *Indussa* need not have been overturned. *Indussa* was concerned with a forum selection clause which divested the court of jurisdiction. The arbitration clause in *Sky Reefer*, on the other hand, allowed the district court to retain jurisdiction. In consideration of the importance the majority placed upon the district court's ability to review the arbitral award for fairness, what the court would have decided if the district court could not retain jurisdiction is uncertain. Assume a case on the same facts as *Indussa* (a forum selection clause, not foreign arbitration clause) came before the court today. Given the express overruling of *Indussa*, it would seem as though the court would have no choice but to enforce the foreign forum selection clause. But note that by enforcing a foreign forum selection clause the court would necessarily be ousting itself of jurisdiction. Would the case fall within the reservation left by *Sky Reefer*? There are at least two possible outcomes:

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54 Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 638 (1985) (as paraphrased by *Sky Reefer*: if international arbitral instutions "are to take a central place in the international legal order, national courts will need to 'shake off the old judicial hostility to arbitration,' and also their unwillingness to cede jurisdiction of a claim arising under domestic law to a foreign or transnational tribunal")

55 *Sky Reefer*, 1995 U.S. Lexis 4067 at 8, citing *Mitsubishi Motors*, 473 U.S. 637. *See* footnote 7 and accompanying text, *supra*, noting that the bill of lading in question provided for Tokyo arbitration (choice-of-forum) and the application of Japanese law (choice-of-law). Apparently the combination of choice-of-law and choice-of-forum clauses in the instant case were insufficient to constitute a "prospective waiver of a party's right to pursue statutory remedies" as defined by *Mitsubishi Motors* and interpreted by *Sky Reefer*.

56 *Sky Reefer*, 1995 AMC 1817, 1827.

(1) Even without being able to retain jurisdiction, the foreign forum clause is enforced.

(2) The court rules that *Indussa* was overruled only so far as it applied to arbitration agreements — therefore, a forum selection clause in a subsequent case will not be enforced because the district court would be unable to retain jurisdiction.

4. WHAT PARTIES ARE COVERED BY *SKY REEFER*?

Is an arbitration clause incorporated into a bill of lading from a voyage charter party binding on the vessel owner who was neither a party nor a signatory to the voyage charter party? In *Sky Reefer*, since the arbitration clause was within the bill of lading, the issue of incorporation did not come into question, but what will be the outcome when incorporation is an issue? *See*, Citrus Marketing Board of Israel and AGREXCO (U.S.A.) Ltd., Plaintiffs v. M/V ECUADORIAN REEFER, HER ENGINES, ETC., in rem, Defendant, 1991 AMC 1042, 754 F.Supp. 229 (Dist. Ct. of Mass. 1990) (Voyage charter London arbitration clause, incorporated by reference into the bill of lading, held to bind charterer to arbitration against vessel owner even though owner was not a party to the voyage charter) and, Coastal States Trading, Inc. v. Zenith Navigation, S.A., 446 F.Supp. 330 (SDNY 1977); *but see*, Federal Insurance Company v. M/V Audacia, 1987 AMC 566 (SDNY 1986), (Vessel owner not party to subcharter prevented from relying on arbitration clause contained in subcharter to stay plaintiff's suit under section 4 of the F.A.A. (Federal Arbitration Act, 9 U.S.C. sec. 4.)

Will the terms of the bill of lading or those of the voyage charter control where suit is between the holder of the bill of lading and the vessel owner; where the bill of lading holder is also the charterer in the voyage charter, to which the owner was not a party; and where the bill of lading provides for arbitration in one jurisdiction and the voyage charter provides for arbitration in another jurisdiction? *See*, Cargill B.V., Plaintiff v. S/S OCEAN TRAVELLER, HER ENGINES, ETC., WURSATA SHIPPING CO., Defendants, 1989 AMC 953. (Voyage charter required all bills of lading contain London arbitration clause but bill of lading in question failed to specify charter to be incorporated. Held that omission irrelevant where bill of lading holder had also negotiated charter terms. Bill of lading holder must abide by London arbitration clause. "Having agreed to London arbitration in a freely-negotiated charter party, plaintiff [Cargill] cannot avoid that obligation by claiming the rights it might have had if it were merely the assignee of a bill of lading." 1989 AMC 953 at n. 6, accompanying next and preceding paragraphs)

5. WILL FOREIGN ARBITRATION CLAUSES BE ENFORCED IN THE CONTEXT OF PROROGATION?

The arbitration clause at issue in *Sky Reefer* was successfully used in the context of

derogation. It was used in other words by defendants to move the locus of the dispute resolution forum from the one chosen by the plaintiff to one to which defendants voluntarily subjected themselves. Foreign arbitration clauses in the context of derogation typically do not involve issues of personal jurisdiction because the party seeking to use them in this context is generally the defendant. In contrast is the situation where plaintiff asserts a foreign arbitration clause to compel defendants participation in dispute resolution in a jurisdiction to which defendants do not voluntarily subject themselves. Assume facts identical to *Sky Reefer* except that the consignee is domiciled in Japan and the carrier is American. Assume further that neither the contracts in question nor the carrier have any connection with Japan. And finally assume that the Japanese consignee moves for the U.S. District Court to compel the American carrier to participate in Japanese arbitration as the defendant. The use of an arbitration clause in this context is referred to as "prorogation." Enforcing a forum selection clause in this context would necessarily involve consideration by the court of the issue of personal jurisdiction. *Sky Reefer* did not address the distinction between arbitration clauses in the contexts of "derogation" and "prorogation." Would the court enforce a foreign arbitration clause in the context of prorogation under the facts assumed above?

6. IS THERE A DISTINCTION BETWEEN THE APPLICATION OF COGSA *EX PROPRIO VIGORE* AND BY REFERENCE?

Apparently the parties stipulated that "the bill of lading at issue ...[was] covered by COGSA *ex proprio vigore*," 29 F.3d 727, 729, but neither the Court of Appeals nor the Supreme Court addressed the issue of whether to enforce foreign arbitration clauses where COGSA only applies by reference. This writer is of the view, moreover, that although the parties appear to have stipulated to the *ex proprio vigore* application of COGSA, there may have been room for arguing that COGSA did not apply under its own terms because the bill of lading holder was also the voyage charterer with rights to the use of the entire vessel for the duration of the specified voyage, and thus the carriage was "private" whereas COGSA was only intended to apply to "public" carriage. *See*, Thomas J. Schoenbaum, *Admiralty and Maritime Law*, West Publishing Co. (1987) at sec. 9-6. Had the court found the carriage in *Sky Reefer* to be private as opposed to public, common law and not COGSA would have formed the basis for the opinion, and the result may well have differed. One commentator has discerned a pattern in the circuit decisions on this point which he has named the "*North River Insurance* rule." *See*, C. Andrew Waters, *The Enforceability of Forum Selection Clauses in Maritime Bills of Lading: An Update*, 15 Tul. Mar. L. J. 29 at 40 (1990), citing North River Ins. Co. v. Fed Sea/Fed Pac Line, 647 F.2d 985 (9th Cir. 1981). (According to the *North River Insurance* rule, *Indussa* controlled and invalidated foreign jurisdiction clauses where COGSA applied *ex proprio vigore*.

Where, on the other hand, COGSA only applied by reference, the *Bremen* reasonableness test was used to determine the validity of the foreign forum selection clause. *See*, M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 1972 AMC 1407 (1972). *Indussa* having been expressly overruled by *Sky Reefer*, does *Sky Reefer* control when COGSA applies *ex proprio vigore* and *Bremen* controls when COGSA is incorporated by reference?

IN CONCLUSION: VIEWS FROM THE PRACTITIONER'S PERSPECTIVE

In May 1995 at the annual meeting of the American Maritime Law Association (MLA) in New York, just one month before *Sky Reefer* was handed down, the MLA Carriage of Goods by Sea Committee proposed, *inter alia*, that COGSA be revised to expressly invalidate foreign forum selection clauses or foreign arbitration clauses where the goods pass through any American port, or with multimodal shipments if they are initiated or completed in the United States. Although the proposed changes were scheduled to go before the membership of the MLA for a vote to determine whether to lobby congress, the vote was postponed. An MLA representative stated that "congress could change the impact of *Sky Reefer* with legislation, and the MLA [was] considering a comprehensive review of COGSA. The change would make a foreign forum clause in a bill of lading unenforceable if it involved a case where cargo was shipped to or from the United States."[57] Also along these lines, at least one commentator has proposed new legislation regarding forum selection.[58]

Soon after *Sky Reefer* was handed down, a shipping industry insider stated that "the ruling will hit the liner trades more than the bulk markets ... [because] ... different market forces [are] at work on the bulk side." Shippers have more leverage to negotiate.[59] A representative of a major protection and indemnity insurer stated that he expects more cases to be settled as a result of *Sky Reefer*. "The effect of this decision is going to force people to take a much more [realistic] view of the merits of a case and settle on a more commercially realistic basis."[60]

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57 Chester D. Hooper, president of the MLA, quoted in the 6 July 1995 edition of the New York Law Journal.

58 *See*, Patrick J. Borchers, *Forum Selection Agreements in the Federal Courts After Carnival Cruise: A Proposal for Congressional Reform*, 67 Wash. L. Rev. 55, 107 (1992) (not related to COGSA particularly but forum selection generally).

59 Philip J. Loree, Chairman of the New York based Federation of American Controlled Shipping, quoted in TradeWinds article "US ARBITRATION CLAUSE RULING STUNS SHIPPERS," 30 June 1995 at page 18.

60 Mr. David W. Martowski, President of Transport Mutual Services, Inc., the U.S. general correspon-

A practicing maritime lawyer[61] was quoted as saying that "[o]ne practical effect of the decision will be that cargo companies will pay closer attention to the arbitration forums specified on the bills of lading, which were rarely questioned before *Sky Reefer*. Major [cargo] shippers will actually bargain for [jurisdiction]." MLA president Charles Hooper brought another perspective to the issue when he stated that "cargo companies could prevent shipping lines from including foreign forum provisions because '[it is] basically a shipper's market' and [the shippers] could threaten to give their business to another shipowner."[62] ■

dent for the U.K Protection & Indemnity Club, which insures 23 percent of the world's oceangoing ships for liability. The 6 July 1995 edition of the New York Law Journal.

61 LeRoy Lambert, Healey & Baillie Maritime law partner, New York Law Journal, 6 July 1995.

62 Quoted in the 6 July 1995 New York Law Journal, Chester D. Hooper, president of the MLA and a partner at Haight, Gardner, Poor & Havens.

The Recent Developments in Chinese Maritime Law*

Genrong YU**

A. AN OVERVIEW OF THE CHINESE MARITIME CODE 1992

The Chinese Maritime Code ("CMC") was promulgated by the Standing Committee of National People's Congress of China on November 7, 1992, and entered into effect on July 1, 1993. It took almost 40 years for the Chinese legislative body to finish the drafting and more than 20 drafts had been made before its promulgation. This reflects, to some extent, the fact that CMC is considered by the Chinese legislature to be an unique and important law in the Chinese legal system. On the whole, CMC is widely considered to be consistent with the trend of the international maritime law development, and well fitted into the existing Chinese legal system.

1. ADOPTION OF INTERNATIONAL STANDARD

Although being domestic law, maritime law is a branch of law with strong international characteristics. The drafters studied intensively the maritime law in other countries and various international maritime conventions, and followed those which they believed represent the international standard of law and practice. The following are a few examples:

(1) CARRIAGE OF GOODS BY SEA

The Chapter 4 of CMC deals with carriage of goods by sea. There are three main international conventions in this respect, i.e. the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading 1924 ("Hague Rules"), the Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading 1968 ("Hague-Visby Rules") and the United Nations Convention on the Carriage of Goods by Sea 1978 ("Hamburg Rules"). CMC basically adopted the Hague-Visby Rules with some modifications based on the Hamburg Rules.

For example, the carrier's liability for carriage of non-containerised goods covers the period from the time when the goods are loaded on to the time when they are discharged from the ship. This is based on the traditional "tackle to tackle" rule set out in the Hague Rules. On the other hand, the carrier's liability for carriage of containerised goods covers

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* This is the speech given at the JSE seminar in Tokyo on November 16, 1995.

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the period from the time when they take over the goods at the loading port until the time the goods are delivered at the port of discharge. The latter, i.e., "delivery to delivery" rule, was adopted from the Hamburg Rules to serve the need of multimode transportation.

In respect of package limitation, CMC adopts 1979 Protocol to the Hague-Visby Rules and limits the carrier's liability to 666.67 SDRs per package or other shipping unit, or 2 SDRs per kilogramme of the gross weight, whichever is higher. This is lower than that in the Hamburg Rules (835 SDRs per package or other shipping unit, or 2.5 SDRs per kilogramme of the gross weight).

(2) MARITIME LIEN

Chapter 2 of CMC deals with maritime liens and basically follows the International Convention for the Unification for Certain Rules Relating to Maritime Liens and Mortgages 1967 ("Lien Convention 1967") and the International Convention for the Unification for Certain Rules Relating to Maritime Liens and Mortgages, 1993 ("Lien Convention 1993"), except some variations in respect of lien exclusions.

Under CMC, maritime liens rank prior to ship mortgages and possessory liens. The possessory liens are defined as rights of the shipbuilder or repairer to secure the building or repairing cost of the ship by a lien on the ship when the owner fails to pay the cost due. This is in conformity with the provisions of both the Lien Conventions of 1967 and 1993.

CMC provides that the maritime liens attached to the ship shall be extinguished if not enforced within 60 days of the public notice of the commercial transfer of the ownership by the court made at the request of the buyer of the ship. The Lien Convention 1967 provides a 30-day notice, while the Lien Convention 1993 provides a 60 day notice.

The Lien Convention 1993 expressly excludes maritime liens from securing personal injury claims and torts damages in connection with carriage of oil, hazardous substances and radioactive properties based on strict liability, or compulsory insurance under the international convention or national law, while CMC only excludes those for securing claims for oil pollution under the International Convention on Civil Liability for Oil Pollution Damage ("CLC Convention").

(3) OTHER EXAMPLES

Chapter 5 of CMC, "Contract of Carriage of Passengers by Sea", is based on the Athens Convention 1974;

Chapter 8 of CMC, "Collision of Ships", is based on the International Convention for the Unification of Certain Rules of Law in Regard to Collision 1910;

Chapter 9 of CMC, "Salvage at Sea", is based on the International Convention on Salvage 1989;

Chapter 11 of CMC, "Limitation of Liability for Maritime Claims", is based on the Convention on Limitation of Liability for Maritime Claims 1976.

2. BALANCE OF THE INTERESTS

China is a developing country with a comparatively large commercial fleet and an ever-increasing international trade volume. China is continuously practising her "opening up to the world" policy and making efforts to create a both financially and legally healthy environment for foreign trade and investment. The legislative history of CMC reflects the above-mentioned government policy, and also reflects the fact that the Chinese legislature tried to strike a proper balance between foreign and Chinese interests, and between shipowner and cargo interests.

For example, Article 50 of Chapter 4 provides that the carrier is liable for the loss of or damage to the goods caused by delay in delivery, and delay in delivery occurs when the goods have not been delivered at the designated port of discharge within the time expressly agreed upon.

The Hague-Visby Rules does not have any provision on delay in delivery.

Rule 2 or Article 5 of the Hamburg Rules reads: "Delay in delivery occurs when the goods have not been delivered at the port of discharge provided for in the contract of carriage by sea within the time expressly agreed upon or, in the absence of such agreement, within the time which it would be reasonable to require of a diligent carrier, having regard to the circumstances of the case."

As you can see, Article 50 of CMC adopted the first part of Rule 2 of Article 5 of the Hamburg Rules. However, the second part of Rule 2 was not adopted. Also, the carrier's liability for delay in delivery is limited to the freight payable for the goods so delayed, which may be lower than that provided in the Hamburg Rules, i.e. 2.5 times of the freight for delayed goods, but not exceeding the total freight payable under the contract.

In determining whether Rule 2 of Hamburg Rules should be fully adopted or only partially adopted by CMC, the drafters may have had several concerns. First, China has decided to keep up with the international development of the law of carriage by sea. The Hamburg Rules provide the cargo owners with much wider protection against the shipowners. It is in the interest of China as a large cargo owner country to adopt this protection. Second, as a developing country with a large commercial fleet, China has to consider whether the carriers in the country are able to sustain the heavy burden set by the Hamburg Rules in case of late delivery. In balancing the interests between cargo owners and shipowners, therefore, it would be better for China to partially adopt Rule 2 of Article 5.

B. SOME PRACTICAL ISSUES UNDER THE CODE

Now let us look at some practical issues which may arise under CMC and examine some recent decisions made by the Chinese Maritime Courts.

1. DELAY IN DELIVERY

On its face, it seems that CMC has lessened the carrier's liability for delay in delivery in comparison with the Hamburg Rules, since CMC does not impose liability on a carrier in absence of an express agreement on time of delivery. Therefore, the cargo interests will find it very difficult to claim damages for late delivery under CMC because generally no such clause in the bill of lading which "expressly" provides for time of delivery.

Is there any other remedy for cargo interests who suffered damages due to unreasonably delay in delivery? Some legal scholars or lawyers argue that, under the present Chinese law, the cargo interests may choose to seek remedy based on the bill of lading or the contract of affreightment in accordance with the General Principles of Civil Law ("GPCL"), instead of CMC. The legal basis for this argument is that (1) a carrier has contractual duty to deliver the goods within a reasonable time; (2) unreasonably late delivery constitutes fundamental breach of the contract; and (3) since the bill of lading and CMC do not provide for remedies in such situation, GPCL should apply. Under GPCL, there would be no limitation of liability for cargo damages and the time bar would be 2 years. As a result, the carrier's liability for unreasonable delay in delivery might far exceed the limit provided for in CMC. However, there has been no reported successful case in this respect.

Another point worth mentioning in this subject is the scope of the remedy for late delivery. Article 50 of CMC provides that the carrier shall be liable for the economic losses caused by delay in delivery of the goods even if no loss of or damage to the goods has actually occurred. The economic losses mainly refer to the market loss or profit loss incurred by the consignee due to the delay.

There has been one case in which the Guangzhou Maritime Court awarded economic loss to the consignee. The case involved carriage of containers of decoration materials from China to Germany. The shipment did not arrived in Germany until more than 20 days later than the time agreed upon by the parties. Because of the late delivery of the decoration materials, the consignee, a designing and engineering company, could not complete their project for interior decoration of a Chinese "Feng Lin" restaurant in Germany. The consignee also could not start the second project in time for decorating another "Peking" restaurant, due to delays in completing the first project. The consignee sued the carrier for time or business loss suffered: DM 19,000 for the first project, DM 10,000 for the second, and DM 9,000 for a third party's loss. The carrier's main defense in the case was that the damages suffered by the consignee was "unforeseeable." The court

held that (1) the carrier should have foreseen consignee's loss for the first project since the time of delivery was expressly agreed upon; and (2) there was no proximate cause between carrier's late delivery and the losses suffered for the second project and the third party, and thus the carrier could not have foreseen such losses. The court granted consignee the damages for the first project.

2. RELEASE GOODS WITHOUT PRODUCTION OF BILLS OF LADING

Release of goods without production of the original bills of lading is a classic problem in carriage of goods by sea. Every year, there are a number of such cases in various maritime courts in China. In the past, the court would in principle hold the carrier/shipowner liable to the holder of the original bills of lading for the damages caused by carrier's release of the goods without production of the original bills of lading. However, in the most recent two years, the courts have made several decisions which are contrary to the result of the previous ones.

(1) CAPACITY TO SUE - LAWFUL HOLDER OF THE BILL OF LADING

The main defense in these cases successfully used by the carrier/shipowner was lack of capacity to sue. In other words, the main issue in such cases is really whether the claimant is entitled to sue. There is no definition of "lawful holder" in CMC. The Chinese maritime courts would usually look into the chain of transfer of the bills of lading and examine the lawfulness according to the international trade law and customs. However, it would not be easy to predict the result, since different courts or judges have different opinions on the issue.

In a case decided by the Guangzhou Maritime Court, the consignee obtained two of the three original bills of lading before making any payment for the goods according to the sales contract with the shipper. The payment terms in the sales contract were documents against acceptance at 30 days sight. The shipowner released the goods to the consignee against the two bills of lading. The consignee failed to pay after receiving the goods, and the shipper, holding one of the original bill of lading, sued the carrier for wrongful delivery. The court held that the consignee was the lawful holder of the bills of lading, and the carrier properly delivered the goods to the consignee.

In a case decided by the Tianjin Maritime Court, the sales contract provided that bills of lading should bear the buyer's name as the shipper. The carrier released the goods without production of the original bills of lading at the destination in Indonesia. The actual shipper, i.e., the seller, was rejected for payment under the L/C because of discrepancies in the documents, and sued the carrier for wrongful delivery of goods. It was held that the seller or the actual shipper was not the lawful holder of the original bills of lading, and thus had no capacity to sue because the bills of lading were order bills,

which were not properly endorsed, and also did not show that the seller was the shipper.

(2) RATIFICATION OF THE WRONGFUL DELIVERY

In a decision by Guangzhou Maritime Court, it was held that although the carrier infringed the right of the lawful holder of the bills of lading by release of the cargo against the letter of guarantee, the latter ratified the infringement by accepting partial payment from the buyer or consignee. In this case, the seller was refused by the bank in negotiating the draft under the L/C because of the documentary discrepancies and later took back the original bills of lading from the bank. The bills of lading were blank endorsed by the shipper, a third party to the sales contract. There was no doubt that the seller was the lawful holder of the bills of lading. The seller first claimed the payment from the buyer and was paid partially. Some 11 months later, the seller went to the carrier's agent and demand delivery of the goods as the holder of the original bills of lading, but found the cargo was taken by the buyer. The court held that the seller should base its claim on the sales contract, instead of the bills of lading.

In a recent case decided by the Tianjin Maritime court, the agricultural products were found contaminated and non-conforming with the contract when they arrived at the Philippine destination. The carrier released the goods against the consignee's bank guarantee. The Chinese shipper or seller, i.e., the holder of the original bills of lading, was rejected for payment under the L/C. The shipper then brought two lawsuits, one against the suppliers for non-conforming, and the other against the carrier for release of the goods without production of the original bills of lading. The court held that the shipowner was not liable. The main reasons for the decision are: (1) the loss and damages were caused by the defects of the goods, not by the wrongful delivery; and (2) the fact that the holder of the original bill of lading, i.e. the shipper/seller, sued the supplier, instead of the carrier, constituted ratification of the wrongful delivery. Therefore, shipper/seller should claim their damages according to the sales contract between the shipper/seller and the buyer.

3. THE TIME LIMITATION

(1) COMPARISON OF CMC PROVISIONS WITH THOSE IN THE GENERAL PRINCIPLES OF CIVIL LAW

(i) TIME LIMITATION

According to the General Principles of Civil Law of China ("GPCL"), time limitation for the general civil lawsuit is two years counting from the time when the plaintiff knows or should have known his right was infringed upon.

CMC provides for some different kinds of time limitation: one year for carriage of goods by sea, towage and general average contribution; two years for carriage of passengers

by sea, charter parties, collision, salvage at sea and marine insurance; and three years for oil pollution caused by the ships.

(ii) INTERRUPTING EVENTS

Article 140 of the GPCL provides that the limitation period shall be interrupted or renewed in the following situations:

1) action in the court;
2) the claimant makes a claim demand;
3) admission of the liability for the claim by the person against whom the claim is brought.

Article 137 of the GPCL further provides that under special circumstances, the court may extend the time limitation.

However, Article 267 of CMC concerning the time limitation does not contain the same rules as the above. It provides that the time limitation shall be interrupted or renewed in the following situations:

1) action in the court (same as in the GPCL);
2) the claimant initiates the arbitration proceeding (different from the GPCL);
3) admission of the liability for the claim by the person against whom the claim is brought (same as in the GPCL);
4) arrest of the ship (different from the GPCL).

(2) PRACTICAL EFFECT OF CMC

Since CMC is a special law to the GPCL, it has priority over the latter. For maritime matters, the time limitation is regulated by CMC. Therefore, the time limitation for maritime matters can not be renewed by simply making a claim demand as in the ordinary commercial cases under the Chinese civil law.

(3) CAN PARTIES EXTEND THE TIME LIMITATION BY AGREEMENT?

It is common in the international shipping practice, and it is also acknowledged by the Hague-Visby Rules and the Hamburg Rules that the parties to the bills of lading can extend by agreement the one-year time limitation for bringing a lawsuit against the carrier. There was a similar provision in the earlier drafts of CMC, but it was deleted in the final version.

According to the legal principles of Chinese law, the time limitation is not a procedural, but a substantiative issue. When a claim is beyond its time limitation, the claimant is not entitled to win the case based upon an overdue claim. It is widely accepted in China that the statutory limitation can only be extended in accordance with the relevant law or by the court when it is deemed appropriate, but can not be extended by the parties'

agreement. In maritime matters, the time limitation can only be extended or renewed by party's admission of liability for the claim or by arresting the ship according to CMC.

Although there is no basis in the Chinese law for the parties to extend the time limitation, there were maritime cases in which the court allowed the time limitation to be extended as long as the parties agreed. In a case decided by the Shanghai People's High Court in 1993, it was held that since (1) the plaintiff had made claim demand to the defendant within the time limitation, and (2) there was agreement to extend the time limitation between the parties, the action was thus not time barred. In 1995, the same court confirmed a decision by Shanghai Maritime Court that the time limitation was renewed by the parties' agreement to negotiate for a settlement agreement. However, it is worth noting that this decision was based on the GPCL, but not CMC, since the claim occurred in 1990.

At a very recent Chinese maritime law seminar conducted by the China Maritime Law Association in Beijing, in October, 1995, one of the very influential maritime judges from the People's Supreme Court commented that the People's Supreme Court has not issued any official interpretation to the effect that the time limitation cannot be extended by parties' agreement, and, in his view, the maritime courts should be able to accept such time extension in accordance with the circumstances of each case. It appears that the maritime courts may still have the discretionary power in deciding whether or not to accept time-bar extension agreement. It should be mentioned that there have been no reported cases to date in which time-bar extension agreement is denied.

C. CONCLUSION

It has been almost two and half years since CMC came into effect. Although it codified all the past maritime regulations in China and adopted the basic concepts contained in most international maritime conventions, CMC is still a very young maritime law code. There have been only a few reported post-CMC cases. Therefore, it remains to be seen how the Chinese maritime courts will apply and interpret CMC in every individual case.

There is no reporting system on maritime cases in China. The People's Supreme Court only reports a very small and selective portion of the maritime decisions every year. Most of the maritime decisions are not within the domain of public information. Lawyers or legal scholars can obtain these decisions only through contacts with the individual courts or the related parties. This actually adds some difficulties to the legal research of Chinese maritime law practice. It is hoped that a national or provincial case reporting system will be soon established, and the lawyers can therefore have access to all the maritime decisions.

In any event, we will continuously make efforts to track and analyze any new maritime legislation and court decisions, and hopefully will be able to give fuller reports on the Chinese maritime law practice in the years to come. ■

The Arrest of Ships in China*

Sharon CHEN**

The legal procedure in China relating to maritime matters generally follows the Chinese Civil Procedure Law. Although China is drafting a specific maritime procedure law, the maritime procedure, at present, is largely same as the ordinary civil procedure except for arrest of ships and judicial sale of the arrested ships.

The legal rules governing arrest of vessels are mainly set out by the People's Supreme Court of China. On July 6, 1994, the Supreme People's Court promulgated the Regulations on Pre-litigation Arrest of Ships, ("1994 Arrest Regulations") which replaced its 1986 counterpart ("1986 Arrest Regulations").

1. TWO KINDS OF ARREST

There are two ways to arrest a ship in China: (1) pre-litigation arrest — before the action is brought; and (2) pre-judgement arrest — after the action is brought, but before the judgement.

Arresting a ship in the process of a legal proceeding is to secure the claim and the judgement enforcement, while arresting a ship before the lawsuit is to establish jurisdiction, in addition to obtaining security from the defendant.

China does not adopt *action in rem* theory. It is important for the applicant to establish that it has a maritime claim against the person such as shipowners, charterers or operators of the ship. If the applicant does not know who is the responsible party, he will not be allowed to apply for arrest of a ship.

According to the 1994 Arrest Regulation, a maritime claim means a claim which involves or arises from ship owning, building, possessing, operating, sale and purchase, salvage or mortgage, or relating to a maritime line. The listed maritime claims include the following 20 categories:

1) collision;
2) personal injury caused by a ship or operation of a ship;
3) pollution by a ship;
4) prevention of pollution, or mitigation of pollution damages;
5) salvage;

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* This is the speech given at the JSE seminar in Tokyo on November 16, 1995.

** Counselor-at-Law, Healy & Baillie.

6) charterparty;
7) carriage of cargo or passenger by sea;
8) general average;
9) towage and pilotage;
10) supplies to a ship;
11) port duty and charges;
12) ship building and repairing;
13) ship mortgage and other incumbrance on a ship;
14) marine insurance;
15) seamen's wages;
16) disbursements advanced for a ship by the master, owner, charterer, or agent;
17) commissions, service charges or agent fees advanced for a ship by the owner, bareboat charterer or their agent;
18) ship ownership;
19) distribution of profit among co-owners of a ship;
20) ship sale and purchase.

2. WHICH SHIP CAN BE ARRESTED?

(1) THE RESPONSIBLE SHIP

According to the 1986 Arrest Regulations, the responsible ship could be arrested only if the owner was responsible for the underlying maritime claim. The (1) 1994 Arrest Regulations allow arrest of a ship if the operator or charterer of the ship, in addition to the owner, is responsible for the underlying maritime claim. It provides (2) that at the time of application for arrest, the responsible ship shall be under the same owners, operators or charterers as at the time when the underlying claim arose, except (3) that the claim is a maritime lien. In the case of a maritime lien, the ship can still be arrested even if the owner, operator or charterer is changed at the time of arrest.

(2) SISTER SHIPS

According to the 1986 Arrest Regulations, if the maritime claim was against the operator or charterer, the claimant could apply for arrest of a ship only if the ship was owned at the time of application by the responsible operator or charterer.

The 1994 Arrest Regulations, however, seem to be much more flexible than 1986 Arrest Regulations. It allows arrest of the related ships owned, operated or chartered by the responsible operator or charterer. The wording of the Regulations is not very clear, so that it can be construed very broadly. According to the broad construction of the Regulations, if Operator A incurred liability in the operation of M.V. I, the claimant may

be able to arrest M.V. II, which is chartered by A at the time of application. This result may make China one of the "paradises" for arresting ships.

3. PROCEDURE FOR ARRESTING A SHIP

(1) Applications must be made to the competent maritime court, i.e., the court having jurisdiction over the port where the ship is to be arrested. There are total 9 maritime courts in China. (See Annex) (2) The application must be in writing, which includes a brief description of the underlying claim and a demand for the type and amount of security from the opposing party. (3) The supporting documents must be submitted together with the application.

(4) If the applicant is a foreigner, local Chinese attorney should be appointed. The local lawyer should be given a power of attorney (POA). The POA must be notarised by a public notary and legalised by the Chinese Embassy or Consulate in the country of the applicant.

4. SECURITY AND COUNTER-SECURITY

(1) TO WHOM THE SECURITY SHALL BE SUBMITTED?

It is not clear in the 1986 Arrest Regulations whom the security should be submitted to, although it was in practice submitted to the maritime court. The 1994 Arrest Regulations expressly provide that the security for release of the ship shall be submitted to the court. However, if there is a jurisdiction or arbitration agreement between the parties, the security may also be submitted to the arresting party, other court or arbitral tribunal.

(2) COUNTER-SECURITY: DISCRETIONARY OR MANDATORY?

Under 1986 Arrest Regulations, the court had the discretionary power to determine whether the counter-security was required in respect of arresting a ship. However, 1994 Arrest Regulations make provision of counter-security mandatory. The amount for the counter-security is decided by the court by considering the damages which may be caused by a possible wrongful arrest.

5. LEGAL PROCEEDINGS FOLLOWING THE ARREST

Chinese courts will generally have jurisdiction over the case if the ship is arrested in China, Jurisdiction clause no impact on arrest of ship. However, if there is a valid arbitration agreement in existence between the parties, the court will not have jurisdiction over the matter. E.g., if there is an arbitration agreement in a shipping contract, Chinese maritime

courts will not have jurisdiction over the case. The 1994 Arrest Regulations also provide that the Chinese maritime court will not exclude the competent foreign jurisdiction over the matter.

Court proceedings or arbitration proceedings have to be commenced within 30 days after the arrest. If not, the arrested party can apply for dismissal of the case and for the release of the ship or return of security if provided.

6. PUBLIC AUCTION OF THE ARRESTED SHIP

After the ship is arrested, the arresting party can apply to the court for a public auction if the arrested party does not provide a sufficient security within 30 days after the arrest. Only the ship owned by defendent, and responsible to the maritime claim can be auctioned. If the application for the public auction of the arrested ship is not approved, the arresting party can apply to the court for reconsideration. The arresting party is required to pay the auction fees to the court in advance.

Once the maritime court approves the application for the auction of the (1) ship, the court (2) will notify the registration authority of the ship, registered mortgagees and other parties who have interests in the public auction. The court will also issue a public notice in overseas and local newspapers. (3) All creditors should register their claims in the court within 60 days after the public notice of the auction is announced. After deducting the court fees and the public auction fees, the court will decide the (4) priority of the valid claims according to CMC (see below). The court normally encourages the parties to negotiate an agreement for distribution of the sale proceeds before making its final decision.

7. PRIORITY OF MARITIME CLAIMS

According to articles 22, 23, 24, 25 of CMC, the ranking of priority of maritime claims is as follows:

(1) the legal costs for arresting, preserving and selling the ship, the expenses for distribution of the proceeds from the sale of the ship, and other expenses incurred for the common interests of the claimants;
(2) crew wages and other remuneration, repatriation costs and social insurance costs;
(3) death or personal injury claims in connection with the ship's operation;
(4) tonnage tax, pilotage fees, harbour duties or other port charges;
(5) salvage claims;
(6) compensation claims resulting from tortious act during the ship's operation (not including oil pollution damages caused by tankers with capacity of 2,000 tons or

more, which have oil pollution liability insurance or other appropriate financial responsibility certificates);

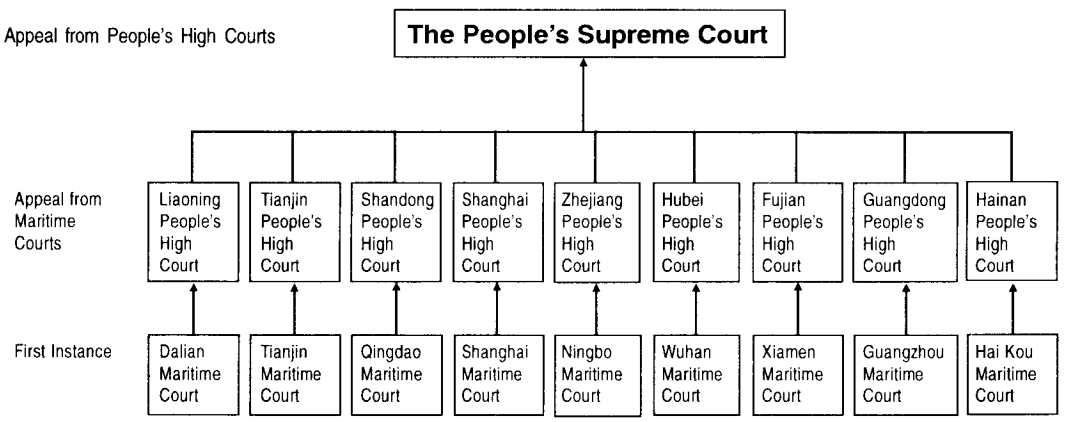
(7) possessory lien by ship builders or ship repairers for unpaid construction or repair costs;

(8) registered ship mortgages;

(9) other unsecured maritime claims. ■

ANNEX

Maritime Court System Chart



Ship Financing in China: Some Legal and Practical Issues*

Sharon CHEN**

A. GENERAL INTRODUCTION

Although China has a substantial capacity of shipbuilding, it is still not sufficient to catch up with the rapid development of the Chinese shipping business, due to reasons such as limited modern shipyards, technology, financial resources, etc. Chinese shipping companies constantly order new modern ships from foreign shipyards and purchase second-hand ships in the international market in order to renew their fleets or build up their new fleets.

Financing is a very important issue in the shipbuilding or ship sale and purchase contracts. Generally speaking, ship finance is distinctive from other type of finance due to its capital intensity, mobile assets, volatile market and limited information of the corporate structure of the owners and their financial status.

The foreign shipyards, sellers, banks or shoshas, who will provide finance to the Chinese shipowners, have various concerns over the safety of the loan and enforceability of the security against Chinese borrowers, because of their unfamiliarity of the financing and legal system in China. It is my focus today to discuss the major finance structures used by the Chinese shipping companies and the legal issues arise therefrom.

B. FINANCING STRUCTURES OF CHINESE SHIPPING COMPANIES

The Chinese shipping companies usually purchase ships and obtain shipping finance through their overseas subsidiaries. The finance structure can be equity, debt or lease, and the financing arrangements will be consistent with the international standard. The Chinese shipping company often sets up an overseas wholly-owned subsidiary, and purchases ship through the overseas subsidiary. The ship will then be chartered to or operated by the parent company. China Ocean Shipping Company ("COSCO") and most of the Chinese major shipping companies adopt this type of structure.

However, recently some provincial Chinese shipping companies have tried to purchase ships by themselves, and obtained direct finance from the foreign sources.

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* This is the speech given at the JSE seminar in Tokyo on November 17, 1995.

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C. THE LEGAL FRAMEWORK: CHINESE LAWS AND REGULATIONS ON SHIP FINANCING AND FOREIGN DEBTS CONTROL

Ship finance involving Chinese shipping companies will be subject to the following Chinese laws and regulations:

1. The Chinese Maritime Code ("CMC")

The CMC was promulgated in 1992 and entered into force on July 1, 1993. The relevant parts of the Code, i.e. Chapter 2, Sections 1-3, provide the general legal principles governing ship ownership and ship mortgage.

2. Ship Registration Regulation ("Registration Regulation")

The Registration Regulation was enacted by the State Council on June 2, 1994, and entered into force on January 1, 1995. The Registration Regulation provides detailed procedural requirements for registration of ship ownership, nationality, mortgage, bareboat charterparty, etc.

3. The Security Law

The Security Law was promulgated on June 3, 1995, and entered into force on October 1, 1995. It regulates generally the legal relationship arising from guarantees, mortgages, pledges, liens, etc.

4. Other Regulations Concerning Control and Guarantee for Foreign Debts:

The Interim Regulations on Foreign Exchange Control promulgated by the State Council on December 18, 1980, set out the general principles for foreign debts control.

The Administrative Rules on International Private Loan to the Domestic Institutions ("Private Loan Rules") and the Administrative Rules on Guarantee for Foreign Debts by Domestic Institutions ("Guarantee Rules"), issued by the State Administration of Foreign Exchange Control ("SAFEC") on September 26, 1991, set out the administrative rules on borrowing foreign money and providing guarantees for foreign debts by the Chinese competent institutions.

D. SOME PRACTICAL ISSUES

1. Choice of Flag: Five-Star Flag or Flag of Convenience?

The Chinese purchasers of foreign ships usually prefer the flag of convenience to the Chinese flag for new built and purchased ships. The main reason for this choice is the tax consideration. If the Chinese shipping company purchases a ship directly from the

foreign shipyard or seller, it will have to pay the import duty. On the other hand, if it uses an overseas subsidiary as nominal purchaser, there will be no import duty payable, and it can still maintain the same degree of control over the ship by way of bareboat charterparty or being the operator of the ship.

If the ship flies a flag of convenience, i.e., it is notionally owned by a company incorporated in a country such as BVI, Cayman Island, Panama, Liberia, etc., the financing structure will be much like Scenario. (See Annex) The governing law of the ship ownership and mortgage registration will be that of the flag country. The Chinese law will come into play only when the ship is chartered to a Chinese company under a bareboat charter.

However, if the ship flies a five-star flag, i.e., it is registered in China, most of the legal issues will be subject to the Chinese laws. These include the laws governing the ship registration, mortgage, guarantee, foreign debts control, etc.

2. Registration of Ship

The following ships are required to be registered in China:

(1) Ships owned by Chinese citizens whose residence or principal place of business is located within China;

(2) Ships owned by enterprises with legal person status (企業法人) established under the laws of China and whose principal place of business is located within China. If foreign investment is involved, the proportion of registered capital contributed by Chinese investors should not be less than 50%;

(3) Public service ships owned by the Chinese government and ships owned by non-profit institutions with a legal person status (事業法人);

(4) Other ships whose registration is deemed necessary by the Chinese Harbour Superintendency Bureau. (Art. 2, the Registration Regulations.)

The ship registration consists of two parts: ownership registration and nationality registration. The shipowner should submit the following documents to the relevant port authorities, in order to obtain the Ownership Registration Certificate:

(1) Invoice, sale contract and delivery documents;

(2) Documents issued by the ship registration authority at the original port of registry certifying the deletion of the ownership registration;

(3) Documents certifying that the ship is not under mortgages or that the mortgagees have agreed to the transfer of the mortgaged ship;

(4) Contract of shipbuilding in case of a new built ship.
(Art 13, the Registration Regulations.)

After obtaining the Ownership Registration Certificate, the shipowner shall submit the following documents to the port authorities in order to obtain the Nationality Registration Certificate:

(1) Valid technical certificates required for international or domestic shipping business, issued by the authorised ship survey institutions.
(2) Documents issued by the ship registration authority at the original port of registry certifying that the original Nationality Certificate is cancelled or will be cancelled upon completion of registration in China. Nationality Certificate is valid for 5 years.

3. Registration of Bareboat Charter

In one of the following situation, the owner or charterer should register the bareboat charter before the ship is on hire:

(1) A Chinese flagged ship chartered to a Chinese company;
(2) A Chinese company chartered a foreign flagged ship;
(3) A Chinese ship chartered to a foreign company.

Under the above item (2), the documents to be submitted for registration are:

(1) Original and copy of the bareboat charter;
(2) All valid technical certificates issued by the recognised ship survey institution;
(3) Certificate issued by the ship registration authority on the suspension or cancellation of ship's original nationality, or that the original nationality will be suspended or cancelled upon completion of registration in China.

Under the above items (1) and (3), the documents to be submitted for registration are:

(1) Original and copy of bareboat charter;
(2) Ownership Registration Certificate;
(3) Nationality Certificate of the ship.

A provisional nationality certificate and a bareboat charter registration certificate will be issued to a foreign ship chartered to a Chinese company upon proper registration. The provisional nationality certificate is valid during the bareboat charter period, but if it is longer than 2 years, the provisional certificate should be renewed once every 2 years.

Under the Chinese law, only the Chinese flagged ships are allowed to conduct Chinese coastal shipping business. Thus, if a Chinese shipping company intends to obtain a foreign ship for coastal transportation, they will usually bareboat charter in a ship, and complete the proper registration process to let the foreign ship fly the Chinese flag.

4. Registration of Ship Mortgage

We heard occasionally of some complaints that the foreign mortgagees were unable to register their ship mortgages in China. There arises the question as to whether there are any restrictions on registration of ship mortgages in China.

It is very clear now that a ship mortgages is only valid against third party when properly registered. (Art 13 CMC; Art 41 Guarantee Law) There are no restrictions

under the Chinese law which would disallow a ship mortgage to be registered in China provided that the ship flies Chinese flag. Chinese ship registry generally will not accept the application for registration of mortgage on a foreign ship. One of the practical considerations for this policy is the difficulty in ascertaining the status of the existing mortgages or other incumbrances on the ship.

The Harbour Superintendence Bureau of each port is in charge of registration of ship mortgages. It is possible that a foreign mortgagee may encounter difficulties in registration of a ship mortgage in China. Since the staff of the Harbour Superintendence Bureau is unfamiliar with this relatively new registration system, especially in those small ports.

A ship mortgage should be registered by the mortgagee and mortgagor, and they should submit the following documents to the Harbour Superintendence Bureau at the port of registry:

(1) Written application executed by both mortgagee and mortgagor;
(2) Ownership Registration Certificate or the ship-building contract;
(3) Mortgage agreement.
(4) Documents concerning other mortgages, if any.
(Art 20, the Registration Regulation.)

The Registration Regulation provides that the registration authority shall within 7 days of application record the information about the mortgagor, mortgagee, the mortgaged ship and date of registry, and issue a ship mortgage registration certificate to the mortgagee. The registry of ship mortgages shall be available for public inspection. (Art 21, 22 Registration Regulations.) Mortgage can be transfered from one mortgagor to another. (23) New certificate will be issued.

5. Restrictions on Enforcement of Mortgage

CMC provides that when the mortgagor fails to pay his debt secured by the ship mortgage, the mortgagee is entitled to the preferred repayment from the proceeds of the sale of the mortgaged ship. (Art 11, CMC.)

The mortgage can be enforced even if the ship is flying a five-star flag, and is defined as state owned property. However, there is an important restriction on the enforcement. The Security Law provides that the mortgagee and mortgagor may not agree in the mortgage agreement that the mortgaged ship should be transferred to the lender when the mortgagor is on default. (Art 40, Security Law.)

6. Priority of Ship Mortgage

According to CMC and other relevant legal rules, the ranking of priority of claims in a ship mortgage foreclosure is as follows:

(1) court fees and other expenses for arresting, preserving and selling the ship;

(2) crew wages and other remuneration, repatriation costs and social insurance costs;
(3) death or personal injury claims in connection with the ship's operation;
(4) tonnage tax, pilotage fees, harbour duties or other port charges;
(5) salvage claims;
(6) compensation claims resulting from tortious act during the ship's operation (not including oil pollution damages caused by tankers with capacity of 2,000 tons or more, which have valid oil pollution liability insurance or equivalent financial responsibility certificates).
(7) possessory lien by ship builders or ship repairers for unpaid construction or repair costs;
(8) registered ship mortgages.
(9) Other unsecured claims.

Where two or more mortgages are established on the same ship, the mortgage registered earlier has the priority. The mortgages registered on the same day have the same priority. (Art 19, 22, 23, 24, 25, CMC.)

7. Foreclose a Ship Mortgage by Arrest of the Ship

The mortgagee can arrest a ship in China to foreclose his mortgage. He can arrest the ship before or after the legal action is brought against the mortgagor.

In applying to the court for the arrest, the mortgagee must provide the documents which show he is the legitimate mortgagee and the mortgagor is in default. The mortgagee is required to provide counter-security to the court in the amount to be determined by the court. The measure of the counter-security is the damages which may be caused by a possible wrongful arrest. The counter-security is not necessarily a cash deposit. It could be a corporate guarantee issued by a reliable Chinese company, such as People's Insurance Company. While the foreign mortgagee may issue a counter guarantee to such a Chinese company.

If the mortgagee is a foreigner, local Chinese attorney should be appointed with properly notarized Power of Attorney.

Chinese court will have jurisdiction over the case if the ship is arrested in China except there is a valid arbitration agreement in existence. However, it does not necessarily mean that Chinese law will apply. See Section 10 below.

Court proceedings or arbitration proceedings have to be commenced within 30 days after the arrest. If not, the arrested party or the mortgagor can apply for dismissal of the case and for release of the ship or return of security if provided.

The arresting party can apply to the court for a public auction if the arrested party does not provide a sufficient security within 30 days after the arrest. All creditors should register their claims the court within 60 days after the public notice of the auction is

announced. The proceeds of the auction, after deducting the court fees and other public auction fees, will be distributed among the creditors according to the relevant law and regulations. See Section 6 above.

8. Who Can Borrow Money from Foreign Financing Institutions?

China practises foreign exchange control although the control has been significantly relaxed in recent years. The government set up a series of rules to control the size and use of foreign funds.

The competent authority for control of foreign exchange and foreign debts is the State Administration of Foreign Exchange Control ("SAFEC"). According to the Private Loan Rules, only the financial institutions with authority to conduct overseas borrowing business and the business enterprises with central government's approval can borrow private loans from foreign financing institutions. (Art 2, Private Loan Rules.)

If the loan term is longer than one year, special approval and registration is required. It is very important to make sure before enter into any loan agreement that proper approval has been obtained from the SAFEC. Otherwise, the agreement is invalid, the relative bank account is not allowed to be opened, and the principal and interest repayable under the agreement is not permitted to be remitted outside China. (Art 7, Private Loan Rules)

The following documents are necessary for application for approval from SAFEC:

1) Certificate stating that the loan is incorporated into the state borrowing plan;
2) Project approval document;
3) Memorandum of loan agreement, specifying the main terms of the loan;
4) Sources and plan for repayment and guarantee arrangement;
5) Corporate balance sheet and other financial statements of the borrowing institution;
6) Other documents required by the SAFEC.

9. Possibility of Issuance by a Chinese Company of a Guarantee to a Foreign Lending Institution

Since the Chinese shipping company usually choose to use an overseas company as the notional purchaser of the ship, the foreign financing institution may require a guarantee from the Chinese company for the overseas subsidiary.

The institutions which may provide guarantee to a foreign lender are those financial institutions which are qualified and authorised by the central government to provide guarantee for foreign debts, or those enterprises which have foreign currency income. Government departments and unincorporated institutions cannot issue guarantees for foreign debts. (Art. 4, Guarantee Rules).

The guarantee limit for Chinese financial institutions is that the sum of the guarantee and foreign debt balances shall not be, in any even, more than 20 times of its own foreign

currency capital. The limit for non-financial enterprises is that the guarantee balance shall not exceed its own foreign currency capital. (Art. 5, Guarantee Rules.)

The approval shall be obtained from SAFEC before a guarantee is issued. The following documents need to be submitted to SAFEC for application for the approval:

1) Feasibility study report of the relevant project with necessary approval documents;
2) Certificate of the foreign currency owned by the Guarantor;
3) Documents concerning the foreign debts owned and existing guarantees provided by the Guarantor;
4) Memorandum of the guarantee agreement;
5) Principal loan agreement or memorandum;
6) Counter guarantee from the borrower;
7) In case of a foreign borrower, the document certifying that the assets, with equal value to the guarantee amount, have been mortgaged to the guarantor by the borrower.

(Art. 8, Guarantee Rules.)

Any future amendment to the principal loan agreement shall be subject to the consent of the guarantor and also subject to the approval of SAFEC. If such consent and approval are not obtained, the guarantee is automatically void. (Art. 9, Guarantee Rules.)

When the guarantee is provided to a lender to whom the ship is mortgaged, the guarantor's liability to pay the lender shall be limited to the amount in excess of that secured by the mortgage. Therefore, if the lender is secured by both ship mortgage and guarantee, he should foreclose his mortgage first. Only the balance, which is not satisfied by the proceeds of the ship, can be claimed against the guarantor. If the lender waives the right under the mortgage agreement e.g. by claiming against guarantor. The guarantor shall be released from the guarantee obligation to the extent of the right so waived under the mortgage. (Article 28, Security Law.)

10. Conflict of Laws: Apply Foreign Law in China

When a foreign mortgagee enforces his foreign registered mortgage in China, he may have some concern whether Chinese court would recognize the validity of his mortgage, and what be the priority of his rights as mortgagee upon the forced sale of the ship.

According to CMC Article 271, ship mortgage is governed by the law of the flag country. If the ship is registered in a foreign country, the validity of the mortgage will be decided according to the law of that country. Accordingly, if the law of the flag country does not require registration of a ship mortgage, the mortgagee still can enforce his right in China, notwithstanding that Chinese law provides that a ship mortgage is valid against a third party only upon registration.

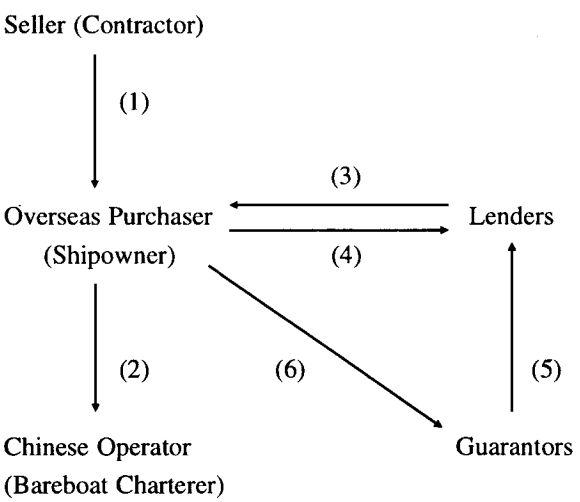
What would be the result if the ship mortgaged is under a bareboat charter to a Chinese

company? As we have discussed above, the bareboat charter must be registered in China, and the ship will obtain a Provisional Nationality Certificate. The Article 271 of CMC provides that the law of the country of the original registration shall govern "the mortgage set up before or during the period of the bareboat charter." Thus, in the above scenario, the law of the country of the original registry will apply for the purpose of determining the validity of the mortgage.

According to Regulations on the Forced Sale of Arrested Vessels for Settlement of Debts, issued by the People's Supreme Court in 1994, the proper law governing the distribution of the proceeds from the sale in China is CMC. (For ranking of priority, see Section 6 above.)

It is safe to conclude that Chinese maritime courts will enforce a foreign registered ship mortgage, provided that the mortgage is valid and enforceable under the law of that foreign country. However, the priority of the ship mortgage is governed by Chinese law. ■

ANNEX



NOTES:

(1) Sales contract or ship building contract between Seller (Contractor) and Overseas Purchaser (Shipowner). The latter is a wholly owned subsidiary of the Chinese beneficial owner.

(2) Ship operated by or bareboat chartered to the Chinese beneficial owner.

(3) Overseas Shipowner arranges loans from foreign Lenders.

(4) Shipowner mortgages the ship to Lenders.

(5) Guarantors provide letter of guarantee to Lenders. Guarantors can be Bank of China, the Chinese beneficial owner, or the similarly authorized or qualified companies.

(6) If guarantee is provided by a Chinese Company, the ship shall be mortgaged to the Guarantor.

Recent Legal Developments and Important Issues in Japan[1]

— A Review on Recent Japanese Cases —

Hiroshi KIMURA*

I. The Japanese Legal System and its peculiarities

Japan is a codified law country, which has basically adopted French and German law as the basis for its civil and commercial law. The main body of academic study in the legal field has been carried out in relation to the interpretation of its Codes and Statutes. Due to the traditional approach that academic discourse over legal issues has historically taken and the relatively few decisions of the Japanese court as a source of precedent, scholarly opinion has had a great influence upon the interpretation and resolution of legal issues in Japan.

Given the foregoing characteristic of Japanese jurisprudence and its development, this approach has sometimes given rise to controversy and conflict between the strict legal position and actual practice in relation to specific legal issues. The Japanese business community always seeks uniformity, particularly in respect of those business matters which are linked to the international business community. Business practices readily leap ahead in accordance with new international developments, leaving the domestic legal regime often lagging far behind. The interpretation of the "Nature of the Time Charter" is one typical such example. It is obvious in one recent court judgement, dealing with identity of the carrier on a bill of lading issued in respect of a time chartered vessel, that the court made some attempt to catch up with present business practices but could not totally disassociate itself from the traditional legal pronouncements on the issue. Accordingly, the judgement contained certain anomalies and ambiguities in dealing with the relevant issues. This has created some difficulty for domestic legal practitioners and the business community as to how to regard the judgement and what exactly the present legal position is in relation to this matter.

One must appreciate the inroads that the Court attempted to make in its judgement despite the fact that there are certain anomalies to be found in the logic of some of the important matters. The *ratio decidendi* contained in the judgement cannot simply make

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1 This paper was presented to the Fifth Annual Conference of Inter-Pacific Bar Association held at San Francisco in May, 1995.

a quantum leap from the present legal position which exists to an all together different position merely for the reason that it is not in line with the current business practice in the international community. Legal development is to be achieved by preserving, not jeopardizing, the harmony that exists between practicality and the legal stability. Legal development in Japan should be achieved through slow and steady progression.

In addition to discussing the issues in relation to the nature of the time charter under Japanese law, this paper will discuss the judicial efforts to follow the practicality in the area of choice of law concerning maritime liens on vessels.

II. Nature of the Time Charter and the Identity of the Carrier in Time Chartered Vessels

1. Nature of the Time Charter

There are a number of different schools of thought on the nature of a time charter under Japanese law, which perhaps can be grouped into two main dichotomies, one is that it is not a charter by demise and similar to a contract of affreightment and the other is that it is or is akin to a charter by demise. The former obviously follows the legal position of major shipping countries such as England, whilst the latter appears to underline the status of a time charterer as an independent marine entrepreneur. It is the latter view which is traditionally the view that has been adopted in judicial decisions on this issue in Japan. It is based on the concept that the denial of an independent legal entity of a time charterer as against a third party does not reflect the contemporary feature of its business operation through the medium of a chartered vessel. All gain and loss through the operation of the vessel falls entirely for the account of the charterer. The shipowner's position would be receded in the sense that its sole concern is to obtain a profit in the form of charter hire by making its capital, namely the ship and labour, available to the charterer. A bareboat charterer's position would be the same as the shipowner in this respect.

Given that the courts in Japan have so far favoured the latter position, legal precedents have historically regarded the time charter as a mixed contract for supply of labor and lease of the ship[2]. This has the effect of making the time charterer, rather than the shipowner, responsible for any casualty related to the chartered vessel. This view however is not adopted in practice. If, however, the matter were to be brought before the court and strict legal principals were applied, the court may still, even though the current judicial trend appears to be moving towards denial of its nature being akin to that of a demise charter (to be discussed below), hold that the time charterer will be the person who should bear the primary responsibility for the casualty caused by the chartered vessel or her crew.

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2 This view was influenced by the position which existed under old German law.

2. Background Cases

The view that the time charter is akin to a demise charter dates back to a 1931 decision of "Daishinin", the former Supreme Court[3]. Although the correctness of this view in the modern context has been subject to a great amount of controversy and scholarly discussion by maritime law jurists, no judgement has overridden this view until recent times. The Tokyo District Court addressed the issue in 1974 in an action taken against a time charterer in relation to a collision (*The Fullmoon*)[4]. The main issue was whether the time charterer was the proper defendant to an action arising from a collision. The Tokyo District Court held that the time charterer was in a position akin to a lessee of the vessel in its capacity as an independent and principal marine entrepreneur. The existence of the employment clause and the misconduct clause in the relevant time charterparty (Baltime form of time charterparty in use) were found by the court to be persuasive reasons as to why the time charterer could be held to be responsible for the collision.

In *The Fullmoon* we have an example of the time charterer being exposed to legal liability for the conduct of the owner of the ship despite the fact that the master and crew were the employees and servants of the owner and the nature of the action was a collision involving the navigation of the ship which was the owner's responsibility.

There are instances, however, where the owner is exposed to the legal liability created by the time charterer. One such example would be where a maritime lien attaches to a vessel for a debt of the time charterer (e.g. bunker claims). After *The Fullmoon* several cases[5] adopted the conventional view that the time charter is akin to a demise charter.

3. *The Jasmin* Case

This is a recent first instance judgement of the Tokyo District Court rendered on the 19th March, 1991[6]. The decision was appealed and the appeal court (the Tokyo High Court) delivered its judgement on the 24th February, 1992. The case is now before the Supreme Court, the ultimate court of appeal in Japan. The judgement at the first instance is summarized as follows[7].

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3 *The Kaisho Maru* Horitsu Shimbun 3311–14, (Daishinin judgement dated 6th August, 1931).

4 *Sadaichi Hisatomi v. Showa Shipping Co., Ltd.* 748 Hanrei Jiho 77 (judgement of Tokyo District Court dated 17th June, 1974).

5 Osaka District Court judgement dated 12th August, 1983 reported in the Hanrei Times Vol. 519 at p. 189, Takamatsu High Court decision dated 2nd May, 1985 reported in the Hanrei Times Vol. 561 at p. 150.

6 Hanrei Jihon Vol. 1379, p. 134.

7 The judgment in *The Jasmin* was given under the old COGSA enacted under the Hague Rules, 1924., Japan has recently adopted the Hague-Visby Rules (1968).

(The Facts and Issues)

The case concerned the M.V. "JASMINE" (the "Vessel") which was owned by Ebisu Marina S.A. (the second Defendant) and was chartered by Kansai Steamship Co., Ltd. (the first Defendant) at the relevant time under an NYPE time charter form. The case concerned the carriage of 3,300 MT of rice bran extraction pellets by the Vessel from Indonesia to Korea. The first Defendant employed the Vessel in the voyage under a voyage charter concluded between it and the voyage charterer. Bills of lading for the carriage of the cargo were issued on the time charterer's form (the "Bs/L") and signed by local agents appointed by the voyage charterer in the style of "For the Master". Prior to the completion of discharge of the cargo it was discovered that part of the cargo stowed along the inside of the shell plates and the surface of the cargo stowed on top of the cargo stowed in the holds was wet, solidified, discoloured and mouldy. The Cargo which was discharged as sound and separated from the damaged cargo also later turned out to be unusable due to mold. The Plaintiffs were four insurance companies who were subrogated to the rights of the holders of the Bs/L by virtue of payment of the insurance proceeds in respect of the damaged Cargo.

There were a number of facts agreed between the parties to this case, including, that the second Defendant was the owner of the Vessel, the first Defendant was the time charterer of the Vessel and that Japanese law was agreed as the governing law as designated on the Bs/L.

There were a number of different issues involved in this case. The Defendants claimed as one of their defences that the cargo was laden on board the Vessel at a high temperature, 40° celsius, and therefore contained an inherent vice[8]. However, the main point of contention between the parties for the purposes of the present discussion was who was the carrier, namely the time charterer or the Vessel's owner under the Bs/L. The Tokyo District Court at first instance ruled that the expression "For the Master" on the bills of lading, to which the local agents affixed their signatures is generally a description that the shipowner itself is the party to the contract of carriage and hence the carrier. (emphasis added) This is the main significance of this judgement. The court held that the master is normally the agent of the shipowner in signing a bill of lading. Such a conclusion however, could not have been achieved without challenging the consistent line of legal precedents that a time charter is akin to a demise charter. As will be discussed below, the court apparently tried to depart from those previous views.

(The Decision)

In relation to the argument concerning the charterer's form of the Bs/L, the court held

8 The International Carriage of Goods by Sea Act, (1957) Japan, Article 4.2.9.

that the use by the time charterer of its own Bs/L form only shows it as the time charterer reflecting the descriptions of the Bs/L and that it is not the time charterer but the shipowner that is indicated thereon as being responsible in the capacity of the carrier. They went on further to say that, "it is inconceivable that the merchant, who is not a member of the general public not versed in shipping business, who takes such bill of lading, mistakes the "carrier" on the Bill of Lading to be any party but the shipowner."

They went on to say that it therefore was not necessary to apply the principle of apparent representation of the charterer representing itself as the carrier on the bills of lading.

(Nature of the Time Charter)

The court then considered the controversial matter of the role of the time charterer, its powers and functions and stated[9],

> " . . . a time charterer has the power of instructing a captain (sic) in respect of the so-called commercial matters . . . but, the conclusion that the time charterer assumes, as a matter of course, the responsibility of the carrier as evidenced by the bill of lading may not be drawn from the fact that such powers rest with the time charterer.
>
> "Any time charter is a contract for the exploitation of the services offered based on expertise and experience in respect of maritime affairs, and such matters to be mandated to those with expertise and experience are to be dealt with as being the responsibility of the shipowner who possesses the ship as a whole and manages it, as the time charterer never participates subjectively in these matters.
>
> "These findings are applicable to not only the so-called navigational affairs such as the navigation itself and the management of the ship . . . but also the matters generally deemed as commercial such as loading, stowage safekeeping, discharge etc. (emphasis added)
>
> "Apart from the situation under which it is agreed in the time charter that the charterer performs part of these commercial matters (loading, stowage and discharge), the time charterer gives instructions to the master and other seamen only in respect of the commercial side of the business of such divisions as loading, stowage, safe-keeping, discharge of the cargo etc. which require expertise and experience, and in respect of the specialised and technical activities, the time charterer neither has, as a rule, a power to direct and supervise nor is required to have such a capacity."

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9 Taken from an English translation of the judgement at first instance delivered on the 19th March, 1991.

The court then continued.

> "However, there may emerge a situation where it is required fairly to divide the burden of the liability between the shipowner and the time charterer in case of the damage to the cargo being found in a field belonging to the commercial matters and an agreement in respect of sharing the liability has been entered into between both parties.
>
> "However, such an agreement providing for ultimately sharing liability for the damage shall remain an internal arrangement and the time charterer shall not be held, as a matter of course, responsible to the cargo owners, even if, according to the internal agreement, the time charterer may meet the claim by the shipowner for the amount he has made good against the cargo owners."

The above analysis of the time charter, its powers and functions is obviously made on the footing that the nature of the time charter is totally different from the one as conventionally held by the courts, namely akin to a charter by demise. The District Court made some effort to disassociate themselves from the conventional legal thought as to nature of the time charter.

(The Demise Clause)

With respect to the demise clause, the court went on to confirm that there was nothing contained in the Japanese COGSA (1957) to deem the time charterer, not specified as the carrier on the bill of lading, as the responsible party thereof. It held, as a result that the demise clause contained in the Bs/L had the effect that it purported to have the shipowner, and not the time charterer, to be the carrier.

The Tokyo District Court judgement attempted to analyze the powers and functions of a time charterer and to catch up with the practically recognized concept of a time charter, that is a time charter is similar to a contract of affreightment.

(The Appeal Court Judgement)

However, the Appeal Court was silent on that part of the District Court's judgement dealing with analysis of the powers and functions of time charterer. As for the nature of time charter itself, the Appeal Court refrained from taking the matter any further than the Tokyo District Court and simply stated that the nature of a time charter has nothing to do with the determination of the identity of the carrier under a bill of lading. The Appeal Court did arrive at the same conclusion that it was the shipowner who was the carrier under the relevant Bs/L, by merely saying that in accordance with normal shipping practice it is generally accepted that when a shipowner confers upon time charterer or its agent a power or authority to sign a bill of lading on its behalf, and the relevant bill of lading had certain provisions, including the demise clause, expressing that the shipowner is the

carrier thereunder, the shipowner shall in those circumstances be considered the carrier.

(Analysis of the Judgements)

The criticism of this Appeal Court judgement is that it disregarded the effort made by the District Court to analyze the nature of the time charter, and rather relied, as its basis for identifying the carrier, mainly on the description contained in the Bs/L or the clauses thereof. It is this writer's view that the Appeal Court judgement is both illogical and inconsistent given that at Japanese law a bill of lading is a negotiable instrument which contains the rights and obligations of the carrier, the shipper and the bill of lading holder in respect of the carriage of the goods. There has been some academic dispute in respect of nature of a bill of lading in Japan, whether a bill of lading, which is a negotiable instrument, creates the rights and obligations contained therein of its own accord or whether such rights and obligations arise from the background transaction for undertaking of carriage of the goods. The latter view, namely the rights and obligations in the bill of lading arise from the background transaction, is the one held by the majority of scholars and is the view traditionally adopted by the courts. Even based on this view, the rights and obligations of the parties to the transaction shall be produced in the bill of lading by its execution. The execution of the bill of lading by the party who commits himself to undertake the carriage in question should be the basis for the creation of such rights and obligations therein. Therefore, what is of paramount importance in establishing the identity of the carrier who assumes the obligation of the carriage as described therein is to determine who is the principal party to execute the instrument. Logically, a carrier who declares himself to undertake the carriage of goods as described in a bill of lading is the principal party to the bill of lading as evidenced by his execution thereof.

In the case of a bill of lading which has been executed "for the Master", it is clear that that bill of lading has been executed by a signor for and on behalf of the Master. The Master himself is of course not the principal to the transaction of issuing the bill of lading, but he is acting as somebody else's agent. Accordingly, in order to determine the identity of the carrier one must identify who is the principal who directs and authorizes the Master to issue the bill of lading? In this regard the nature of the time charter should be of paramount importance. Factors such as (i) who earns the freight for carriage of the cargo as described in the bill of lading, (ii) whose form of bill of lading is used, and (iii) how the identity of carrier is claused in the bill of lading, may be considered, but they are subordinate to the execution of the bill of lading and only are relevant when the principal issuer of the bill of lading is in line with these factors.

It is difficult to estimate how much relative influence the demise clause had in both the District Court and the Appeal Court decisions in arriving at their conclusion as to who was the carrier. Possibly neither of the Courts considered the demise clause to be

such a decisive factor as to conclusively determine the carrier's identity. The Courts simply mentioned that the demise clause was not in conflict with the provisions of the Japanese COGSA, particularly Article 15 which provides that any provision purporting to lessen the carrier's liability shall be void. The Courts did not clearly say what was the role of the demise clause in identifying the carrier. Perhaps it was the intention of the Courts that the demise clause was merely valid in the sense that it was not inhibitive or contrary to the finding that the shipowner was the carrier.

If a bill of lading is issued in circumstances where the time charterer is the principal issuer, one may reasonably inquire whether court will hold that the owner is nevertheless the carrier by virtue of the demise clause. This question may arise where the time charterer is a substantial company who has the use of a vessel in its fleet under a time charter from an owner who may only be a single ship owning company registered in a "flag of convenience" country. Based on the foregoing, it is doubtful whether one can attach any substantial significance or importance to the demise clause as an element or factor in identifying the carrier in Japan.

4. Post-*Jasmin* decisions – *The Shinzan Maru No. 5*

While it is not certain how the Supreme Court will ultimately determine *The Jasmin* while the case is still pending, some indication may be derived from a Supreme Court judgement subsequent to the District Court's decision in *The Jasmin* (but before its High Court judgement), also concerning the question of the nature of the time charter[10].

(The Facts)

The case involved the collision of a Japanese coastal carrier, the "SHINZAN MARU NO. 5" on a contract described as a "time charter", with a mine sweeper of the Japanese Self Defence Force, owned by the Japanese Government. The owner of the mine sweeper, sued the time charterer of the "SHINZAN MARU NO. 5". The time charter party of the "SHINZAN MARU NO. 5" was in a simple form, having only a few provisions in which the charter period was of a fixed time duration, the hire was calculated monthly (but in fact the hire was paid in accordance with the actual time engaged in voyage performance and the bunkers were paid by the owner) and the operation of the vessel was subject to the instructions of the time charterer. The Court found as a matter of fact that the crew was employed by the owner of the "SHINZAN MARU NO. 5", the time charterer had no power to have the crew replaced and it was actually the owner that had possession of the Vessel.

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10 *The Shinzan Maru No. 5*, Hanrei Jiho Vol. 1421 p. 122 (judgement rendered 28th April, 1992).

(The Decision)

The Supreme Court held that it was the time charterer and not the owner of the "SHIN-ZAN MARU NO. 5" who could be held responsible for the collision. The Supreme Court appeared not follow its line of precedent that a time charter is a combined contract of lease and supply of labour, but instead held that the time charterer in this case utilized the Vessel in continuous and exclusive manner in that its position as an independent marine entrepreneur was akin to that of the owner. Perhaps the Supreme Court's position as stated therein is nearest in line with the present prevailing view amongst scholars as mentioned before.

5. Conclusion

From the foregoing, perhaps it may prove difficult for a Japanese court to deviate from the position that a time charter is a main marine business enterprise by way of utilizing a vessel for an agreed time duration in which a substantial control over the vessel rests with a time charterer, and to fall into line with the world wide accepted concept that a time charter receives only the service of transportation from a shipowner.

However, what is now required is for the Supreme Court in its decision in *The Jasmin*, to set up clear and consistent criteria with respect to the nature of the time charter and identification of a carrier under bill of lading. Such a ruling is eagerly awaited and will be welcomed by legal practitioners and all people in the business community whose business dealings involve some form of sea transport alike.

III. Governing Law with respect to Maritime Liens

1. Background

From an historical perspective, as with the nature of the time charter, there has been great deal controversy and debate with respect to the question of what are the laws governing the determination of the validity of maritime liens on vessels.

There are various schools of thoughts propounded by jurists or which have resulted from various court decisions some of which are briefly summarized below. In this discussion it is important to realize that Japanese law treats the existence of the maritime lien (i.e. the matter from which the maritime lien arises) and the effect of the maritime lien, as two separate and distinct issues, which, as you will see, may be subject to the laws of different jurisdictions.

2. Schools of Thought

(a) The question of whether a particular claim gives rise to maritime lien on a vessel is to be determined by having regard to both the law of the vessel's flag and the governing

law of the claim itself. In this view, a maritime lien can only be granted in the event that both the laws of the flag state and the governing law of the claims would recognize and grant the creation of a maritime lien in the circumstances. The enforceability and the content of maritime lien recognized as such shall be subject to the law of the vessel's flag.

This is the view which is shared by the majority of scholars[11] and supported by the main stream judgements[12].

(b) The existence of the maritime lien and its effect shall be determined only by reference to the law of the vessel's flag.

(c) The existence of the maritime lien and its effect shall be determined by both the law of the vessel's flag and the governing law of the claim to be secured thereby (however, the order of priority shall be determined in accordance with the law of the vessel's flag).

(d) The existence of the maritime lien and its effect shall be determined by the governing law of the claim to be secured thereby and its effect shall be subject to the law of the place where the vessel in question is located.

(e) The existence of the maritime lien shall be determined by both the law of the vessel's flag and the governing law of the claim to be secured thereby and its effect shall be subject to the law of the place where the vessel in question is located.

(f) The existence of the maritime lien and its effect shall be determined by the law of the place where the vessel in question is located. The law of the place where the vessel is presently located is the same as the law of the place where an action has been commenced. Therefore this view is based on the same footing of application of the "lex fori" principle.

3. Rationale

There are two main reasons that the scholarly and judicial thoughts on this matter are so diversified, which in short are because consideration needs to be given to, (i) whether the governing law of the claims to be secured need to be considered and if so to what extent and (ii) which law would be the ruling factor to be taken into account, the law of the vessel's flag or the law of the place where the vessel is located.

The Japanese statute in this regard is known as the "Horei", enacted in 1898, which

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11 Prof. K. Yamato, Prof. H. Egawa, Prof. Y. Orimo, Prof. K. Sawaki, Prof. Y. Kawamata.

12 Yamaguchi District Court Yanai Branch Judgment of 26th June, 1967 Kakyu Minji Hanreishu 18-6-711, Akita District Court Decision of 23rd January, 1971 Kakyu Minji Hanreishu Vol. 22 1-2-52, Takamatsu High Court Decision of 30th April, 1985 Hanrei Times Vol. 561 p. 150, Hiroshima High Court Decision of 9th March, 1986 Hanrei Times Vol. 633 p. 219.

Statute contains the provisions dealing with choice of laws. The Statute provides in Article 10 that any real rights or such other rights as required to be registered with respect to real property (non-movable) or chattels (movable) shall be governed by the law of the place where the property (asset) in question is located. (emphasis added)

The question of whether and to what extent the governing law of the claims to be secured need to be considered may be answered, by one line of reasoning, on the basis that a maritime lien is in the nature of a privileged right as having originated from and not independent of the claim to be secured thereby and therefore if the law which governs the claim itself does not recognize any need that the claim be secured by a maritime lien, it is inappropriate to grant maritime lien for that claim by applying another country's law.

The problem with this view is that in some cases there may be great difficulty in determining the governing law and certain complexities exist in applying a law which is unknown to and does not necessarily fit in to the legal system of the country where the action has been commenced.

As for the question of which law would be the ruling factor the prevailing opinion considers that the law of the place where the asset is located should in fact be the law of the vessel's flag and not the actual place where the vessel is located. If the latter criterion is adopted, the law is liable to vary with the movement of the vessel and depending upon the place where the vessel is located the recognition of maritime lien is likewise affected. This results in jeopardizing both the predictability and the stability of the law. The law of the vessel's flag is more closely attached to the vessel and not subject to ready change, and therefore a more reliable criterion for the recognition of a maritime lien.

On the other hand, the application of "lex fori" is practically convenient because the parties to the action and proceedings need only look to their own country's legal position, which obviates any requirements to adduce evidence of the legal position in another country.

4. The Case Law

In *The Manila Transport*, a recent decision of the Tokyo District Court[13], the court dealt with a case relating to exercise of maritime lien by way of attachment by a time charterer (the "Applicant") of an ore carrier (the "Vessel") to the insurance proceeds paid in respect of the total loss of the Vessel. The Vessel was registered under the Panamanian flag and owned by a Panamanian company (the "Owner") who bareboat chartered her to a Filipino company (the "Bareboat Charterer") who in turn time chartered out the Vessel to a time charterer (the "First Time Charterer"). The Applicant took the Vessel on time

13 *The Manila Transport*, Hanrei Jiho Vol. 1402 p. 91 (judgement of Tokyo District Court Decision, rendered on 19th August, 1991).

charter from the First Time Charterer. The Vessel sank whilst carrying a cargo of ore (the "Cargo"), whereupon the Applicant attached the insurance proceeds of the Vessel to be payable by a Japanese insurance company (the "Third Party Debtor"). According to the evidence the Owner, the Bareboat Charterer and the Time Charterer were all named as co-assureds under the relevant insurance policy.

The Applicant commenced the aforesaid action for recovery of its damages in respect of loss of the Cargo and loss of earnings due to deprivation of use of the Vessel for the remaining time charter period on the grounds that, (i) it held a maritime lien on the Vessel for the aforesaid claims by virtue of the Japanese law concerning limitation of owner's liability (the "Limitation Law")[14] and (ii) the insurance proceeds with respect to the total loss of the Vessel served as substitution for the Vessel and therefore could be the subject of a maritime lien.

The court gave recognition to the maritime lien for the claims in loss of the cargo and loss of earning, applying Japanese law, which was the law of the place where the action was commenced.

(The Decision)

The above decision applied the "lex fori" principle and probably is most in line with the school of thought mentioned in (f) above. The decision itself is very brief and provides no reason why the court has applied "lex fori" to determine the maritime lien for the subject claims for damages. Accordingly, it is difficult to make any proper analysis of the significance of this decision. Aside from this it is likely that the reasons for the decision were probably heavily influenced by considerations of practical convenience and the simplicity with which the selection of law could be made with respect to the maritime line. A certain number of district courts (i.e. the Tokyo District Court decision on 15th December, 1992) in Japan have now apparently followed this position in respect of determining the laws governing the validity of a maritime lien on a vessel.

(Other Legal Issues)

Aside from the choice of law question in respect of maritime lien the aforesaid decision has raised some interesting legal issues. It is considered doubtful that the alleged claims for damages relating to the loss of the Cargo and the loss of earnings actually gives rise to a maritime line. The Applicant was the time charterer of the Vessel and did not have any direct right or interest in the Cargo. The Applicant's claims for loss of the Cargo

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14 The Limitation Law was enacted in accordance with the 1957 Limitation Convention and as amended by the 1976 Convention. The Limitation Law grants a maritime lien on a vessel for such line of claims as its recovery is limited thereby.

could be founded on, (i) an indemnity claim under the time charter and/or (ii) a subrogated claim of the cargo interests as a result of its settlement of the claim with the cargo interests. The indemnity claim does not come within application of the Limitation Law and thus does not give rise to a maritime lien.

However, the subrogated claim which the owner of the cargo originally had against the Bareboat Charterer or the Owner is such a claim as is limited by the Limitation Law and thus to be secured by maritime lien. Therefore, if the Applicant has been duly subrogated by the cargo owner's claims upon settlement thereof, it would have been entitled to exercise a maritime line on the vessel. However, when the present action was commenced, the Applicant had not settled the cargo owner's claim so it was merely in a position where it potentially could be subrogated to the cargo owner's claim if it settled the same. In the view of the writer, such so called "potentially subrogated rights" should not be the basis upon which a maritime lien should be allowed to be exercised on a vessel.

The exercise of a maritime lien is an enforcement procedure and only such claims or rights as have been clearly and fully accrued should be the basis upon which it may be enforced. If the Applicant wished to secure its claim against any of the First Time Charterer, the Bareboat Charterer and/or the Owner it should have attached the insurance proceeds via other proceedings, namely preservation proceedings. The practical difference as far as the Applicant in this situation is concerned is that under preservation proceedings, it would have been required to provide security.

The other part of the Applicant's claim was for the loss of earning due to deprivation of use of the Vessel. Insofar as that claim is directed against the disponent owner of the Vessel under the Time Charter, that is purely a claim as arising from and based on the time charter itself. That type of claim is also not subject to the Limitation Law and therefore does not give rise to a maritime lien.

The loss of earning claim may be probably directed against such a party as not being a party to the Time Charter, such as the Bareboat Charterer and/or the Owner, based on tort. Such a tort claim, if founded, is subject to the Limitation Law and therefore creates a maritime lien. However, the question is whether such an action in tort could be founded against the Bareboat Charterer and/or the Owner for the reason that such third party wrongfully lost the Vessel, resulting in deprivation of the Applicant's use of the Vessel. The decision was silent in relation to this matter. One must question whether the Court gave proper consideration to this point in arriving at its decision.

Finally, the above decision confirms that the insurance proceeds in respect of total loss of a vessel is a tangible substitute for the vessel and thus maritime lien can extend to those proceeds. Although this issue had been the topic of controversy, it has now been resolved that a maritime lien can indeed be extended to the insurance proceeds of vessel.

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The Practical & Legal Considerations Regarding the Cost of Oil Spills

— Legal Liability Arising out of Oil Spills —

Ian DAVIS*

INTRODUCTION

An oil spill gives rise to both civil and criminal liability, the distinction being that criminal liability arises from a breach of regulatory legislation giving rise to fines or imprisonment, whereas civil liability is the liability to pay compensation or damages (which may be limited by legislation or convention) to third parties whose property or income has been adversely affected by the spill. There may also be forms of liability for on-going clean up work which, though not necessarily a financial penalty as such, will involve the party exposed to this liability to an on-going financial and corporate commitment.

OIL SPILLS - CRIMINAL LIABILITY

General

The Federal Government and each of the States (including the Northern Territory) have enacted legislation which prohibits the discharge of oil or oily mixtures or other noxious substances into the waters over which they have jurisdiction.

Under the Off-shore Constitutional Settlement formalised by the Commonwealth *Coastal Waters (State Powers) Act* 1980 and the *Coastal Waters (State Title) Act* 1980, each coastal State has jurisdiction from the low water mark for three nautical miles out to sea and over its own inland waters. The Federal Government has jurisdiction from the three mile limit to the end of the twelve nautical mile territorial waters. The Federal Government does, however, also have power to intervene within State waters, if necessary, in matters that are not otherwise dealt with but otherwise come within areas of the Federal Government's legislative competence, which include, for example, navigation and any matters which arise from Australia's obligations under international treaties to which it is a party. The Federal Government also has power to intervene in relation to oil pollution in the exclusive economic zone and on the high seas where it is necessary or desirable to do so to prevent or mitigate danger or potential danger to Australian waters, coastlines, reefs, fishing grounds and other areas of importance.

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This paper considers the Federal and New South Wales legislation in detail as an indication of the general nature of liability that owners and masters are exposed to. The general principles are in broad terms applicable in each of the other States and Territories. So far the States of New South Wales, Victoria, South Australia and Tasmania have passed legislation implementing Annexes I and II of MARPOL 73/78. Western Australia has passed (but not yet proclaimed) legislation implementing Annexes I and II, and Queensland has drafted legislation that has not yet been passed.

COMMONWEALTH

Prohibited discharges

The principal group of statutes passed by the Federal Parliament are the Protection of the Sea Acts, the most important being the *Protection of the Sea (Prevention of Pollution from Ships) Act* 1983. This Act gives the force of law to the 1973 International Convention for the Prevention of Pollution from Ships and the 1978 Protocol to it, collectively known as MARPOL 73/78, and Annexes I (oil pollution), II (pollution by noxious liquids in bulk) and V (garbage) of that Convention. Annexes III (harmful substances in package form) came into force internationally on 1 July 1992 and Annex IV (sewage) at some as yet undetermined time in the future, after it comes into force internationally. The discharge of oil or oily mixtures from a vessel into the sea is prohibited except where they are permitted by the Convention to secure the safety of the ship or life at sea, if it resulted from unintentional damage or if the discharge were authorised to combat a specific pollution risk.

Regulations have been passed that provide that the outer edge of the Great Barrier Reef is the "nearest land" for the purposes of Annexes I, II, IV and V of MARPOL, which has the practical effect of prohibiting most forms of pollution from vessels within the area of the Reef.

The penalties were substantially increased in June 1991. The Act outlaws the discharge of oil or oily mixtures and provides for fines of up to A$200,000 for persons and A$1,000,000 for companies: section 9(1). The Act will not apply, however, in State waters if there is relevant State legislation enforcing Regulations 9 and 11 of Annex I: section 9(1A). These Regulations are reflected in sections 9(1) and 11 of the Commonwealth Act. The discharge of oil residues from Australian ships is prohibited if against Australian law: section 10(1); the maximum penalties are A$200,000 for persons and A$1,000,000 for companies.

Other discharges

Certain discharges of oil from tankers are permitted by section 9(4) but they relate

generally where the vessel is not near land, outside a "special area", is proceeding en route, the oil content is less than 100 (or in some cases 15) parts per million and, in some cases, an oily-water separating equipment has been installed and used.

Notification and reporting

Under section 11 masters of Australian ships are required to notify "without delay" a prescribed incident to the relevant officer under the Act or the Government of a foreign country if that is the nearest coastal State: section 11(1). The maximum penalties are A$50,000 for persons and A$250,000 for companies. It is a defence if the person required to make the notification was unable to comply: section 11(2). If the master cannot comply, in certain circumstances the owner, charterer, manager or operator of the vessel, or the agent of any one of those, must notify the relevant person of the incident.

If required, the master must provide a report to the relevant prescribed officer or government; failure to do so gives rise to a maximum fine of A$20,000: section 11(6). The prescribed officers are listed in Regulation 4; the form of notification in Regulation 5 and the form of report in Regulation 6. Regulation 7 requires a report to be furnished within 24 hours.

Oil books must be kept honestly and retained on board for 12 months and by owners for 2 years: sections 12, 13 and 14. The form of oil book is specified in Regulation 8. All Australian ships of 400 gross tons or more and all Australian tankers of 150 gross tons or more must carry on board an oil pollution emergency plan in the working languages of the master and officers: section 11A(3). It must list notification procedures, authorities who must be notified, a detailed description of action to be taken, and procedures for communication and co-ordination of the response to the spill: section 11A(4). The maximum penalty for non-compliance is A$50,000 for individuals and A$250,000 for corporations.

Inspectors' powers

Section 27 of the Act provides oil inspectors with wide powers of entry, enquiry and examination and provides fines and other penalties for failure to comply with their directions. These provisions are very similar to equivalent provisions in the comparable New South Wales legislation discussed below.

STATE LAW - NEW SOUTH WALES

Prohibited discharges

The scheme of the *Marine Pollution Act*, 1987 (NSW) closely follows that of the Federal legislation, at least so far as the Federal legislation goes. The MARPOL provisions

are brought into New South Wales law and apply in New South Wales state waters. The fines are in line with those in the Federal legislation (maximum fines A$200,000 for persons and A$1,000,000 for companies) although interestingly enough they are expressed in terms of "penalty units". A "penalty unit" is defined in section 56 of the *Interpretation Act*, 1987 (NSW) as A$100, which reflects a scheme introduced by the New South Wales Parliament to allow all fines contained in various NSW Acts of Parliament and so expressed to be increased by a simple amendment to the *Interpretation Act* rather than to each of the pieces of legislation. This means that, should the New South Wales Government increase the amount of the "penalty unit", the fines in the *Marine Pollution Act* could increase beyond those set by the Federal Act.

It is important to note that under the NSW legislation, there is a wider range of people who may be prosecuted: in addition to the master and owner, any other person whose act caused the discharge who may be charged with an offence under the *Marine Pollution Act.*

Other duties

The *Marine Pollution Act* contains provisions similar to the Federal Act in relation to the prohibition on the discharge of oil, oil residues, the duties to report and notify of incidents and the maintenance of oil record books. There are similar provisions throughout the Act in relation to the other Annexes of MARPOL 73/78 though only Annexes I and II (oil and noxious substances) are in effect.

In a number of ways, however, the New South Wales legislation goes further than the Federal scheme both in terms of the establishment of liabilities for oil spills and the bureaucratic and administrative consequences of such spills.

Transfer operations

Section 27 prohibits the discharge of oil or oily mixtures in connection with "a transfer operation", which is defined in section 25 to mean any operation that is involved in the preparation for, or in the commencement, carrying on or termination of, a transfer of oil or of an oily mixture or of a liquid substance of a mixture containing a liquid substance to or from a ship or a place on land. The fines for such a discharge are the same as for other oil discharges. The only defences are if the discharge was for the purpose of combating specific pollution incidents in order to minimise the damage from pollution or was authorised by the State Pollution Control Commission: section 27(2). There are duties to report discharges arising from transfer operations, the maximum penalty for a breach of which is a A$20,000 fine. Records relating to transfer operations must be maintained and kept in accordance with the Regulations. There is a A$20,000 fine for a failure to make an appropriate entry in the record and penalties of A$20,000 for persons and

A$100,000 for companies if the records themselves are not kept and maintained.

If the transfer operation involves two or more ships, the liability arising from discharge is joint and several (which means that consequences are as if the discharge was from both vessels): section 31.

Transfers of oil or oily mixtures cannot take place between sunset and sunrise without express permission: section 32; the penalty is A$50,000.

Recovery of clean-up costs

The New South Wales Act has a number of miscellaneous provisions which relate to the procedures of enforcing the prohibitions referred to elsewhere in the Act and in recovering fines and costs from people who have breached the Act.

Under section 46 the Maritime Services Board may take any action it thinks fit where a discharge occurs or where there is a probability of a discharge occurring to prevent or limit the discharge, to disperse the oil or oily mixture that has been discharged, to contain any such oil or oily mixture, to remove it or to minimise the damage from pollution. Under section 46(2), more importantly, the Board may recover all costs and expenses incurred by it in respect of any action taken under section 46 from the owner, the master or the person who is responsible for the discharge or probable discharge in relation to a transfer operation, or any other person whose act caused the discharge or the probable discharge. The costs may be recovered as a debt in the usual debt recovery proceedings in court and it is not necessary for an offence or breach under the Act to be established first: section 46(3). In a case I involved with in 1991, the costs of clean up over a period of little more than 24 hours of a spill estimated at about four tons of heavy oil discharged into a confined corner of a New South Wales port without any risk of significant long term effect was A$94,000. However, there was no prosecution in line with recommendations of the MSB oil inspectors.

Detention and security

Under section 52A a vessel may be detained by the Board if it has reasonable cause to believe that a discharge has occurred from it and that, if that is proved, the Board would be entitled to take proceedings to recover costs and expenses incurred by it under the Act and if it is believed that the ship will depart from New South Wales waters before the completion of the Board's investigations. It is not necessary for the MSB to prove that the vessel was responsible for the spill before it can be detained.

A detained ship must be released immediately if appropriate security is provided, if proceedings are discontinued, if the proceedings are heard and concluded without any person being convicted or costs or expenses being awarded against any person, if all penalties, costs and expenses have been paid, if the Board forms the belief that the discharge

did not occur from the vessel or for any other reason the Board determines: section 52A(2). The security must be of sufficient amount to cover any amount which in the Board's opinion is recoverable by it from the owner or master in relation to a discharge and the maximum amount of penalties that can be imposed: section 52A(3). This, of course, may be quite a considerable amount given the fact that multiple offences may have occurred and in principle there is nothing to prevent the Board commencing proceedings against, for example, both the owner and master for the same offence. The security to be given must be in a form suitable to the Board, although the form is not determined by the Act itself: section 52B(2). The Explanatory Note to the Bill which brought in these amendments last year uses the examples of bank guarantees or letters of undertaking from one of the members of the International Group of P & I Clubs. There is nothing, however, to force the Board to accept any particular form of security though it would be very difficult in practice for the Board to refuse the tender of security in one of these forms. The Act does provide, however, that the monies so secured may only be used in payment of costs or expenses or the payment of penalties for offences under the Act: section 52B(3). Any balance would presumably be refunded to the ship owner.

It is a penalty with maximum fines of A$100,000 for companies and A$20,000 for persons to allow a vessel to leave State waters before it is officially released from detention unless the person charged with this breach can establish that he or she was not aware that the ship had been detained: section 52C.

The Act does not provide for a period for which a ship may be detained and, therefore, unless the appropriate security is promptly tendered, the detention may be indefinite.

Power to require action

Under section 48 the Board is entitled to serve written notice on any person appointed to it for this purpose requiring that person to take such action or prohibit the taking of such action that has the purpose of preventing, limiting, dispersing, containing or removing pollution from a prohibited discharge or a likely prohibited discharge. Such a notice may prohibit the removal of a vessel from a place without the Board's approval or the removal of any cargo from a ship: section 48(1). The action required by the Board may include maintenance, repair, replacement or reconstruction of any equipment, the removal of oil or an oily mixture from a ship or from land, the removal of a ship to a specified place, the termination of any operation or activity, or the requirement that any facility or apparatus be put into operating the condition: section 48(2). This list is not exhaustive. The appropriate person will be either the owner or the master of the vessel or, in relation to transfer operations, the person responsible in relation to that transfer operation.

Failure to comply with such a notice gives rise to a penalty of A$200,000: section 50. If it is not complied with, the Board may, by force if necessary, enter, seize or operate

vessels, places, equipment or facilities: section 50(4). A notice under section 48 does not have to be complied with if the non-compliance is for the purpose of securing the safety of a ship or saving life at sea or is with the approval of a prescribed officer: section 50(3).

Third party rights to recover damages

Although the Act is primarily concerned with criminal offences and the powers of the Maritime Services Board, section 51 expressly preserves the right of third parties who suffer loss of or damage to property or incur costs or expenses in preventing or mitigating or attempting to prevent or mitigate any loss or damage resulting from a relevant discharge to recover the amount of that loss, damage or expense as a debt in a relevant court: section 51(1). The person from whom those costs, damages or expenses may be recovered is the master or owner of a vessel or the person responsible in relation to a transfer operation. The Board is a person who may seek to recover those damages. The right to take action under this section would not be available or would be modified where it is also available under the Civil Liability Convention as the Federal legislation implementing that Convention purports to cover the field.

Oil inspectors

Where there has been a discharge or a probability of a discharge in contravention of the Act, inspectors are empowered to board the vessel with such assistants and equipment as he considers necessary and to require the master and officers of the ship to take such steps as the inspector directs. The inspector is entitled to inspect and test any machinery or equipment, to require the master to direct the testing of any such machinery or equipment, to open and cause to be opened any hold, bunker, tank or other part of the vessel, to require the master to produce the oil record book required by the Federal legislation, to take copies or extracts from any book or document, to require the master to certify that any entry in such a book is a true copy, to examine and take samples of any substances on the vessel, to require the master to certify for the taking of such samples, to require the testing of any apparatus which is relevant and to require any person to answer questions: section 53(1). It is an offence giving rise to a penalty of $20,000 to hinder or obstruct the inspector without reasonable excuse or to provide an answer that is false or misleading: section 53(3). In our view, the requirement in section 53(1)(n) to answer questions does not prevent reliance on the general common law privilege against self-incrimination. The only real limitation on the inspector's powers is that under section 53(4) he shall not unnecessarily delay a ship from beginning a voyage in exercising them.

Section 60 provides complete immunity to oil inspectors in relation to the exercise in good faith of their duties under the Act.

Prosecutions

The recovery of the fines may be brought either in the Local Court or the Land & Environment Court of New South Wales. If the proceedings are brought in the Local Court, they must be commenced within two years of the offence and the maximum penalty is A$10,000 or two years imprisonment, or the maximum penalty otherwise provided by the Act if it is lower. Proceedings in the Land & Environment Court, however, may be taken at any time and the maximum penalties provided by the Act may be imposed. It is now apparently the policy of the NSW Maritime Services Board to commence all prosecutions in the Land & Environment Court.

When proceedings are taken, the Act provides for certain and more legalistic, procedural and evidentiary matters which assist the Board in its prosecution of offenders. If the contravention is by a corporation, not only are there higher fines applicable under the Act, but each director of that corporation is deemed to have contravened the same provision if he knowingly authorised or permitted the contravention. That person may be prosecuted separately whether or not the corporation itself is prosecuted: section 56(2). Certain documents, such as any records kept in pursuance of the Act or as required by the Act or certain notices given by the Board under the Act, are all prima facie evidence of the facts stated in that evidence. This means that this evidence may be refuted by contradictory evidence adduced any person and the records are, therefore, not necessarily conclusive: section 58. However, in particular, reports by analysts appointed by the Board to analyse substances are also taken as prima facie evidence of the facts stated in them unless specifically contradicted: section 59. Any analysis certificate which the Board seeks to rely on must be given to the person charged a reasonable time in advance to allow that person to test that evidence: section 59(4).

OTHER STATES

The position in Victoria is governed by the *Pollution of Waters by Oil and Noxious Substances Act* 1987, which implements Annexes I and II of MARPOL 73/78 in that State.

In South Australia the relevant legislation is the *Pollution of Waters by Oil and Noxious Substances Act* 1987 and in Tasmania it is also called the *Pollution of Waters by Oil and Noxious Substances Act* 1987.

CERTIFICATION PROVISIONS OF MARPOL 73/78

Certain other requirements concerning the certification of ships confirming the vessel is constructed in accordance with the provisions of Annex I of MARPOL are to be found

in sections 266 and following (Division 12 of Part IV) of the Commonwealth *Navigation Act* 1912. Section 267B provides that Australian ships may be certified that their construction is in accordance with Annex I. So may foreign ships if requested by the foreign State in question: section 267C.

Notification within seven days must be given of any alteration or damage to the ships which effects its compliance in accordance with that certificate. If notice is not given, the master and owner are each guilty of the offence and liable to a fine of A$1,000: section 267D(1). The penalty is repeated each further day that notification is not given: section 267D(2). Certificates may be cancelled and their delivery up may be requested if they were issued based on erroneous or fraudulent information or as a result of alterations or damage to the ship which affect compliance: section 267D(5) to (7).

Under section 267E an Australian ship with a certificate in force shall be periodically surveyed for the purpose of ensuring compliance with Annex I. It is an offence not to do so punishable by a fine of A$2,000.

The ship construction certificate ceases to have effect if the vessel ceases to be an Australian ship: section 267F. Vessels that are required to have the relevant certificate are oil tankers of at least 150 tons gross tonnage and other vessels of 400 tons gross tonnage or more. It is an offence for a master of such a ship to put to sea unless a ship construction certificate is in force for it: section 267G(2); the penalties are fines of A$10,000 or imprisonment for up to four years. It is a similar offence on the part of the owner. The certificates must be carried aboard the ship: section 267H; the certificates must be produced if required by Customs in certain circumstances: section 267J.

Under section 267K, the Australian Maritime Safety Authority is empowered so far as is necessary or expedient to protect the environment to issue directions to foreign ships not constructed in accordance with Annex I not enter any port or any specified port or ports in Australia, not use any or any specified off-shore terminals, or that they comply with any specified requirements while entering or leaving port or any specified ports and when approaching, using or leaving any off-shore terminal or any specified off-shore terminals in Australia.

There are similar statutory provisions and regulations in force for ships carrying noxious liquid substances in bulk in compliance with Annex II of MARPOL 73/78.

CIVIL LIABILITY

It is beyond the scope of this discussion to consider the general bases of claims for damages, costs or expenses arising out of oil pollution. Suffice it to say that the general common law in relation to tort (including negligence), nuisance and the principles in *Rylands -v- Fletcher* (which relates to the escape from property of dangerous substances

onto another property) in principle all apply subject to the extent to which they have been over-ruled, subsumed or are otherwise dealt with by statute. However, these rights of recovery are generally intact and could result in massive claims.

In considering the regimes governing civil liability, distinction must be made between those agreements such as TOVALOP (Tanker Owners' Voluntary Agreement concerning Liability for Oil Pollution) as revised and extended and CRISTAL (Contract Regarding Interim Supplement to Tanker Liability for Oil Pollution) as revised and extended on the one hand, and the enforcement of the International Convention of Civil Liability for Oil Pollution Damage 1969 ("CLC") on the other. TOVALOP and CRISTAL are voluntary agreements entered into by tanker owners or oil traders and impose obligations only on the parties to the agreements. Although these are necessary and welcome acceptances of responsibility on the part of the oil industry generally, their application is voluntary and does not effect or amend the application of liability under other legislation enforced as a result of Australia's adherence to CLC.

It is important to note at the outset that the 1976 Limitation Convention (which is now part of Australian law by virtue of the *Limitation of Liability for Maritime Claims Act* 1989) is not relevant: under Article 3 of that Convention, its Rules do not apply to claims for oil pollution damage within the meaning of the CLC. CLC, however, relates only to certain liabilities of tanker owners and it seems that other forms of civil liability for oil pollution maybe covered by the 1976 Limitation Convention.

Civil liability legislation

Under section 8 the Commonwealth *Protection of the Sea (Civil Liability) Act* 1981 a number of provisions of CLC have been given the force of law as part of the law of Australia:

- Articles I to VI,
- Paragraphs 1, 8 and 9 of Article VII,
- Article VIII,
- Paragraphs 1 and 3 of Article IX, and
- Paragraph 1 of Article XI

Under sections 9 and 10 the State courts are given jurisdiction to hear claims relating to oil pollution and the measures taken to combat it and to hear applications by any relevant person (which includes an insurer, owner, or other person providing financial security in relation to a ship) for a determination of the limitation of liability pursuant to the Convention in relation to any such claim.

The relevant version of the 1969 Convention is that as amended by the 1976 Protocol. The 1984 Convention with its increase in limitation amounts is waiting in the wings but has not yet come into force internationally. The Australian Government anticipates that

it will amend the Act to bring the 1992 version of the CLC into effect in Australia in about May 1996.

Under CLC the owner of a ship carrying oil in bulk as cargo at the time of an incident is liable for any pollution damage caused by persistent oil which has escaped or discharged from it as a result: Article III. No liability will attach if the damage resulted from an act of war, hostilities, civil war, insurrection or natural phenomenon of an exceptional, inevitable or irresistible character, or was wholly caused by an act or omission by a third party done with intent to cause damage, or was wholly caused by the negligence or other wrongful act of any Government or other authority responsible for the maintenance of navigational aides: Article III(2). Apportionment is available if the person who damaged or effected was partly or wholly responsible for the damage: Article III(3). The Convention provides an exhaustive scheme for recovery and prohibits claims against servants or agents of the vessel's owners (Article III(4)) buy only in relation to claims covered by the CLC.

Provided that the incident did not result from the actual fault or privity of the owner, he is entitled to limit his liability for claims under Article V(1).

Limitation of civil liability

Under the 1976 Protocol to CLC, the limitation amount is 3,000,000 units of account for ships under 5,000 tons and for heavier vessels the limitation amount is 3,000,000 units plus 420 units of account for every additional ton, with a maximum limitation amount of 59,700,000 units of account. The unit of account is defined in Article V(9) as the Special Drawing Right ("SDR") defined by the IMF, which as at 8 August 1995 was equivalent to A$2.06366 (or ¥140.008). Thus, the limitation amounts convert to A$6,190,980 (¥420,024,000) for ships of up to 5,000 tons, with an additional A$866.74 (¥58,803) for each additional ton with a maximum of A$123,200,502 (¥8,358,477,600).

Under the amended Article V(10) the unit of tonnage in question is that defined by the International Convention on Tonnage Measurement of Ships 1969.

Once the right to limit is established, the limitation fund can then be set up by the deposit of the sum itself or by bank guarantee or other form of guarantee acceptable to the court seized of the case: Article V(3).

Once the limitation fund has been established, no person with a pollution damage claim can exercise any other right against the assets of the owners in relation to that claim and the relevant court or competent authority shall order the release of any arrested property that may have been detained to provide security: Article VI.

Evidence of financial security

Owners of tankers carrying more than 2,000 tons of oil as cargo are required to maintain insurance or other financial security to cover liability under the Convention: Article VII(1).

A certificate attesting to this insurance is to be issued to each ship and is to be kept on board, a copy of which is to be deposited with the State of the ship's registry or with the authorities of the State issuing or certifying the certificate. States which are party to the Convention, such as Australia, are not permitted to allow ships under its flag covered by this Article to trade without such a certificate being in force: Article VII(10).

The provisions relating to certificates of insurance or financial security are enforced by section 14 of the Act and apply to every non-Government ship carrying more than 2,000 tons of oil in bulk as cargo. There is no condition that the ship be an Australian ship. If such a ship enters or leaves or attempts to enter or leave an Australian port or a terminal in Australia's territorial seas without such certificate on board and in force, the master and owner of the ship are guilty of offences not exceeding A$50,000 in the case of individuals and A$100,000 in the case of corporations. Similar offences apply to the masters and owners of Australian ships seeking to enter or leave other countries without such certificate being in force.

Fines for not carrying a relevant certificate on board give rise to fines of A$2,000 and A$5,000 for individuals and corporations respectively: section 15(3). A ship may be detained until the certificate is produced when requested by a relevant officer: section 15(5) and (4). The relevant officers may include any persons so designated, Customs officers and surveyors appointed under the *Navigation Act* 1912.

Limitation period

Under Article VIII rights for compensation are extinguished unless action is brought within three years from the date when the damage occurred or in any event no more than six years from the date on which the relevant incident took place, or the first in a series of incidents.

Claims for compensation can only be brought in the relevant State if the incident occurred or preventative measures were taken in territorial waters of that State.

The Convention does not apply to war ships or other Government ships on Government non-commercial business: Article XI.

POWERS OF INTERVENTION

The *Protection of the Sea (Powers of Intervention) Act* 1981 entitles the Australian Maritime Safety Authority ("AMSA") (established by an Act of 1990 of the same name), where it is satisfied that there is a grave or imminent danger to the coastline of Australia or the related interests of Australia following upon a maritime casualty from pollution or the threat of pollution by oil, to take such measures on the high seas as it considers necessary to prevent, mitigate or eliminate the danger: section 8(1). The measures may

include the movement of a ship or part of a ship, the removal of cargo from a ship, the salvage of a ship or any part of it or its cargo, sinking or destruction of a ship or part of a ship or of its cargo and the taking over of control of the ship or any part of it. To do so, it may issue appropriate directions (authorised by section 11) to the owner, master or any salvor in possession of a vessel: section 8(2).

By these provisions and others in the Act, the International Convention relating to Intervention on the High Seas in Cases of Oil Pollution Casualties and the Protocol to it (which relates to substances other than oil) are brought into effect for Australia.

Similar provisions are granted to AMSA for pollution by substances other than oil under section 9.

Under section 10 AMSA may take such measures as it considers necessary to prevent or reduce pollution or likely pollution by oil or noxious substances of any Australian waters, coast or reef, or damage to the related interests of Australia by reason of such pollution where oil or a noxious substance is escaping or has escaped from a ship, being any Australian ship on the high seas or any ship in Australian coastal waters: section 10(1) and (2). Where spills occur close to shore or in port, it is more likely that the intervening authority will be the relevant State or Territory authority rather than AMSA, in which case the relevant State or Territory law will govern the powers of intervention. The position in New South Wales is discussed earlier in the paper.

A number of sections of the Act authorise the issue of directions to persons, being masters or owners of vessels, to do various things in pursuit of AMSA's powers. It is an offence to contravene or not to comply with such a direction and each person so doing is liable to a fine of A$20,000 if an individual or A$50,000 if a corporation: section 19(1). Prosecutions may be taken in summary jurisdiction, in which case the fine is reduced to A$2,000 and A$5,000: section 19(3). It is a defence against such prosecution if the contravention or non-compliance resulted from the need to save life at sea, if compliance was not possible or if it could not be complied with until another event took place and was complied with as soon as possible after that time: section 19(4). Prosecution for an offence under the Act may be brought at any time: section 20.

Recovery of intervention costs

The recovery of expenses under the *Protection of the Sea (Powers of Intervention) Act* is to be found in Part 4 of the *Protection of the Sea (Civil Liability) Act* 1981, sections 20 and following. Where the Minister has incurred any expense or other liability by reason of the exercise of his powers under sections 8, 9 or 10 of the *Protection of the Sea (Powers of Intervention) Act*, that liability or expense is recoverable as a debt due to the Commonwealth by the owner of the ship or ships involved: section 20(1) of the *Civil Liability Act*. The debt may be avoided if the incident which gave rise to the claim by

the Commonwealth resulted from an act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional, inevitable and irresistible character, was wholly caused by an act or omission of a third party with intent to cause damage or wholly caused by the negligence or other wrongful act of any Government or similar authority responsible for the maintenance of navigational aides: section 20(2) of the *Civil Liability Act.*

Provided that the incident giving rise to the claim did not occur as a result of the actual fault or privity of the owner of the ship (which reflects the conditions applying in the Civil Liability Convention), the liability of a ship to the Commonwealth under section 20 can be limited to the lesser of 133 Special Drawing Rights (A$274.47 or ¥18,621) per gross ton or 14,000,000 Special Drawing Rights (A$28,891,240 or ¥1,960,112,000): section 20(3) and Regulation 11. The upper limit will apply to vessels of over 105,263 tons.

An important provision is section 20(4): the ability to recover the debt and the limitation applicable in section 20(3) do not apply to third party claims for pollution damage which would otherwise be governed by the Convention: section 20(5); they relate purely to the costs, expenses and other liabilities incurred by the Minister in exercise of his powers of intervention as defined by the same-named Act.

Detention and security

Under section 22 a ship may be detained until payment of any amount owed to the Commonwealth by way of compensation for any expense or other liabilities incurred by the Minister in exercise of his powers of intervention until that amount is paid or security for it is provided to the Minister's satisfaction: section 22(1). Going to sea before release from such detention is an offence giving rise to a penalty of A$5,000 or imprisonment for two years or A$10,000 in the case of a body corporate. Unlike the similar New South Wales legislation, there is no more detailed description of the purposes and uses and acceptable forms of security.

MISCELLANEOUS

Finally, it is worth noting the *Protection of the Sea (Civil Liability) (Registration of Foreign Judgments) Regulations.* These are designed to assist in the recovery in this country of sums payable under judgments of courts in the contracting States to the CLC arising under claims dealt with by the CLC. It is not necessary to discuss them in detail, merely to note that the Government here has a policy of facilitating the international enforcement and recognition of pollution damage awards given elsewhere.

In general terms, ship owners, operators and masters should note the *Environment Protection (Sea Dumping) Act* 1981 and related Regulations. These do not relate specifi-

cally to oil spills but are clearly related to the same basic philosophy.

VOLUNTARY AGREEMENTS

The TOVALOP and CRISTAL agreements as revised and extended were signed originally as industry-motivated measures to deal with the public outcry following major oil spills in the 1970's and 1980's. They represent a commitment by tanker owners and others involved in the trade of oil to clean up oil pollution or to reimburse Governments and third parties for doing so. It requires members to carry insurance sufficient to cover not only CLC but also TOVALOP and CRISTAL commitments. Both agreements were revised with effect from 20 February 1990 and extended to operate until 20 February 1997. It is estimated that 97% of the world's tanker tonnage is covered by TOVALOP and that 80% of the world's oil by CRISTAL.

The standing TOVALOP agreement does not apply if CLC does, for instance under the *Protection of the Sea (Civil Liability) Act* 1981, but the 1987 supplement will if CRISTAL-owned cargo is involved to provide higher limits. The standing agreement will remain relevant if the anti-pollution legislation of the country concerned does not adopt CLC or if the State of the vessel's flag has not.

CLC is essentially an international scheme subscribed to by nations, the ships of whose flags will then undertake insurance through the usual P & I channels. It is administered on a State or Governmental level. TOVALOP and CRISTAL, on the other hand, are privately administered by the International Tanker Owners' Pollution Federation and Marine Pollution Compensation Services Limited respectively in London.

There are a number of differences between the compulsory and voluntary schemes:

(a) CLC, TOVALOP and CRISTAL relate only to persistent oils; but CLC covers whale oil but TOVALOP and CRISTAL do not;

(b) The right to limit under TOVALOP is absolute though not under CLC, where it is lost if the owners' fault or privity contributes to the incident;

(c) TOVALOP covers tankers in ballast whereas CLC only covers tankers carrying oil as cargo;

(d) Demise charterers are covered by TOVALOP and CRISTAL but not CLC;

(e) TOVALOP and CRISTAL are broader and cover the threat of pollution damage, whereas CLC only covers actual damage;

(f) TOVALOP has a shorter limitation period (2 years) and failed negotiations must go to arbitration at the International Chamber of Commerce rather than to the courts, which is the case with CLC and its enacting legislation. TOVALOP claims are made directly to its administrators.

The limitation amount under the standing TOVALOP agreement is US$160 (A$215.26)

per limitation ton with a limit of US$16,800,000 per incident (A$22,601,910), which operates from 105,000 tons. Under the 1987 Supplement, there is a set maximum of US$3,500,000 (A$4,708,731) for tankers of up to 5,000 tons plus US$493 (A$663.26) for each additional ton to a maximum of US$70,000,000 (A$94,174,627), corresponding to a tanker of 139,888 tons.

Although the claims are administered independently, it is the contracting tanker owner's responsibility to meet the claims and to prove their financial or P & I capacity to do so.

CRISTAL was originally designed as a voluntary scheme pending the entry into force of the International Fund Convention 1971 and to supplement TOVALOP. It would not apply if the Fund Convention does and in principle acts as a supplementary scheme to begin operation where other regimes, such as CLC and TOVALOP, fall away. The Fund Convention came into force internationally in 1978 but has not been adopted in Australia.

Before a member of CRISTAL is liable, the tanker owner must have paid out claims up to the TOVALOP limit. A tanker owner must be a member of TOVALOP before it can be a member of CRISTAL to obtain the "top-up" advantages. However, the polluting oil creating the pollution must be owned by a party to CRISTAL. It covers all pollution damage, including the removal of pollution threats, not otherwise recoverable from the tanker owner or any other source.

Its limit of liability for vessels up to 5,000 tons is US$36,000,000 (A$48,432,665) when aggregated with all other sources of compensation. This rises by US$733 (A$986) for each additional ton to a maximum of US$135,000,000 (A$181,622,494), which corresponds to a tanker of 140,061 tons.

Any company engaged in trading, storing, refining, marketing, producing or using bulk oil can join CRISTAL; this can include, for example, major consumers.

FUND CONVENTION

The International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1971 (the "Fund Convention") as amended by the 1976 Protocol came into force in Australia on 8 January 1995 by virtue of the *Protection of the Sea (Oil Pollution Compensation Fund) Act* 1993. The 1984 and 1992 Protocols to the Fund Convention are not yet in force but the Australian Government anticipates that the 1992 Protocol will come in Australia in about May 1996.

Under section 8, the Fund is given legal status. The following portions of the Fund Convention have been given the force of law:

- Article 1,
- Articles 3 to 6,
- Paragraphs 1, 3, 5 and 6 of Article 7,

- Article 8,
- Article 9,
- Article 10,
- Paragraphs 1 and 2 of Article 11,
- Paragraphs 2 and 3 of Article 12, and
- Article 15.

An action brought against the Fund for compensation under Article 4 or for indemnity under Article 5 may be brought in the Federal Court of Australia or in the Supreme Court of any State or Territory: section 11. Late payment penalties are payable under section 18. Contributions and late payment penalties payable under the Fund Convention may be recovered by the Fund as a debt due to the Commonwealth of Australia on behalf of the Commonwealth: section 20.

POLLUTION FROM OIL PLATFORMS

There is no specific legislation, either State or Federal, which relates directly to the legal consequences of spills from oil platforms. In many cases the legislation will not apply because it is directed only to vessel owners, masters or operators. Some State legislation may apply if a spill occurs within the State waters limit of three miles. For instance, in New South Wales there may be some liability under section 27, which prohibits the discharge of oil or oily mixtures in connection with a "transfer operation" if the spill occurs at a relevant place in a pipeline.

Petroleum seabed exploration can only take place with the relevant permit, lease, licence, pipeline licence, special inspecting authority or access authority issued under section 101 of the Commonwealth *Petroleum (Submerged Lands) Act* 1967. The issue of any of those documents may be qualified by directions issued by the relevant Government authority. Specific directions were issued in relation to off-shore petroleum exploration production in the Specific Requirements as to Off-Shore Petroleum Exploration and Production Schedule 1990. The only specific reference in those rules relating to oil spills is paragraph 220, which provides that where an escape or omission of petroleum occurs, such action as is necessary to minimise the loss of petroleum and the pollution of the area and protect persons and property shall be taken. It also provides that no chemical disbursements shall be used on oil spills without approval.

Of rather more fundamental importance are the conditions under which the permits, etc are issued. The terms of those conditions should be referred to specifically. In general terms, they require the permit holders to protect and take precautions against oil spills, to set up contingency plans and to comply with MARPOL Convention requirements. The penalties for non-compliance with a direction in force is punishable by a fine not exceeding A$10,000: section 101(7). (10 August, 1995) ■

Japanese Sentiment, Today and Tomorrow

— Outside Pressure —

Takao TATEISHI*

From a historical point of view, the Japanese will give way in the end in negotiations – this has been a good illustration of what the Japanese do under the pressure from outside. But the tide appeared to start turning when Japanese Prime Minister Ryutaro Hashimoto, the then Minister of International Trade and Industry, faced the US negotiators with his tough attitude during the talks last summer on auto imports to Japan. In consequence he earned a reputation as a tough negotiator.

The history of Japanese vulnerability to pressure goes back to the mid-19th century when the US fleet led by Admiral Perry came to Uraga in Tokyo Bay and demanded that the Edo Shogunate break down its insularism and resume international trade, or open its domestic market. Bowing to the pressure, the Edo Shogunate agreed to conclude a trade treaty. Whether the directness of the Japanese on international scenes is actually taking shape one and a half centuries later remains to be seen.

Speaking of arbitration, it now seems globally recognized that arbitration institutions need to abide by the principle of foreign representation, namely register international arbitrators on the panel and permit foreign lawyers to practice in international arbitration cases, if they wish to truly internationalize. As regards the legal representation of foreign lawyers, it is a matter of Japanese law and the Ministry of Justice is just about to submit a bill to revise the current act to the Diet. When legislated, probably later this year, the new act will allow foreign lawyers to act as legal attorneys for international arbitration held in Japan, even when the Japanese law has jurisdiction over the case.

Apparently this process has been made in accordance with the international trend in favor of arbitration, and besides in consideration of the fact that Japan has long been criticized for its ineptness at dealing with international cases including arbitration.

Along this line, the Japan Shipping Exchange, Inc. (JSE), as well, will make amendments to its Arbitration Rules shortly. One thing the JSE is stressing is the arbitration proceedings where English may be the language of arbitration. They are also reviewing the qualifications for the arbitrators to be listed on its Panel which may open the way for international arbitrators. But this is not under the outside pressure but rather from their wish to internationalize. ■

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* The Japan Shipping Exchange, Inc.

Japan Maritime Information Service

<< provided by The Japan Shipping Exchange, Inc. >>

— Computerized Information Service —

Detailed and accurate data which contain:

☆ Particulars of all Japanese merchant ships over 100 tons gross (about 9,000 ships; Japanese version with English guide)

☆ Addresses and telephone numbers of Japanese shipowners, brokers, shipbuilders and other companies engaged in maritime businesses (about 2,000 companies; Japanese version)

JMIS

All or part of these data are available either on floppy discs for data-processing or as hard copy printout.

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