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Arbitration Award in the Voyage Charter Party Covering the Vessel "S"

Claimant-1 Carrier, Time Charterer of the vessel "S"
Claimant-2 Agent for Claimant-1
Respondent Voyage Charterer

With regard to the dispute concerning the voyage charter party, between the Claimant-1 and the Respondent, and covering the vessel "S" dated 24 September 1991, the below mentioned arbitrators, appointed in accordance with the TOMAC arbitration rules of the JSE, have, upon consideration, reached the following results.

AWARD

1. The Claimant's claim shall be dismissed.
2. Arbitration costs are assessed at ¥2,163,000 and are to be borne equally between the parties.
3. The court of jurisdiction for this arbitration award is the Tokyo District Court.

POINTS OF CLAIM

1. Claimants

(1) The Respondent to pay the Claimants the amount of ¥84,940,634, and the Respondent to pay interest of 6% per annum on ¥69,940,643 of that amount from 20 April 1992 until said amount has been paid in full.
(2) Arbitration costs to be borne entirely by the Respondent.

2. Respondent

(1) Dismiss the Claimants' claim.
(2) Arbitration costs to be borne entirely by the Claimants.

ARGUMENTS

Claimants

The Claimants' arguments may be summarized as follows:

1. The Claimant-1 time chartered vessel "S" (Panamanian Registry, 2,759 GT, hereinafter referred to as the "Vessel") from its' owner, who is not a party to these proceedings, and the Claimant-2 issued bills of lading and delivered the cargo, as agent for the Claimant-1.
   On 24 September 1991, the Claimant-1 entered into a voyage charter party with the Respondent (on the ASBATANKVOY form, the Claimants' exhibit 9, hereinafter referred to as "the Charter").
   After loading a cargo of Isopropyl Alcohol and Ethyl Acetate (hereinafter referred to as "the Cargo") at Kaoshung, Taiwan, on 28 September a bill of lading (Claimants' exhibit 11, hereinafter referred to as "the B/L") was issued to the shipper "A" printed on the Claimant-2's letterhead. The B/L was made out to the consignee as "TO ORDER OF SHIPPER" and the notify party was filled in as "B Co., Ltd."

2. While the Vessel was making way en route for the port of Yokohama on 1 October of the same year, Mr. Q, the person-in-charge at the Respondent company issued to the Mr. P, person-in-charge at the Claimant-1 a message to the following effect: "We understand the B/L will not be available at the time of discharge. Accordingly, please discharge the Cargo in exchange for the single L/G of B, who is not a party to these proceedings. A and B are long standing trading partners so we anticipate no problems." The L/G (hereinafter referred to as "the L/G") issued by B was faxed via the Respondent. The original L/G was mailed to Claimant-1 by cargo handler C, who was not a party to these proceedings. On 3 October when the vessel arrived at the port of Yokohama, the Cargo was delivered to C in exchange for the L/G in question. C consigned the Cargo to two warehouses, one in Ichikawa City, Chiba Prefecture and the other in Kawasaki City, Kanagawa Prefecture.

3. B, however, had gone into bankruptcy and no longer had the ability to pay for the Cargo. A then took the following actions while reserving presentation of the B/L:
   (1) demanded delivery of the Cargo from the Claimant-1,
   (2) moved for an injunction in the Tokyo District Court ordering C not to dispose of the Cargo, and
   (3) arrested the Vessel at Hong Kong. In the circumstances, the Claimant-1 presented a Mitsubishi Bank issued L/G and obtained release of the Vessel. Settlement was

reached in Tokyo District Court between all parties concerned excepting the Respondent on 20 April 1992. In exchange for the original B/L, the Claimant-1 paid US$620,000 to A which took receipt of same.

The Claimants hereby demand payment from the Respondent of ¥84,940,643 (as detailed in the attached damages worksheet) on grounds that the only reason they exchanged the Cargo for a single L/G was that Mr. Q, instructed them to do so and that, but for the Respondent's wrongful instructions, they would not have delivered the Cargo without taking receipt of the B/L (so-called L/G delivery).

4. Allegations regarding the L/G delivery are as follows:

Without consignee B's permission, C presented an L/G issued in B's name to the Respondent. Intentionally and without the consent of the Claimant-1, the Respondent took receipt of the L/G from C. Unaware of the above, the Claimant-1 thereby agreed to deliver the Cargo. Whether Claimant-1 tried delivering the Cargo to B or to C, in either way it would be in fulfillment of their obligation to the Respondent under the Charter, and be viewed as receipt by the Respondent.

As far as the Claimant-1 is concerned, delivering the Cargo other than in exchange for the B/L necessarily involves the risk that the holder of the B/L will make a claim for damages later. As a direct party to the Charter, however, and aware of the risk to the Claimant-1, in a case where the Cargo is delivered other than in exchange for the B/L, the risk of loss is borne by the charterer.

In other words, the charterer (party requesting carriage) the Respondent, implicitly promises to indemnify Claimant-1 against demands for payment of losses of this sort. Further, when the Cargo is carried in accordance with the Respondent's instructions, because the Claimant-1 is obligated to deliver the Cargo, there is a corresponding duty on the part of the Respondent (the party requesting carriage) to use due care to see that Claimant-1 is not exposed to claims from third parties. This duty arises under the Charter.

In trades such as that between Taiwan and Japan, where the goods often arrive before the bill of lading, waiting for the bill of lading can result in demurrage losses. Accordingly, letter of guarantee delivery has become customary. It is common knowledge that liability for loss where the charterer requests delivery without the bill of lading is to be borne by the charterer.

In addition to their "implicit guaranty," and "contractual duty" to provide appropriate instructions, the Respondent also legally has a "fiduciary duty" and liability under tort where they fail to provide appropriate instructions.

5. The Claimants offer the Claimants' exhibits 1 to 24 as documentary evidence and Mr. P as witness.

Respondent

The Respondent's case may be summarized as follows:

1. The background circumstances behind the Cargo being delivered in exchange for a single L/G are as follows: Before the Vessel arrived at the discharge port, Mr. P requested Mr. Q to prepare consignee's single L/G because the B/L had not yet arrived and the Claimant-1 would exchange the Cargo for consignee's L/G. Mr. Q contacted consignees' port transport business agent and requested provision of consignee's L/G. Having taken receipt of the L/G via fax from C, Mr. Q faxed same to Mr. P. The Respondent was not authorized to instruct the carrier/Claimant-1 to discharge the Cargo in exchange for an L/G. Having been requested to do so by the Claimant-1, the Respondent is nothing more than a messenger shuttling the L/G from the consignee to the Claimant-1. Since the Vessel was scheduled to load its next cargo at Yokohama on 4 October (the Claimants' exhibit No. 10-2-2) the Claimant-1 was under pressure to quickly discharge the cargo in question. It is not difficult to understand in the circumstances why Mr. P made the proposal that he did to Mr. Q.

2. Regarding carriage of the Cargo under the B/L, regardless of the relationships under the charterparty, a contract of affreightment exists between A and the issuers of the B/L. The issuers of the B/L must carry the Cargo in accordance with the B/L's provisions, and bear the obligation to deliver the Cargo to the holder of the B/L. The Claimant-1 was the Vessel's time charterer and argues that they issued the B/L in the Claimant-2's name. The B/L in question was printed on a form with the Claimant-2's name in the letterhead, and the signature line is stamped "For Master." It was not clear who signed the B/L. But because ordinarily, in cases such as this, the time charterer's agent signs the bill of lading, we find that such was the case in the instant case as well.

   Where a time charterer issues a "For Master" bill of lading the issue arises whether the issuer of the bill of lading, the carrier in other words, is the shipowner or the time charterer. The expression, "for the master" is generally interpreted to mean the shipowner the party to the contract of affreightment indicated in the bill of lading. Accordingly, in the instant case, the carrier under the B/L is neither the Claimant-1 nor the Claimant-2 but the shipowner. Thus, because neither the Claimant-1 nor the Claimant-2 has a contractual relationship with A, they accordingly have no obligation

to indemnify A, the B/L holder, for losses incurred as a result of the L/G delivery.

3. Even assuming hypothetically that the Claimant-1 is the carrier, once the B/L has been issued, the carrier's duty is to carry the Cargo in accordance with the terms of the contract of carriage between the B/L issuer and the consignee. The voyage charterer has no rights or obligations in this respect. The Respondent is in the position of a broker and has neither the right nor the obligation to give instructions regarding the delivery of the Cargo. The issue of L/G delivery arises with the issuance of the B/L. Whether or not to make L/G delivery is entirely up to the issuer of the B/L. This determination and responsibility is entirely up to the Claimant-1.
   Accordingly, the Claimants' claim should be dismissed.

4. The Respondent called Mr. Q to testify.

REASONING

On 16 April 1992, the Claimant-1 and Claimant-2 entered into an agreement with the Respondent to refer the resolution of the dispute in question to TOMAC (the Claimants' exhibit 18). The instant arbitration was referred in accordance with this agreement.

1. We find from the evidence presented (the Claimants' exhibits 9, 11 and 13) that the parties are on common ground with respect to the following facts (1) that the contract in question for the Vessel was concluded between the Claimant-1 and the Respondent on 24 September 1991, (2) that the B/L in question was issued in regard to the Cargo, and (3) that the Cargo was delivered in exchange for an L/G.

2. Because in the instant case the Claimant-1 did not exchange the Cargo for the B/L, but rather exchanged the Cargo for a single L/G issued in B's name, when the Claimant-1 received a demand for damages from B/L holder A, the Claimant-1 was therefore forced to bear responsibility for that demand. The Respondent charterers under the instant charter, on the other hand, in spite of their obligation to respond truthfully to the Claimants' requests for information concerning disposal of the Cargo, breached this obligation by failing to provide appropriate instructions. The Claimants assert this is a breach of the duty to take due care and accordingly seek damages from the Respondent.

3. We now consider the Respondent's argument to the effect that, because there was no contractual relationship between the Claimants and A, and the party to the contract

of carriage referenced in the B/L was the shipowner, therefore, the Respondent bears no liability for any losses arising out of the L/G delivery.

As in the instant case, where the time charterer the Claimant-1 used a B/L printed on the Claimant-2's letterhead, and the B/L was issued "For Master," the issue arises of whether the owner of the cargo may make a claim for damages against the shipowner and/or the charterer. Where, however, as in the instant case, the Claimant-1 operated as the carrier, there is no need to consider the issue further, accordingly we hold here that the Claimant-1 was the carrier.

4. Next, with regard to cases where a bill of lading is issued pursuant to a voyage charter party, it is frequently the case that the ship in question arrives at the discharge port before the bill of lading finds its way into the hands of the consignee. In the circumstances, it is widely accepted customary practice for consignees who wish to gain custody of the goods quickly to provide the carrier with a letter of credit and to take delivery of the cargo in exchange for the letter of credit. When the party bearing the risk of loss under the letter of credit is a first class trading company, carriers often exchange the cargo for a single such letter of credit. But ordinarily the letter of credit exchanged for the cargo will either be issued by the consignee's bank or else jointly by the consignee and his bank. This is the so-called joint letter of credit.

5. In the instant case the consignee issuing the L/G did not have a particularly high degree of credibility. In exchange for the L/G, the Cargo was delivered to C. Examining the history of the L/G in question, both the Claimant-1 and the Respondent assert that B's single L/G was issued in response to opponents' demands. The arbitrators in this case may presume as a result of hearing of Mr. P and Mr. Q and C's testimony the following is true: "On 2 October 1991, at B's request, the person in charge at C consulted regarding the issuance of an L/G to Mr. Q, and drafted an L/G based on their heretofore used model, and faxed same to the attention of Mr. Q, and after receiving confirmation that the signature of the person in charge at C would be effective if the president of B was unavailable, he drafted an L/G and sent the original to the attention of the Claimant-1." And although we recognize the circumstances in which the Claimant-1 was in a rush to make the next load, as we stated above at item 4, in light of ordinary practice, the Respondent's side required the L/G delivery. However, even when L/G delivery is requested based on the Respondent's instructions, whether to take receipt of B's single L/G is at the carrier's (Claimant-1's) discretion who issued the B/L. The appropriate steps for the carrier to take in preparation for a request for delivery of the Cargo from a proper B/L holder are: (1) investigate and

evaluate the creditworthiness of the issuer of the L/G, (2) check the genuineness of the L/G, (3) check whether the shipper has been paid for the Cargo, including an inquiry into the possibility of disposing of the Cargo, and (4) the most critical thing is to request joint participation in the L/G from either the charterer/Respondent or B's bank. Over the past seven years there have been thirty-some transactions between the Claimants and the Respondent. Stepping back through the record of L/G deliveries, we are only able to confirm cases of L/G delivery where the issuer of the single L/G was a major trading house or one of the issuers of the joint L/G was a bank. Accordingly, this instance gives rise to a new set of circumstances not covered by custom and practice to date. We do not find that the charterer/Respondent had an unspoken understanding that they would be liable for the L/G delivery. In a matter of fact, the persons directly in charge for the Claimants and the Respondent had become friendly in the course of transactions. As a result the Claimants had failed to conduct a credit check on the consignee and had also failed to request that the Respondent or a bank provide a joint L/G. As a result we can only determine that these failures by the Claimants to exercise their duty of due care were the reason that they delivered the Cargo in question in exchange for the L/G in question.

Moreover, when the carrier is subject to a claim for damages from the B/L holder, the argument to the effect that the charterer/Respondent must bear an accessory duty to compensate the carrier, made by the Claimants, who bore both a contractual and fiduciary duty, is without basis and we cannot accept it. However, because the Respondent was not a broker under the Charter but one of the parties to the Charterparty, if they had understood the Claimants' position and cooperated this incident may have been avoided. But nonetheless, we do not find that for this reason the Respondent was in breach of the Charter of their fiduciary duty.

And with regard to Claimants' arguments that the Respondent is subject to tort liability because he failed to provide proper instructions, we find that evidence sufficient to establish tort liability has not been established.

As indicated above, upon thorough consideration of the arguments of the parties, all the documentary evidence presented, and the testimony of all witnesses, we hereby dismiss the Claimants' demands.

6. We order that the arbitration costs in this case of ¥2,163,000 be borne equally between the Claimants and the Respondent and we hereby award same.

24 April 1996

TOMAC of The Japan Shipping Exchange, Inc.

ARBITRATOR: Takakuni MIYAKE (signature)

ARBITRATOR: Hideki TAKASHIBA (signature)

ARBITRATOR: Koji TSUBAKI (signature)

■

Arbitration Award in Disputes Arising from a Bill of Lading

Claimants (Cargo Underwriters)
Claimants' Attorney
Respondents (Carriers)
Respondents' Attorney

Regarding the disputes between the above mentioned parties arising from the Respondents' Bill of Lading No. HK20667131, the undersigned arbitrators appointed in accordance with the Rules of Simplified Arbitration Procedure Supplement to The Rules of Maritime Arbitration of The Japan Shipping Exchange, Inc., hereby render the following award.

AWARD

1. Claimants' claim shall be dismissed.
2. The cost of arbitration shall be ¥504,700 which shall be paid by the Claimants.
3. The court of competent jurisdiction shall be the Tokyo District Court.

SUMMARY OF FACTS AND CLAIMS

The Claimants

1. The Claimants were the insurers of 3 containers containing 492 packages of fabrics carried between Kobe and Hong Kong under the Respondents' bill of lading No. HK20667131(Evidence A-1, hereinafter referred to as the "BILL OF LADING").

2. The dispute between the parties is to be resolved by arbitration in Tokyo by the Tokyo Maritime Arbitration Commission of The Japan Shipping Exchange, Inc. in accordance with Clause 4 of the BILL OF LADING.

3. The grounds for the claim are as follows:
   On arrival of the containers at the place designated for devanning, the cargo in the container - - - 1014325 (hereinafter referred to as the "CONTAINER") was found to be in a damaged condition. After examination it was concluded that water had entered the CONTAINER through 5 holes in the CONTAINER roof.
   Before the said cargo (hereinafter referred to as the "CARGO") was loaded into the CONTAINER by the representatives of the shippers, the containers were all checked and found to be in apparent good order and condition. The Respondents issued a clean bill of lading acknowledging receipt of the full containers in good order.

The containers were removed from the container terminal in Hong Kong on the 9th April, 1992, and moved immediately to the place designated for devanning. There was no incident during the course of carriage from the container terminal to the devanning warehouse such as could have caused holes in the roof and in addition there was only light rainfall on that day. The transit time from the container terminal to the devanning godown was only a few moments.

When the consignees noted the damage to the CONTAINER and the CARGO, they invited the Respondents by telephone to send a surveyor but the Respondents refused and instead referred the consignees to the underlying carriers, who had been responsible for performing the actual ocean transit.

After the damage was quantified, the Claimants paid the claim presented by the consignees and have now acquired subrogated rights of recovery against the Respondents whose BILL OF LADING provided for them to be responsible for the goods from the time when the full containers were received until the time when the full containers were finally delivered.

4. Despite requests for an amicable settlement and for an extension of the time limit beyond the 9th January, 1993, the Respondents have maintained a total repudiation of liability and has also refused to grant an extension of the time limit to permit amicable negotiation. For this reason, the Claimants through their representatives arranged for a law office to serve a formal Notice of Claim(Evidence A-29), in the format required under the Japanese legal procedure, which had the effect of suspending the time limit for six months beyond the time bar date.

   It is accepted that the claim is subject to a 9 month time limit, effective from the date of delivery. The CARGO was collected from the underlying carriers' terminal on the 9th April, 1992 so the time limit expired on the 9th January 1993. The time limit was extended for 6 months until the 9th July by virtue of the claim letter from the Law Office, even though the Respondents had not agreed to voluntary extension of the time limit. The arbitration was commenced on the 9th July 1993.

5. The Claimants' claim for HK$294,490.59 remains unsatisfied and as such the Claimants wish to preserve the time limit position and also to seek an award to satisfy their claim.

The Claimants filed Evidence A-1~A-34.

The Respondents

1. The Respondents admit the following as facts:

1) According to the BILL OF LADING issued by the Respondents, they carried three containers from Kobe to Hong Kong on board the vessel named "S".
2) The actual carriers of the above mentioned containers were "M" Ltd.
3) One container out of three containers was numbered - - - 1014325(Evidence A-5).

2. According to the Claimants' claim, the delivery of the CARGO was made on 9th April, 1992, and at that time, the consignees discovered the alleged wet damage to the CARGO.

Clause 10(2) of the BILL OF LADING stipulates as follows:

"In any event the Carrier shall be discharged from all liability in respect of loss or damage unless arbitration is filed pursuant to Clause 4 within nine months after delivery of the goods or the date when the goods should have been delivered."

As the Claimants filed arbitration on 9th July, 1993, nine month time limit was over. Then the Claimants' claim should be dismissed.

3. Although the Claimants' agent requested from the Respondents six month extension of the said time limit through its letter of 3rd December, 1992 (Evidence A-24), the Respondents have never agreed. Notification through fax raised by a lawyer of the Law Office, arrived to the Respondents on 8th January, 1993, and further on 11th January, 1993, by registered airmail. Even if the above-mentioned Clause 10(2) stipulates the negative prescription (time bar), the prescription period was elapsed. The Respondents were entirely discharged from all liabilities.

The Respondents filed Evidence B-1~B-5.

REASONS

1. The 2nd sentence of Clause 4 of the BILL OF LADING reads:

"Any dispute arising from this Bill of Lading shall be referred to arbitration in Tokyo by Tokyo Maritime Arbitration Commission (TOMAC) of The Japan Shipping Exchange, Inc. in accordance with the Rules of TOMAC and any amendments thereto, and the award given by the arbitrators shall be final and binding on both parties."

The application was accepted by the TOMAC on July 9th, 1993, and a copy of a complete set of the Claimants' application documents was immediately served upon the Respondents.

2. The Respondents pleaded in brief as follows:

According to the Claimants, the CARGO was delivered to the consignees on April 9th, 1992 and at that time, the consignees discovered the alleged wet damage to the

CARGO. The Claimants' application for arbitration was made after the time limit and the Respondents were discharged from any liability for the alleged damage in accordance with the Clause 10(2) of the BILL OF LADING which reads "In any event the Carrier shall be discharged from all liability in respect of loss or damage unless arbitration is filed pursuant to Clause 4 within nine months after delivery of the Goods or the date when the Goods should have been delivered."

3. The Claimants further stated in brief as follows:
   The Claimants through its representatives arranged for the Law Office to serve a formal notice of claim, which had the effect of suspending the time limit for six months beyond the time bar date.

4. Further the Respondents stated that the Claimants misunderstood the interpretation of the law and that they insisted that the time limit was extended until July 9th, 1993.

5. Now, the arbitrators examined all of the statements and evidence filed by both parties and found as follows:

   1) The applicable law to the BILL OF LADING is Japanese law in accordance with the 1st sentense of Clause 4 of the BILL OF LADING which reads "The contract evidenced by or contained in this Bill of Lading shall be governed by Japanese law."

   2) According to the Clause 10 of the BILL OF LADING, it is clear that the time available for the Claimants to file an application for arbitration is nine months after delivery of the CARGO by the Respondents. And in accordance with Article 140 of the Civil Code of Japan this nine month term shall start on the next day, i.e., April 10th, 1992, and expire on January 9th, 1993. Although such time might be strictly considered as time limit for application for arbitration, practically it is often deemed as negative prescription (time bar) under the Civil Code of Japan. Then the arbitrators considered this case in accordance with such practical usages and the Civil Code of Japan.

   3) According to Article 153 of the Civil Code, it is understood that a claim notice shall not have its effect to interrupt negative prescription (time bar) without application for arbitration or law court within six months. And this term of six month shall start at the time when such claim notice has served on the other party. Evidence A-29 and A-34 make it clear that a claim notice from the Law Office was served on 8th January, 1993, by telefax and 11th January, 1993, by registered mail. Thus, only the claim notice by telefax, which served before the above-mentioned expiration of nine months, is effective, and six month term shall start on 9th January, 1993, and expire on 8th July, 1993.

4) According to the practical usages, an agreement of extension of time limit is considered to interrupt the expiry of the time limit. In this case, it is found that the Claimants requested such extension from the Respondents (Evidence A-24), but the Respondents refused it(Evidence A-28). It is established that a unilateral notice of extension of time limit has no such effect.

5) As the Claimants filed the application for arbitration with the TOMAC on 9th July, 1993, after the expiration of negative prescription (time bar), the Claimants had lost their claim.

Therefore, the undersigned arbitrators render the award as stated in the AWARD.

Dated: 15th February, 1994

The Tokyo Maritime Arbitration Commission (TOMAC) of The Japan Shipping Exchange, Inc.

ARBITRATOR: Kenichi Shinya (signature)

ARBITRATOR: Masaru Shimizu (signature)

ARBITRATOR: Osamu Shirouzu (signature)

■

Arbitration Award in Disputes Arising under the Fixture Note of the Time Charterparty for the Motor Vessel "O"

Claimants(as Charterers)
Claimants' Representative

Respondents(as Shipowners)

REGARDING the disputes between the above-mentioned parties arising from the Fixture Note of Time Charterparty concerning the motor vessel "O" dated 10th February, 1995, the undersigned arbitrator, appointed in accordance with the Rules of Simplified Arbitration Procedure Supplement to the Rules of Maritime Arbitration of The Japan Shipping Exchange, Inc., hereby renders the following award.

AWARD

1. The appeals by the Claimants shall be dismissed.
2. The cost of arbitration shall be ¥618,000 (including Consumption Tax of ¥18,000) which shall be paid by the Claimants.
3. The court of competent jurisdiction shall be the Tokyo District Court.

FACTS AND REASON FOR THE AWARD

I. Summary of the Facts

Based upon the filing and other documentary evidence submitted by the parties, the arbitrator makes the following finding of facts:

1. On 10th February, 1995, the Claimants, as the Charterers, and the Respondents, as the Owners, concluded the fixture note for the motor vessel with 'tweendeck, the "O" (the Claimants' Encl.1 and the Respondents' Encl.1) (hereinafter referred to as "the Charterparty"), which included the following terms:
   1) Vessel : M.V. "O" (hereinafter referred to as "the Vessel")
      D/W 7,018KT, G/T 5,473, ... Built 1990, Flag Panama, Class NK, LOA 99.90M, Beam 18.00M, Depth 13.00M, Draft 7.57M, ... Bale 11,246.10M3, Grain 11,704.72 M3, ...
   2) Delivery : Dropping outward pilot at Bangkok, at any time day/night SHINC.
   3) Redelivery : Dropping outward pilot at one safe port of Taiwan or Hong Kong at Charterers' option, at any time day/night SHINC.

4) Cargo : Plywood (Wooden products)
5) Duration : About 20/25 days without guarantee.
7) Lay/Can : 13th/17th February, 1995.
11) Remarks ... 3) Other terms and conditions as per N.Y.P.E. and M.V. "T" C/P dated 10th September, 1993.

And, New York Produce Exchange Time Charter Party Form (hereinafter referred to as "NYPE Form"), which was incorporated in the Charterparty, contains the following terms:

Clause 7. That the whole reach of the Vessel's Hold, Decks, and usual places of loading (not more than she can reasonably stow and carry), also accommodations for Supercargo, if carried, shall be at the Charterers' disposal, reserving only proper and sufficient space for Ship's officers, crew, tackle, apparel, furniture, provisions, stores and fuel. ...

Clause 8. That the Captain shall prosecute his voyages with the utmost despatch, and shall render all customary assistance with ship's crew and boats. The Captain (although appointed by the Owners), shall be under the orders and directions of the Charterers as regards employment and agency; and Charterers are to load, stow, and trim the cargo at their expense under the supervision of the Captain, who is to sign Bills of Lading for cargo as presented, in conformity with Mate's or Tally Clerk's receipts.

2. On the same day of 10th February, 1995, the Claimants, as the Time-Chartered Owner, and a shipping company in Indonesia (hereinafter referred to as the "Sub-Charterers"), concluded the fixture note (the Claimants' Encl.2), which contains the following terms:

PERFORMING VESSEL : MV "O" OR SUBSTITUTE
7,018DWT ON 7.75M PANAMA FLAG BUILT 1990
GRT 5,473T/NRT 1,999T LOA 99.90M/ BEAM 18.00M
GRAIN 11,804.72M3/BALE 11,246.10M3
TWEEN DECK 2HOLDS/2HATCHES 2x25T 2x30T DERRICKS

LOADING PORT : AT 1SB EACH 3SPS OF PAKANBARU/BANJARMASIN, INDONESIA

DISCHARGING PORT : AT 1SBSP OF KAOHSIUNG, TAIWAN

CARGO QUANTITY : ABOUT 7,132M3 PLYWOOD ONLY

LAYCAN : FEB/16-21 ...

FREIGHT RATE : USD20.25/M3 FIOST 2/1 BSS

OTHER TERMS AND CONDITIONS TO BE BASED ON GENCON CHARTER PARTY REVISED 1978

3. (1) On 13th February, 1995, by the Claimants' voyage instructions (the Respondents' Encl.2), the Claimants ordered the master of the Vessel (hereinafter referred to as "the Master"), to load the cargo of plywood in crate, as the cargo, at three Indonesian ports namely 3,750M3 at Pakanbaru, 2,100M3 at Palembang, and 1,000M3 at Pontianak, for a total of 6,850M3 of cargo and to discharge it at Kaohsiung, Taiwan. However, the Claimants, by their telegram (the Respondents' Encl.3) dated 21st February, 1995, changed the above order to require loading of 3,774M3 at Pakanbaru and 3,350M3 at Banjarmasin, thus making a total load of 7,124M3.

(2) On 21st February, 1995, the Master answered the Claimants' telegram to the effect that the Vessel had arrived at Pakanbaru at 10:05 on 18th February, that loading of the cargo had been commenced at 14:00 and completed at 11:15 on 21st February, 1995, that the Vessel had sailed at 12:30 and would arrive at Banjarmasin on 25th February, 1995, and that the Vessel had loaded 3,775.2273M3 of cargo. The Master also answered that for the past four years the Vessel had never loaded more than 6,625M3 of Indonesian plywood (the Respondents' Encl.4).

(3) On the same 21st February, 1995, in reply to the Master's answer, the Claimants gave notice to the Master that the package and measurement of the cargo had been different from Japan's and that the Claimants always calculated the stowage factor at between 1.55 and 1.58. The Claimants asked the Master to do his best to avoid shutout of any of the cargo of 3,357M3 at Banjarmasin. The Claimants further asked for the Master's advice regarding whether the Vessel could fully utilize her 11,246M3 bale capacity for the shipment (the Respondents' Encl.4).

(4) In addition to the above, the Claimants gave notice that in the past four years the "M", owned by the Claimants and was of 12,483M3 bale capacity had been able to load 7,687M3 of plywood, and the vessel "T", which had been time-chartered by the Claimants, and was of 11,856M3 bale capacity, had carried 7,081M3 of plywood from Banjarmasin to Kaohsiung (the Respondents' Encl.5).

(5) On the same 21st February, 1995, a broker in Tokyo (hereinafter referred to as "the Broker"), as the broker of the Charterparty, informed the Claimants of the Vessel's stowage factor, and asked the Claimants to recalculate by the above stowage factor because the Claimants' loadable quantity based on the Claimants' calculation was very tight for the Respondents (the Respondents' Encl.7).

4. On 22nd February, 1995, the Master sent to the Claimants a telegram to the effect that the Vessel could fully utilize her hold's 11,246M3 bale capacity and could load 3,147.9235M3 of cargo at a stowage factor of 1.61, and that the Master would try his best to properly stow the cargo (the Claimants' Encl.3 and the Respondents' Encl.6).

5. (1) On 27th February, 1995, the Master gave notice to the Claimants by telegram to the effect that the Vessel might have an overdraft problem (the Respondents' Encl.8). In response to the Master's telegram, the Claimants suggested that the Master adjusts the ballast water in order to load all cargo because they thought the Vessel probably had full ballast water on board (the Respondents' Encl.8).

(2) On 27th February, 1995, in response to this suggestion, the Master answered that both the 738T of ballast water in the Vessel's water ballast tanks and the 1,407T in her segregated ballast tanks were essential for the safe navigation of the Vessel by minimizing her GM, and that no ballast water could be discharged (the Respondents' Encl.8).

(3) On 28th February, 1995, the Claimants insisted to the Master that keeping full ballast water in excess of 2,045T including deeptanks was a breach of the shipowners' obligation to perform the contract at her deadweight capacity described in the Charter-party, and the Claimants again suggested that the Master pump out her unnecessary ballast water from the side deeptanks and forward ballast tank. The Claimants maintained that the Vessel's fully laden draft at Banjarmasin should be based on the tropical zone and not the summer zone, and on that basis, the Claimants calculated and contended that the Vessel's deadweight tons and bale capacity were just sufficient to load 4,200T of cargo with 2,045T of ballast water as the loading port had no draft limitation (the Respondents' Encl.8).

(4) On the same 28th February, 1995, the Master gave notice to the Claimants by telegram to the effect that loading at Banjarmasin had been completed at 04:00 on the same day, that at that time the total cargo quantity was 6,373.3217M3, the Vessel's mean draft was 7.78M and her metacentric height (GM) was 0.44M, and that her ballast water in her side deeptank could not be discharged because the Master needed a minimum GM0.4M for safe navigation (the Respondents' Encl.8).

6. (1) On the same 28th February, 1995, the Master gave notice to the Sub-Charterers that among the plywood cargo to be loaded at Banjarmasin, 431 crates or 773.9398M3 had been shut out because the Vessel's draft had already exceeded by 20 centimeters and that if the Vessel had discharged her ballast water, her GM would have been reduced from the proper 40 centimeters and her stability would have been impaired (the Claimants' Encl.4).

(2) Furthermore, on 28th February, 1995, the Master wrote to the Claimants to the effect that the Master had found that the Vessel could not load the entire 7,135M3 of cargo as per the the Claimants' instructions, and that on 21st February, he had informed the Claimants and the Sub-Charterer in advance that the Vessel could only load 6,625M3 maximum. The Master repeated that the cargoes were too

heavy for 'tween deck cargo holds and that the cargo already loaded in the lower holds was too light. She was over her Summer draft by 21 centimeters, and this meant that she had to discharge drinking water to load the maximum quantity of cargo in order to avoid overdraft. She still had 250M3 of broken space but could not take additional cargoes, as she was overdraft and below her allowable GM of 40 centimeters. In addition, the Master noted that because he had to maintain her GM in order to navigate safely and to guarantee safe passage of the cargo to its destination, shutting out the remaining cargo was therefore reasonably justified (the Respondents' Encl.9).

(3) In response to the above, the Claimants wrote to the Brokers that they had finally fixed the Vessel to load 7,132M3 of homogeneous plywood and that they were entitled to utilize the Vessel's full 11,246M3 of bale capacity. At Banjarmasin, however, the Master informed the Claimants that the Vessel's hold space could not be filled to capacity due to insufficient stability. Furthermore, the Claimants said that although plywood was a common cargo for KASAAGECARRIERS, the Respondents nevertheless failed to notify the Claimants anytime beforehand that the Vessel had design defects preventing it from loading plywood up to its full bale capacity. And, said the Claimants, this caused and the Sub-Charterers claimed the deadfreight and consequential penalty for the cargo carrying charges. In this connection,the Claimants reserved their full right to claim against the Respondents deadfreight at the contract rate of US$20.25/M3 and any other consequential losses (the Claimants' Encl.5).

7. (1) On 8th and 9th March, 1995, at the port of Kaohsiung, at the request of the Respondents, a survey was done by NKKK Taiwan, Ltd. The NKKK surveyor reported that the Vessel had 689.1M3 of broken space, that the cargo was properly stowed in her cargo space, and that she was not able to load additional cargo in consideration of her draft limitation, GM stability and also safe navigation (the Respondents' Encl.10).

(2) On the same day, 8th March, 1995, at the same port, at the request of the Claimants, the Vessel's survey was done by the surveyor of GMSCE, Taipei, Taiwan. The Grand Marine surveyor reported that the Vessel had 689M3 of broken space in the hatch opening square area (the Claimants' Encl.6).

8. On 8th March, 1995, the Sub-Charterers claimed to the Claimants their loss in the sum of 11,177,660 Indonesian Rupees or U.S.$5,080.75 on account of the shutout of a part of the cargo at Banjarmasin (the Claimants' Encl.7).

II. Evidence

As evidence, the Claimants submitted Encls.1 to 7, and the Respondents submitted Encls.1 to 10 and Encl.S-1 and Encl.S-2.

III. Reason for the Award

1. Appeals of the Claimants and the Respondents

The Claimants appealed as below:

(i) The claim from the Sub-Charterers in the sum of 11,177,660 Indonesian Rupees or U.S.$5,080.75.

(ii) Loss of deadfreight in the sum of U.S.$13,952.25 (689M3 x US$20.25).

(iii) Interest on the above sums at 12 per cent per annum (in U.S. Currency) from the date of shut-out.

(iv) All other costs, which are deemed necessary.

The Claimants appealed the above claims on the basis that the Respondents breached the Charterparty by the shut-out of 773.9398M3 of Indonesian plywood at Banjarmasin because, the Claimants contended, the Respondents had warranted bale capacity of 11,246.10M3 and deadweight of 7,018T at the time the Charterparty was fixed on 10th February. And Clause 7 of NYPE Form, which was incorporated in the Charterparty, warrants that the whole reach of the Vessel's hold, shall be at the Charterers' disposal for cargo carrying.

(1) The Claimants: As stated in the "Summary of the Facts", this shutout was based on the Master's decision that the Vessel could not load all cargo at Banjarmasin because her overdraft, GM (metacentric height) and stability affected the safety of navigation. Firstly, regarding the overdraft, the Claimants contended that plywood is light, not heavy, cargo. Unless the Master kept unreasonably excessive quantities of fuel or ballast on board, there is no way the light measurement cargo of plywood had to be shut out due to overdraft. On 28th February, 1995, the Vessel had ballast of 2,145T on board when she completed loading at Banjarmasin. So the Claimants suggested that the Master should try to discharge and adjust her ballast. But the Master refused the Claimants' suggestion, because it would have affected her GM and stability. On this point, the Claimants insisted that the Respondents should have made it clear at the time they fixed the Charterparty.

And the Master said the other reason for shutout was that the Vessel had to maintain her allowable GM and stability for safe navigation. However, the Claimants contended that the Master shut out the cargo to maintain the Vessel's proper height of GM and stability, notwithstanding the cargo was a homogeneous cargo of plywood and it was all loaded under her 'tween deck. No charterers, unless being told in advance of the fixture by the owners, could foresee a vessel to have such a peculiar

GM and stability.

The Claimants claimed the Respondents' misrepresentation of the bale capacity and deadweight of the Vessel without stating in advance the above problem of the Vessel, and their breach of Clause 7 of NYPE Form incorporated in the Charterparty, in which describing "the whole reach of the Vessel's capacity shall be at the Charterers' disposal reserving only proper and sufficient space for fuel, ballast, etc."

(2) The Respondents: To the contrary, the Respondents submitted that although this shipment was a homogeneous cargo of plywood and not heavy cargo, since different types of plywood have different densities and various stowage factors, plywood is not always loaded "full and down" (fully loaded in terms of measurement and weight), taking the Vessel's GM and stability into consideration. And, in respect of the Claimants' assertion that the Vessel had unpumpable ballast at about 2,000T, the Respondents contended that the Vessel was able to navigate without ballast water of 2,000T, because she had been able to carry a cargo of steel products of 6,550.90T from Chiba to Bangkok without ballast water in May, 1994 (the Respondents' Encl.S-2) and that there was no inherent problem of the Vessel in light of the facts that she was classed NK and similar vessels are prevailing on the shipping market today.

Also, the Respondents contended that the Respondents had committed no breach of contract in that the Vessel had about 2,000T ballast from the survey report by the NKKK surveyor at the port of Kaohsiung on 8th and 9th March, 1995, which reported that "we understood that any water deballasting or any additional cargo loading will decrease the Vessel's G.M." (the Respondents' Encl.10).

And, the Respondents contended that the Claimants had not confirmed the Vessel's stowage plan in advance and that they overbooked the cargo by fixing the cargo of plywood at 7,124M3 with the Sub-Charterers in spite of the fact that on 21st February, 1995, the Master had given notice to the effect that in the past four years the maxload for Indonesian plywood on the "O" had not exceeded 6,625M3.

The Arbitrator awarded, based on their points with full consideration, that:

2. Reason for the Award

(1) The instant dispute arose on 28th February, 1995 at Banjarmasin, the second loading port, because the Master shut out 773.9398 M3 of plywood provided for shipment by the Claimants. I find that the reason the Master shut out the cargo in question was his concern about the overdraft, metacentric height (GM) and stability of the Vessel.

Regarding the appropriateness of the shutout, in light of the applicable contract and

as a practical matter, I find as follows:

According to NYPE Form Clause 8, which is incorporated into the contract in question, "The Captain (although appointed by the Owners), shall be under the orders and directions of the Charterers as regards employment and agency..." Thus, under the contract, the Master is placed in the position of being under Charterers' direction. Not only, however, does the Master have the right to refuse Charterers' instructions when they might effect the seaworthiness or safety of the vessel, he is obligated to do so. This indicates that, with regard to issues of seaworthiness and navigational safety, the judgements of the Master has the highest priority.

The above clause also provides "That the Captain shall prosecute his voyages with the utmost despatch, and shall render all customary assistance with ship's crew and boats." This language obligates the Master to employ the utmost measures to speedily carry out the voyage. Based on this premise, the Master, together with the crew, must safely carry the cargo from the loading port to the discharging port in accordance with Charterers' instructions. The Master must have broad discretion to reach his goal of carrying out the voyage without breaching these duties.

In regard to this point, in the instant case at about the time he had completed loading cargo at Pakanbaru, the first loading port, the Master received instructions regarding a change in the location of the second loading port and the amount of cargo to be loaded there; the Master proceeded to load cargo at Banjarmasin, the revised second loading port. It is clear from the survey report, the Respondents' Encl.10, that the Master shut out cargo in consideration of the safety of the Vessel on the voyage to Kaohsiung, the discharging port. According to the survey report, at the time when loading was completed, loading any further cargo would have risked sinking the Vessel. I find that in consideration of her stability and GM, she was at her loading limit. Moreover, while the same survey report also mentions that there was broken space, it is to the effect that the broken space was a result of proper loading, and not to the effect that the broken space was a problem of required stowage.

In this connection, even if the Claimants believe the Master's judgements to have been negligent or in error, I have not seen any valid evidence to support a finding that the shutout was inappropriate.

Accordingly, I reject the Claimants' allegations in regard to the shutout.

Moreover, although NYPE Form Clause 8 provides that "Charterers are to load, stow, and trim the cargo at their expense under the supervision of the Captain...," the gist of this provision is the recognition of the Master's discretion in regard to the safety and seaworthiness of the vessel. With regard to loading/unloading operations, Charterers must comply with the Master's discretionary instruction and supervision. With regard to this point, in the instant case the Master's communication to the

Claimants on 28th February, 1995, to the effect that in the past 4 years the Vessel had never loaded over 6,625M3 of Indonesian plywood (the Respondents' Encl.4), which the Master considered the Vessel's maximum safe cargo capacity. The Claimants employed their own stowage factor to calculate cargo quantity for loading at Banjarmasin, the second loading port. In regard to this, the Master, through the Broker, after informing the Claimants of the Master's stowage plan, requested that the Charterers recalculate their figures of cargo quantity based on the Master's stowage plan, the Vessel's capacity and the actual record. In response to this request, the Claimants failed to recalculate, and instead, the Claimants instructed the Master to discharge ballast water to secure a load of over 6,625M3 of plywood. However, in consideration of the Master to the Vessel's draft, GM and stability for safe stowage and navigation, he rejected the Claimants' instruction.

With regard to this point, from the perspective of the safety of the Vessel, the Master properly exercised his authority with regard to the instruction and supervision of the Claimants on matters of loading and stowage in accordance with NYPE Form Clause 8.

In this connection, I am unable to see that the Claimants, as Charterers, in any way conferred in detail with the Master in respect to the stowage plan, before entering into the contract with the Sub-Charterers and determining the quantity of the cargo. In fact, when the Master conveyed the figures for the Vessel's actual maximum capacity to carry plywood, the Claimants strictly adhered to the contracted stowage capacity. In response to the Master's answer that he could not discharge ballast in consideration of navigational safety, the Claimants rejected his proposal. It can be seen from the above fact that the Claimants clearly ignored the Master's supervisory rights under Clause 8 concerning the loading and stowage of cargo.

Therefore, the loss suffered by the Claimants was not the results of a breach of contract by the Respondents, but rather arose as a result of failure, on the part of the Claimants, to consider navigational safety and the Master's judgement in securing same.

Accordingly, there was no breach of contract by the Respondents under Clause 8 of the NYPE Form.

(2) Next, the Claimants asserted that, even if assuming the appropriateness of the Master's judgement as above and in spite of carrying over 2,000T of ballast water, by representing the Vessel as having warranted bale capacity of 11,246M3 and 7,018 deadweight tons, the Respondents violated the NYPE Form Clause 7 as incorporated in the Charterparty, that the whole reach of the Vessel's hold shall be at the Charterers' disposal for the purpose of the carriage of goods. In this regard, I find as follows:

It is certainly true that Shipowners, according to the provisions of NYPE Form Clause

7, must allow Charterers the use of the ship's holds and other spaces necessary for the Charterers to carry out the intended contract of carriage.
However, the same clause also provides that this be "not more than she can reasonably stow and carry." I therefore hold that the Master's stowage capacity for the Vessel, determined in consideration of safe stowage and navigation, etc., overrides the capacity figures calculated by the Claimants with the stowage factor of the plywood on the expressly described bale capacity and deadweight tons in the Charterparty.
Accordingly, I dismiss the Claimants' allegation that the Respondents were in breach of the NYPE Form Clause 7 guarantee.

As stated above, I hold unwarranted the Claimants' allegations that the Respondents were in breach of the relevant contract and find the Claimants' demands groundless. I therefore hold as provided in the above award.

TOKYO, 10TH NOVEMBER, 1995

The Tokyo Maritime Arbitration Commission (TOMAC) of The Japan Shipping Exchange, Inc.

ARBITRATOR: TAKAYA, Shinichi (signature)

■

Japanese Sentiment, Today and Tomorrow

– Harmony –

Takao TATEISHI – *Editor*

The Japanese people could have been better at making a decision if they had preserved and complied with Japan's first ever law made nearly 14 centuries ago. By this I mean the Constitution of 17 Articles that Prince *Shotoku* promulgated in 604. The essence of his code called for discussion among officials before drawing a conclusion. This principle was based on the perception that everyone has his or her own value judgement, that no one is free from shortcomings and that it is therefore necessary to get on a par in debate in an effort to eliminate misjudgement. It epitomized the spirit of the horizontal relationship in the society that time.

But what happened just a millennium later started changing the relationship to a vertical one. In 1603 *Tokugawa Iyeyasu* established the *Edo Shogunate* and put a definite end to the *Sengoku* Warring Age which had lasted no less than a century. *Iyeyasu* brought about exactly what the nation wanted: peace and stability. The *Edo Shogunate* gave protection top down to the people for the following two and half centuries and in exchange for that promoted the idea of vertical relationship, which meant obedience and avoidance of controversy.

In the *Edo* Era the tactics that a *Samurai* warrior needed to climb up or at least not to be thrown out of the ladder of *Daimyo* feudal lords were diplomacy and maneuvers, in other words a Machiavellian approach, instead of physical strength as well as combat skill crucial to survive the bottom-up battles in the *Sengoku* Warring Age. And the Japanese people may have gradually developed the concept that *wa*, or harmony, was vital to pursue a stable life, a mentality which perhaps gave rise to the nature of hesitation in taking the leadership.

At schools in Japan today most of the curricula are based on a top-down, one-way teaching system. It is rare, even peculiar, that a student stands up and challenges the comments of his teacher. Standing out is not expected in the Japanese society and a solution to a problem is normally rendered from somewhere above. Conformity was a by-product of what created peacefulness in the *Edo* Era and it is still out there.

That appears okay as long as Japan remains inside its archipelagoes and never wishes to go international. But as I pointed out before in this column, the outside pressure inevitably broke down the Japanese insularism towards the end of *Edo* Era. And as witnessed in the hostage seizure in Peru more recently, if an emergency occurs and jeopardizes the Japanese interests, they have few manuals to seek for their principles of action. This lack of contingency plans on the level of national security should be taken seriously and put to discussion horizontal. ■

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