THE BULLETIN OF
THE JAPAN SHIPPING EXCHANGE, INC.

No. 36

March 1998

CONTENTS

GOOD FAITH AND REASONABLENESS IN RELATION TO REPRESENTATIONS

Greg O'NEILL*

Two recent cases in the English courts have highlighted a curious interface between the concepts of good faith and reasonableness in the fields of shipping and insurance. Perhaps English Common Law has created a problem here because historically good faith has been associated with the courts of Equity and contracts of *uberrima fides*/utmost good faith (eg. insurance) while reasonableness has been identified with the law of Tort. In ordinary contract law, however, there is no sanction for want of good faith unless either party is guilty of fraud such as a fraudulent misrepresentation or where the contract is in furtherance of a crime[1]. Civil law on the other hand it seems has had a much longer history in marrying the two concepts (see below)[2]. The problem is highlighted by considering the following questions.

First, is the distinction only one of, respectively, subjectivity and objectivity? Second, how does one challenge and assess whether any statement has been made in good faith? This may be a particularly acute problem where a party may need to take a position in ignorance of the full facts. Third, is it still possible to show lack of good faith by demonstrating a sufficient degree of unreasonableness? Fourth, is there a legal analysis

---

* Solicitor, Penningtons, London.

1 See for example *Walford v. Miles* ([1992] 2AC 128 (HL)) – "A duty to negotiate in good faith is as unworkable in practice as it is inherently inconsistent with the position of the negotiating party: it is here that the uncertainty lies. In my judgement while negotiations are in existence, either party is entitled to withdraw from those negotiations at any time and for any reason ... a bare agreement to negotiate has no legal content."

2 French law, for example, imposes duties of trust and good faith although not to the extent of ignoring completely one's own interests. There is also a duty of co-operation associated with good faith. Good faith and equity however are distinguished. Good faith acts from "within", whereas equity acts from "without" and places itself at a higher point - that of justice. There is no single definition of good faith but generally it has two aspects, one subjective and one objective. The subjective aspect corresponds to a personal belief. The objective aspect derives from a moral order of behaviour evidenced by commonsense and common practices. It seems it is sometimes likened to responsible behaviour.

Italian law considers the literal sense of words first before considering the relevance of good faith. Generally speaking, however, under Italian law good faith corresponds to objective rules of trust and fairness in order to establish the intentions of the parties and not the subjective belief of one of them.

which might afford the victim of a representation made in good faith a remedy? I shall return to these considerations in the course of this article.

Before considering the cases, I must sound first of all a cautionary note. The treatment of representations, whether they be of fact or belief, has not historically been identical as between the law of marine and general insurance and the general law of contract[3]. Because of the special nature of insurance contracts (viz. the almost total reliance by the insurer on the insured's representations) the implications of any misrepresentation have always been treated extremely seriously. Nevertheless, the strictness of that approach finds echoes in the absolute warranties of safe ports and bunker quality where the charterer has been deemed to be in unilateral possession of the relevant knowledge.

Economides -v- Commercial Union Assurance Co. Plc

It is trite law that insurance contracts must be negotiated, entered into and performed in good faith[4]. However, this has led to problems in relation to s.20(5) of the Marine Insurance Act 1906 which provides that:-

> "A representation as to a matter of expectation or belief is true if it be made in good faith".

In *Economides -v- Commercial Union Assurance Co. Plc*, the Appellant had insured the contents of his flat for £12,000 on the basis that figure represented the cost of replacing all the contents as new. When his parents came to live with him they brought additional valuables into the house and the Appellant sought to increase his cover to £16,000 to take into account his parents' possessions. The increased figure (of about £3,000-£4,000) had been suggested by the Appellant's father. The Appellant was generally aware of his parents' valuables, which included jewellery and silverware, but did not seek to obtain a separate valuation and simply passed on his father's estimate to the insurers.

The Appellant's flat was subsequently burgled and many items of value were stolen including those belonging to his parents. The total value of the items stolen was in excess of £40,000. The insurers denied liability on the basis that the Appellant had misrepresented

---

3 See *Arnould on Marine Insurance*, paragraph 603.

4 Eg. see Marine Insurance Act 1906, section 17 - "A contract of marine insurance is a contract based upon the utmost good faith, and, if the utmost good faith be not observed by either party, the contract may be avoided by the other party."

the value of the goods on the premises or, alternatively, had failed to disclose on renewal that the value of the goods greatly exceeded the sum insured.

The proposal form required the insurance value of the contents to "represent the full cost of replacing all your contents as new". The Court of Appeal saw three possible constructions of this statement given that the figure had to be given by the Appellant to be best of his knowledge and belief.

1. The Appellant was making a factual statement that the value of his contents was £16,000 so that if the statement was false irrespective of the Appellant's knowledge and belief there had been a misrepresentation.
2. The Appellant was making a statement as to his honest belief provided that there were reasonable grounds for his belief so that, if the assured ought to have realised that the contents were worth more, there was a misrepresentation.
3. The Appellant was making a statement as to his honest belief so that there could be a misrepresentation only where the Appellant did not hold an honest belief to the effect stated.

The insurers abandoned the first construction. The Trial Judge adopted the second construction and found against the Appellant. The Court of Appeal, however, adopted the third construction and found for the Appellant.

The Court of Appeal had an opportunity to consider section 20(5) Marine Insurance Act 1906 and to review the authorities. These suggested that the test in relation to representations of expectation or belief in good faith was not completely subjective and that the assured ought to have a reasonable basis for putting forward such belief or expectation. The assured in a contract of insurance, very much like the charterer in a trip timecharter, is in a much better position to give a reasoned and informed assessment than respectively the insurer and owner. In *Economides* however the Appellant argued that the section was only concerned with honest belief and not with reasonable care and that if he gave an answer which he believed to be correct, he had fulfilled his duty to avoid making false statements.

Perhaps surprisingly, the Court of Appeal accepted the Appellant's construction and held that honesty was the relevant test. They did, however, accept the insurers' argument to the extent that a "blind guess" would not be acceptable as there was necessarily likely to be little evidence of a genuine subjective assessment of the facts.[5]

The Court of Appeal therefore concluded that the honest opinion of the assured was sufficient compliance unless:-

(a) his answers were "blind guesses", or
(b) he was aware of factors which would have rendered his opinion doubtful but nevertheless "put a blind eye to them"; or
(c) he actually knew that his opinion was groundless.

These reservations by the Court of Appeal are not without some significance. All three considerations would involve similar evidential processes no doubt starting with the question to the representor, "how did you arrive at your estimate?" Even a "blind guess" involves some subconscious reliance on disparately absorbed information. Presumably, if a representor admitted that he had "blind guessed" a court would be bound to find that his opinion was dishonest unless the representor could satisfy the court that his subconscious considerations were based on a wealth of experience and knowledge. If a blind guess is unacceptable, the corollary must be that an estimate should have some degree of rational basis.

The "Lendoudis Evangelos II"

Section 20(5) of the Marine Insurance Act 1906 reflects, perhaps not without coincidence, the arguments put forward by the defendants in the shipping case of *Lendoudis Evangelos II* ([1997] 1 Lloyd's Rep. 404). In that case, involving a one timecharter trip "duration about 70/80 days without guarantee", the court held in relation to a claim for over 23 days' detention (in excess of 80) that the charterer was only under an obligation to make his estimate of the duration of the trip in good faith. Judge Longmore J. followed the decision of Leggatt J. in *Benship International Inc. -v- Deemand Shipping Co.* ([1988], unreported). (See note [6] below).

I have previously described the use of the expression "without guarantee" (Penningtons' Shipping Notes, March 1997[6]) as mischievous and I believe entirely accurately. The fact

---

[5] Although not entirely relevant to this article, it is worth noting that although in *Economides* the information required from the assured was one of fact, the insurers conceded in argument that it amounted to only one of a reasonable opinion because of the overall rider that information should be given to the best of the assured's knowledge and belief. The Court of Appeal had no problem accepting this concession.

[6] "The often used qualification to charterparty warranties of "without guarantee" has been the subject of judicial consideration several times in the last 80 years but probably only twice in relation to time charter trip duration. The first was in an unreported case: *Benship International Inc. -v- Deemand Shipping Co.* in

is, however, that it has entered into the lingua franca of commercial dealing and will continue to cause legal problems.

Having found that "without guarantee" estimates only had to be made in good faith, Mr Justice Longmore, in the *Lendoudis Evangelos II* defined the test of good faith as requiring the charterers to genuinely believe at the time of fixing that the trip would last between 70-80 days. It was never alleged that the charterers did not have a genuine belief. The arbitrator had found in favour of the owners on the grounds that the estimate was unreasonable in the circumstances. It appears indeed that he came close to finding that there is a degree of unreasonableness which is inconsistent with good faith. Unfortunately, when the matter came to court, the concept of good faith and reasonableness were treated as alternatives and not one as a factor of the other.

The *Lendoudis Evangelos II* might have been more useful as a precedent had the issue of honest belief, as a matter of fact, been before the trial Judge. Because it was not, the Judge had no opportunity to examine the concept more forensically in the manner of the Court of Appeal Judges in the *Economides* case. Had he done so, the three reservations made by the Court of Appeal in *Economides* may have led him to question the extent to which the charterers were aware of factors which made their estimates of duration without guarantee, in effect constructively "dishonest".

If the *Lendoudis Evangelos II* is relied on by representors as allowing them carte blanche or at least a wide latitude, in giving estimates they run the risk of a much closer analysis of the basis of their estimate than that authority might suggest. The assured in the *Economides* case was a layman and a young student who might not be expected to know with any accuracy the value of items of jewellery or silverware. Charterers and owners these days, however, would be expected to have a fair amount of knowledge and

---

1988. In that case, Legatt J. found that where a time charter trip was for 'about 40-120 days' duration without guarantee' the clause was no more than a mere (innocent?) representation which placed a charterer under an obligation to make an estimate in good faith of the duration of the time charter trip.

This was in effect upheld by Longmore J. in the *Lendoudis Evangelos II* (15 November 1996). The Judge held that good faith did not depend on any objective test of reasonableness but only on the charterer's genuine belief at the time of fixing that the trip would last a period falling between the minimum and maximum periods. This conclusion is perhaps supportable as a matter of sensible legal construction but some would say may establish an additional category of representation which props up the existing categories of innocent, negligent and fraudulent. Shipowners would be advised to resist the continuing insistence by charterers on this mischievous qualification to duration clauses. Charterers should perhaps seek greater certainty by agreeing the time charter duration as an estimate with the shipowner which logically would avoid the complications of "innocence" or "good faith"."

have ready access to information which would allow them to reach an honest belief from a position of considerable awareness. The assured in the *Economides* did not as such act unreasonably - indeed, the Court of Appeal found that his reliance on others in relation to the value of the jewellery was reasonable in the circumstances. In an informed market, charterers would be expected, I believe, to make a more informed estimate.

Misrepresentation Distinguished

The Marine Insurance Act 1906 would, for a misrepresentation of a material fact or a dishonest representation of belief, allow an insurer to avoid the policy and/or a claim under it. The Misrepresentation Act 1967 would normally allow the wronged party to rescind a contract which had not been performed or affirmed, for an innocent misrepresentation.

Representations to be made in good faith, however, arise by reason of a specific contractual term to that effect and/or as a matter of construction (as in the *Lendoudis Evangelos II*).

If such a representation is found to have been made in good faith even though the information turns out to have been incorrect, it will not amount to a misrepresentation.[7] In practice, however, it is frequently the case that the condition of the representors' mind can only be investigated long after performance in particular in a charterparty contract. In other words, although the incorrectness of the misrepresentation might be obvious at an early stage, the grounds for the representor's belief may only become evident in the course of a trial.

ETA's Distinguished

Representations qualified by principles of good faith should not be confused with an unconditional and unqualified obligation to give estimates. Insurance law (see *Supra*) has specific statutory provisions and frequently specific contractual conditions qualifying the obligation by principles of good faith. The *Lendoudis Evangelos II* demonstrates that the expression "without guarantee" has a similar effect in relation to an estimate of the duration of a voyage. Where, however, a shipowner is required to give narrowing ETA's, in par-

---

[7] See *Anderson -v- Pacific Fire Marine Insurance Co.* ([1972] LR 7 CP 65). See also *Arnould Law of Marine Insurance and Average, paras. 604-607* - "There is high judicial authority for the view that such a representation is one of fact; that fact relating, however, not to the subject matter of the expectation, but to the condition of mind of the person making the statement."

ticular in relation to arrival at a loading port (whether or not there is a cancelling date), it has been held that such estimates must be made on a reasonable basis. Incorrect and unreasonable ETA's may lead to a claim in damages from the charterer as it did in the case of *Hyundai Merchant Marine Co. Ltd -v- Karander Maritime Inc.* (the *Niizuru*) ([1996] 2 Lloyd's Rep. 66)[8]. Although it was never an issue in that case whether estimates were made in good faith, the tenor of the decision and the court's treatment of the laycan narrowing provisions effectively precluded any considerations of good faith.

Conclusion

My conclusions are two-fold.

The first derives from case law and concerns reasonableness. The second is of a more general nature and concerns approximation.

1. In my view, an element of realism must enter the argument of "honest belief" and "good faith". Unless a party to a contract is of subnormal intelligence, it would be quite irrational for anyone to have an honest belief, or believe in good faith, in something which was not to a degree based on a reasonable assessment of the circumstances and an assessment based on information readily available. Let us take a typical example. Supposing a charterer said "I estimate that I will take 5 days to load and 5 days to discharge, and the voyage will take 20 days, therefore I estimate a trip timecharter of 30 days." If that charterer has made no attempt, despite the availability of information and his own experience in the business, to see whether there are any problems with congestion, bad weather, labour problems, availability of berths etc at either of the ports or during the sea voyage, how can it be said that he holds an "honest belief"? In the words of the Court of Appeal in the *Economides* case, he has put the telescope to his blind eye. Clearly between an extreme situation such as that and an entirely genuine situation where the charterer has made all the necessary enquiries and come up with an "honest belief/estimate" there is every possible shade in between. I believe this example holds the key to the correct legal

---

[8] See also Penningtons' Shipping Notes, August/September 1997 - "Mance J. held that unqualified laycan narrowing provisions should usually be regarded as a condition precedent to delivery. The charterparty here provided that the owners should give charterers 30/20/15/10 days' approximate notice of delivery date and probable port; then 5 days' approximate notice of delivery time and exact delivery port. In the case referred to, the owners gave a series of non-contractual estimates of time of delivery. The court held that as a matter of construction, the vessel could only be delivered 30 days after the owners' first legitimate estimate of time of delivery. On the particular facts of the case, delivery was held to be at an earlier time (though later than that contended by the owners) viz, when the charterers actually accepted delivery."

analysis. If the correct legal analysis is applied, the preparation of any particular case will allow for a full forensic analysis of the charterers'/representors' mental processes in reaching this conclusion as regards good faith.

2. There remains the somewhat jurisprudential question of whether under English law it is desirable for the courts to encourage a degree of latitude in behaviour inherent in giving good faith a substantially subjective meaning. The English law of contract has always aimed to refine the certainty of the law and subjective assessment militates against such certainty[9].

It could be said that in both the *Benship* case and the *Lendoudis Evangelos II* the court was off target. Given that the intention of the parties must be inferred from the language they have used, an estimate of voyage length given "without guarantee" does not obviously mean that the representor is only giving his estimate in good faith. Surely an equally plausible interpretation is "I have given an estimate which I think is correct but obviously it could be more or less, so I cannot guarantee it." If an officious bystander were to press for a further explanation, one could reasonably imagine that the representor would say, "In the absence of force majeure, my estimate is approximately correct. However, if the voyage is half or twice as much again, then obviously I would have misled you." That scenario is grounded in realism. In my submission, an interpretation which effectively means "you cannot rely on my estimate at all in law unless I am dishonest" comes close to rendering the estimate worse than useless as a contractual term and therefore much less likely to be what the parties intended. A warranty qualified by good faith with its implication of fraud, is generally unfamiliar to maritime arbitrators.[10] However, a warranty qualified by reasonableness and approximation would be familiar territory for the courts but especially for shipping arbitrators who in my experience could be relied on to get it right. The *Lendoudis Evangelos II* has in many ways not solved a problem of construction but adjourned it to another day. ■

---

9 Compare the *Nanfri* ([1978] 2 Lloyd's Rep. 132). This Court of Appeal decision (upheld in The House of Lords) defines the character of legitimate set-offs from hire (eg. for slow speed) as those made "upon a reasonable assessment and in good faith". It is difficult to discern what the Court of Appeal meant to add by requiring good faith. It is highly debatable whether a reasonable deduction from hire could be made in bad faith and conversely that a deduction made in bad faith could ever logically be reasonable. The expression was coined by Lord Denning following his reliance on *Gilbert-Ash (Northern) Ltd -v- Modern Engineering (Bristol) Ltd* ([1974] AC 689 (HL)). Deductions in the latter case, however, were by the express terms of the contract allowed to be made in good faith. Charterparties rarely if ever allow for deductions expressly in good faith.

10 Indeed, the old 1950 Arbitration Act (now repealed and replaced by the 1996 Arbitration Act) provided by s.24(2) for the discretionary transfer of fraud cases to the High Court.

THE CAMFAIR
The Enforceability of a Demise Clause in a Bill of Lading under Japanese Law

Kazuo SATORI*

Often a cargo claimant will file a cargo claim with the bill of lading issuer as the contractual carrier. The bill of lading issuer will then rely on the demise clause as a defense by stating that they are not a carrier but an agent of the carrier, therefore they are not a responsible party under the carriage of goods contract.

Regarding this re-occurring problem, on September 30, 1997, a rather important decision called the *Camfair* was handed down by the Tokyo District Court. The holding brings into doubt the enforceability of a demise clause or an identity of carrier clause in a bill of lading. In this manner the *Camfair* would appear to contradict the same court's decision reached in the *Jasmin* in 1991,[1] and affirmed by the appeal court in 1993.[2] In the *Camfair,* the demise clause was held ineffective as the decision was distinguished from the *Jasmin.*

A demise clause typically reads as follows:

> If the ship is not owned by or chartered by demise to the company or line by whom this bill of lading is issued (as may be the case notwithstanding anything that appears to the contrary) this bill of lading shall take effect only as a contract with the owner or the demise charterer as the case may be as principal, made through the agency of the said company or line who act as agents only, and shall be under no personal liability whatsoever in respect thereof.

The wording "company or line" are often replaced by the words "the charterer".

Very closely related to the demise clause is the identity of carrier clause which often reads as follows:

---

* Attorney at Law, Satori Law Office.

1 Judgment of the Tokyo District Court dated March 19, 1991. An English translation of this decision was published in the March 1992 edition of THE BULLETIN OF THE JAPAN SHIPPING EXCHANGE, INC.

2 Judgment of the Tokyo Court of Appeal (Tokyo High Court) dated February 24, 1993. An English translation of this decision was published in the December 1993 edition of THE BULLETIN OF THE JAPAN SHIPPING EXCHANGE, INC.

The contract evidenced by this bill of lading is between the Merchant and the Owner of the vessel named herein (or substitute) and it is therefore agreed that said Shipowner alone shall be liable for any damage or loss due to any breach or non-performance of any obligation arising out of the contract of carriage, whether or not relating to the vessel's seaworthiness. If, despite the foregoing, it is adjudged that any other is the Carrier and/or bailee of the goods shipped hereunder, all limitations of, and exonerations from, liability provided for by law or by this bill of lading shall be available to such other. It is further understood and agreed that as the Company or Agents who has executed this bill of lading for and on behalf of the Master is not a principal in the transaction, the said Company or Agents shall not be under any liability arising out of the contract of carriage, nor as Carrier, nor bailee of the goods.

1. Two Views Concerning the Effectiveness of the Demise Clause

The first view is that the demise clause is only effective where the cargo claimant / consignee would like to pursue damages from the shipowner or the demise charterer in breach of contract and the demise clause is used to establish the contractual relationship. The cargo claimant can pursue damages from both the bill of lading issuer and the shipowner, or individually from whichever party he chooses, based on breach of contract. I am of the opinion that this view is generally supported world wide, as there is no reason to refute the owner's or demise charterer's contractual liability, because the owner or the demise charterer has taken the initiative in assuming contractual liability by means of the demise clause.

The second view is that the demise clause has been held to be effective where the bill of lading issuer seeks to refute a cargo claim because they were acting as agents only according to the terms of the demise clause and therefore they are not liable for the cargo claim. This is surprising since even in common law countries, the second view has not been admitted.

2. *THE CAMFAIR*

Facts:

On 2 December 1988, the Camfair left Rabaul, Papua New Guinea, after loading a cargo of round logs with a volume of 5,781 cubic meters (the "cargo") and bound for Taichung, Taiwan.

On December 18, one half mile north east of Rapu Rapu island located off the southern end of Luzon island, in the Philippines, the Camfair was grounded and sank due to a breach of the hull in the No. 2 hold. As a result of the sinking of the vessel the cargo

became a total loss.

Concerning this loss the cargo insurers paid insurance money to the consignees, or the bill of lading holders and were subrogated to their rights of recovery for the loss. Thereafter the insurer commenced litigation for delivery of the cargo based on the carriage of the goods by sea contract under the bill of lading and pursued damages from the time charterer X Shipping, based on a breach of contract and/or an action in tort.

The insurers previously won a default judgment against the Philippine shipowner in November of 1995 before the Tokyo District Court.

Defendant X Shipping's allegation:

Because the captain is the shipowner's general agent, the Defendant's signature "on behalf of the captain" under the bills of lading, was intended to designate the shipowner as principal. Also there was a demise clause on the reverse side of the relevant bill of lading, therefore the Defendant is not the issuer of the bill of lading, nor is the Defendant the carrier. The Defendant only has the right to receive freight on behalf of the principal.

Applicable law and bill of lading clauses:

(A) Articles 2, 7 & 15 of the Japanese International Carriage of Goods by Sea Act [COGSA](Law No. 72, 1957) provide as follows:

Art. 2. (Definitions)

1. In this law the term "ship" has the meaning provided in the Commercial Code Art. 684(1), but excludes those boats and small vessels described in Art. 684(2).
2. In this law the term "carrier" means a shipowner, a lessee of a ship, or a charterer carrying goods according to the previous Article.
3. In this law "consignor" means a consignor or charterer who commissions the carriage of goods according to the previous Article.

Art. 7. (Issuing a bill of lading)

1. The bill of lading must state the following particulars (in the case of a receipt bill of lading items 7 and 8 shall be excluded) and the carrier, master or the carrier's agent shall sign it or inscribe and affix his seal to it.
   (1) The kind of goods;
   (2) The weight or volume of the goods, or the number of packages or individual pieces and the marks of the goods;
   (3) The apparent condition of the goods;

(4) The consignor's full name or trade name;
(5) The consignee's full name or trade name;
(6) The carrier's full name or trade name;
(7) The name of the ship and its nationality;
(8) The date and port of loading;
(9) The port of discharge;
(10) The freight;
(11) When several bills of lading are issued, the number of bills issued;
(12) The place and date of issuance.

Art. 15. (Prohibition of special agreements)

1. Any special agreement unfavorable to the consignor, consignee or to the holder of the bill of lading and contrary to the provisions of Articles 3 to 5, Articles 8 and 9 and Articles 12 to 14, is void. The same shall apply to any contract purporting to transfer to the carrier rights arising from the insurance contracts for the goods carried and other similar contracts.

(B) The relevant clauses on the bill of lading [B/L] provide as follows:

1. (Definition)

In this bill of lading the "ship" and the "vessel" mean the herein designated ocean vessel; the "owner of the goods" includes the shipper, the consignee, the owner of the goods, the receiver and the endorsee and/or holder of the bill of lading whether by way of security and/or as agent or otherwise; and the "carrier" means the owner or demise charterer of the vessel. Wherever the term "Merchant" is used in this bill of lading it shall be deemed to include the Shipper, the Receiver, the Consignee, the Holder of the bill of lading and the Owner of the cargo.

2. (Identity of Carrier)

(1) The contract evidenced by this bill of lading is between the owner of the goods and the owner or demise charterer of the vessel and it is therefore agreed that said owner or demise charterer of the vessel only shall be liable for any damage or loss due to any breach or non-performance of any obligation arising out of the contract of carriage, whether or not relating to the vessel's seaworthiness.
(2) If despite the foregoing it is adjudged that any other is the carrier or bailee of the goods shipped hereunder, all limitations of and exonerations from, liability and all rights and liberties provided to the Carrier by law or by this bill of lading shall be available to such other.

(3) It is further understood and agreed that as the Line, Company, or Agent which has executed this bill of lading for and on behalf of the Master is not a principal in the transaction, said Line, Company or Agent shall not be under any liability arising out of the contract of carriage, nor as Carrier nor bailee of the goods unless said Line, Company or Agent be the owner or demise charterer of the vessel.

13. (Freight, Charges and Lien)

(1) Freight and all other amounts due under this contract are payable to X Shipping. The shipper, the consignee and holder of the bill of lading shall be jointly and severally liable to X Shipping for all such amounts and costs and for the performance of the obligations of each of them hereunder.

(2) X Shipping shall have a lien on the goods, which lien shall survive delivery, for all freight, charges and other amounts payable by the goods or the shipper or the consignee under this bill of lading and for any unpaid freight, charges or other amounts due from the shipper or the consignee to X Shipping arising from the carriage of other goods or from any other transaction. Said lien may be enforced upon the goods or any part thereof and upon any other property belonging to the shipper or consignee which may be in possession of X Shipping, by all available means, including public or private sale, with or without notice of time or place of sale.

(C) On the front page of the bill of lading:

In large print at the top right hand corner was the name X SHIPPING.

In the middle on the left hand side "Y LIMITED AS AGENTS" was stamped.

"For the Master, By X SHIPPING, as Agent" was printed on the bottom right hand corner and "Y LTD., SHIPPING AND TRANSPORT, AS AGENTS RABAUL" was stamped in the same area.

The Judgment:

The identity of carrier.

1. Due to the fact that Art. 9 of the COGSA provides that when an entry on the bill of lading is contrary to the truth, the carrier can set up the defense against the good faith holder of the bill of lading that the item inserted into the bill of lading is contrary to the truth if the carrier proves that he took due care when making that entry (in 1992 this Art. 9 of the COGSA was revised), the bill of lading issued by the ocean vessel, which is subject to this article, is a valuable instrument but not a written instrument.[3] In identifying

who is the carrier in making a carriage of goods by sea contract with the shipper and who shall be responsible for a breach of contract to the bill of lading holder, it is reasonable for us to consider whether the Defendant is a carrier or not by considering all the circumstances at the time the contract was entered into, although the wording on the bill of lading must be well considered as evidence, since to identify the carrier is a general matter related to the construction of the contract.

2. The reverse side of the bill of lading defines that the term "carrier" as the shipowner or bareboat charterer under clause 1 and stipulates that:

> Clause 2(1) - The contract evidenced by this bill of lading is between the owner of the goods and the owner or demise charterer of the vessel and it is therefore agreed that said owner or demise charterer of the vessel only shall be liable for any damage or loss due to any breach or non-performance of any obligation arising out of the contract of carriage, whether or not relating to the vessel's seaworthiness.
>
> Clause 2(3) - It is further understood and agreed that as the Line, Company, or Agent which has executed this bill of lading for and on behalf of the Master is not a principal in the transaction, said Line, Company or Agent shall not be under any liability arising out of the contract of carriage.

However, clause 13 of the bill of lading stipulates that the Defendant has a right to claim freight and have a lien on the cargo. On this point, the Defendant alleges that this right to claim freight and a lien is the right to do so as an agent, but there is no wording to "receive on behalf of" under this clause and therefore there is no reason to understand it as the right to claim as an agent.

Conversely, according to the reverse side of the bill of lading, Japanese law is the governing law and the Defendant has statutory securities such as a possessory lien and a maritime lien. Under Japanese law, the above security occurred not due to the contract between the contractual parties, but was given to the party who is entitled to claim freight and other incidental expenses under Articles 295 and 318 of the Civil Code and therefore it is reasonable to understand that clause 13 of the bill of lading, as a whole, clarifies that the Defendant has a right to claim freight and have a security for freight (while COGSA Art. 20(1) and the Commercial Code Art. 753(2) stipulate the master's possessory lien and COGSA Art. 20(1) and Art. 757 of the Commercial Code stipulate the shipowner's

---

[3] Translator's comment: Here "written instrument" means that the legal relationship between the parties is determined solely by the "written wording on the instrument".

right to sell the cargo by judicial auction, since the Defendant is not master or the shipowner, clause 13 does not refer to these rights.) Because the right to claim freight based on a contractual relationship is in return for the obligation to carry the goods, clause 13 of the bill of lading is based on the premise that the Defendant is a carrier.

Therefore, some of the articles on the reverse side of the bill of lading are not compatible with clauses 1, 2(1) and 2(3) and it is unreasonable to identify the carrier by these clauses alone. In spite of clause 2(1), of the bill of lading, clause 2(2) stipulates the position of the Judgment that someone other than the shipowner or bareboat charterer is the carrier and even if this rule considers judgments in the U.S. courts, the bill of lading terms admitted that it is likely that the carrier cannot be identified by clause 1, or clause 2(1).

3. The Defendant signed this bill of lading "for the master, by the agent of Y Ltd., Shipping and Transport". Where a bareboat charter party is not entered into, the master is the comprehensive agent (Commercial Code Art. 713(1)) and because there is no bareboat charter party to this vessel, the wording "for the master" means to sign for the master who is the comprehensive agent of the shipowner and as a result it is interpreted that the shipowner is the principal. Therefore from the wording "for the master" on this bill of lading, it is clear that the Defendant is an agent and it is reasonable to interpret that even if the trade name of Defendant is printed in big size on the Defendant's form bill of lading, this is not intended to represent the Defendant as a principal.

4. COGSA Art. 7(1)(6), provides that a bill of lading shall stipulate "the carrier's full name or trade name", but this bill of lading does not stipulate the shipowner's name and address, therefore it is a problem as to whether the identity of the carrier as the principal is fully established by the above signature. Now judging from the entire tenor of the oral proceedings, more particularly it is common to do marine business by using another's owned vessel in various forms, in addition to using a self owned vessel and in maritime practice, a company involved in the carriage of goods by sea offers sea transportation and negotiates the necessary terms of transportation with the cargo owner and receives freight and issues a bill of lading in his own trade name and on his own printed form. When the bill of lading holder tries to identify the vessel owner, he must investigate Lloyd's Shipowner's registry, but it is common that the registered owner is a paper company and not a real owner. Those who actually issue the bill of lading, in general, do not notify the cargo owner whether the vessel is owned by him, or is bareboat chartered by him, therefore usually the bill of lading holder has no means of knowing whether the vessel has been bareboat chartered or not. Therefore different from the days when the shipowner could be easily identified from the name of the vessel or the captain, today, unless the principal discloses his own identity, it is difficult to know which party the

captain represents and therefore in order to issue a bill of lading through agents, although this is not a written instrument, the representation of the agents is not enough and it is necessary to represent clearly the name of the shipowner or bareboat charterer. Even if many bill of lading holders have some knowledge of the marine transport business, it is unreasonable to place the burden of such troublesome investigation work and risk on the holders of the bill of lading based on the reasoning that it is a characteristic of maritime law.

In consideration of all of the above, the wording "for the master" means that the Defendant simply represents "to issue the bill of lading" as an agent and this bill of lading fails to represent clearly the name of the shipowner or bareboat charterer and therefore lacks the carrier's representation. On this point, because the reverse side of this bill of lading seeks to define the carrier as meaning the shipowner or the bareboat charterer and also there is a demise clause, some idea exists that the carrier himself is represented by these rules. However, it is reasonable that the term "The carrier's full name or trade name", under COGSA Art. 7(1)(6), means a specific individual's full name or trade name. As it is not clear from the bill of lading whether the vessel is bareboat chartered or not, the carrier himself is not represented by the above rules from the reverse side of the bill of lading.

Therefore even if the time charterer or his agent signed with the wording "for the master", it does not mean that the signature is a signature of a sub-agent of the shipowner or the bareboat charterer. Consequently "for the master" does not have any legal meaning.

5. The reverse side of the bill of lading sets out that the Defendant has the right to claim freight and a lien and in addition, judging from Evidence A19 (1) & (2) and from the entire tenor of oral proceedings, the freight in the bill of lading often exceeds the time charter hire, even in such a case, the shipowner, in order to maintain a steady income stream by saving the work involved in collecting the freight, agrees not to seek the difference from the Defendant time charterer. Therefore, whether the Defendant received freight under the voyage charter party from Z Ltd., or not, the freight under this bill of lading substantially belongs to the Defendant. (On this point the Defendant cited the *Jasmin*, a decision of the Tokyo District Court dated March 19, 1991 and affirmed by the Tokyo High Court in a decision dated February 24, 1993, as precedent to refute that the time charter was the carrier. In the *Jasmin*, the shipping agent for the voyage charterer was a company independent from the time charterer and signed with the wording "FREIGHT PAID for and on behalf of the Master / Owner" on the bill of lading. Therefore the *Jasmin* is distinguishable from the instant matter).

Therefore the Defendant is to be regarded as the carrier.

6. There is a demise clause on the reverse side of the bill of lading and therefore allegedly the time charterer is not liable for loss of the cargo. However, by the demise clause the shipowner assumes and discharges the obligation from the Defendant who is admitted to be a carrier and therefore this clause contravenes Art. 15(1) of the COGSA because it intends to discharge the defendant from liability as a carrier and it is a special agreement unfavorable to the consignor, consignee or the holder of the bill of lading. (There is a general tendency in the USA and civil law countries to refute the effectiveness of the demise clause due to the clause being contrary to public policy).

Art. 15 of the COGSA has unilateral enforceability and there is no reason to refute the liability of the shipowner who voluntarily assumes carrier's [contractual] liability (Art. 15(2) of the COGSA). Therefore, the shipowner is liable for the loss of the cargo as a carrier as well as the Defendant time charterer (The demise clause has no effect to discharge [the Defendant] from carrier's liability but has the effect to assume liability together with [the Defendant respectively]). (In the USA, cases have become popular where the time charterer and the shipowner are each jointly liable as the carrier, this is called the "plural carrier" theory. The shipowner of the Camfair, the Co-Defendant before the separation of oral proceedings from the Defendant X Shipping, was held liable for damages in this accident based on Art. 690 of the Commercial Code and/or Art. 709 of the Civil Code, as a default judgment was issued due to the non-appearance of the Defendant).

3. THE JASMIN

The *Jasmin* is a decision rendered in the first instance on 19 March 1991. The decision was affirmed by the Tokyo High Court on 24 February 1993. The case remains outstanding before the Supreme Court.

With the decision in the *Jasmin*, I believe that Japan has become the only country in the world to admit the demise clause in a bill of lading where the bill of lading issuer was able to refute responsibility under the bill of lading by relying on the demise clause.

The Jasmin decision

The Tokyo District Court at first instance ruled that the expression "For the Master" on the bills of lading, affixed to the bills of lading by the local agents, is generally a description that the shipowner itself is the party to the contract of carriage and hence the carrier. This is the main significance of the judgment. The court held that the master is normally the comprehensive agent of the shipowner when signing a bill of lading.

In relation to the argument concerning the charterer's form of the bill of lading, the court held that the use by the time charterer of its own bills of lading only showed it as

the time charterer reflecting the descriptions on the bills of lading and that it was not the time charterer but the shipowner indicated on bill of lading, that was responsible in the capacity of the carrier.

The court continued:

> "...it is inconceivable that the merchant, who is not a member of the general public not versed in shipping business, who takes such a bill of lading, mistakes the "carrier" on the bill of lading to be any party but the shipowner."

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

Also, the court held that the demise clause does not contravene Art. 15(1) of the Japanese COGSA, which has the same purpose as Art. III (8) of the Hague Rules.[4]

In line with the judgments in the leading English cases, the court was of the opinion that the demise clause did not reduce the liability of the carrier, but merely specified his identity.

Moreover, the court stressed that because it is the shipowner who has the maritime property which constitutes the best security in the case of a claim against the carrier, it cannot be said that the demise clause fails to protect the interests of the cargo owner.

Thus the court came to the conclusion that the demise clause is valid under Japanese law.

My comments on the *Jasmin* decision:[5]

The general approach of the court in the *Jasmin*, is correct in so far as it intended to focus on the bill of lading, but the court failed to take into consideration actual marine practice.

I criticize the *Jasmin* decision, as nowadays it is very, very difficult to locate the

---

[4] Art. 15(1) provides that any special agreement unfavorable to the consignor, consignee or to the holder of the bill of lading and contrary to the provisions of the Rules is void.

[5] There have been several commentaries on the *Jasmin* published in English. Specifically, Robert Margolis, *Validity of the Demise Clause under Japanese Law and the Consequences for Enforcement abroad of Claims under Japanese Bills of Lading*, 2 LMCLQ 164 (May 1993). Takashi Aihara, *Identification of the Carrier on the Bill of Lading and Validity of the Demise Clause under Japanese Law - The Jasmin*, THE BULLETIN OF THE JAPAN SHIPPING EXCHANGE, INC., No. 28, March 1994 at 63 - 69. Hiroshi Kimura, *Recent Legal Developments and Important Issues in Japan*, THE BULLETIN OF THE JAPAN SHIPPING EXCHANGE, INC., No. 32, March 1996 at 38 - 50. Caslav Pejovic, *The Identity of the Carrier under a Time Charter in Japanese Law - (The Jasmin Case)*, THE BULLETIN OF THE JAPAN SHIPPING EXCHANGE, INC., No 33, September 1996 at 1 - 8.

responsible owner of a vessel. I will expand on this point later in this paper.

4. The Decisions of Note in This Area

In order to gain perspective on the implications of the *Jasmin* and *Camfair* rulings, I performed a search of leading decisions in other jurisdictions which referenced the demise clause.

What I found was that in most circumstances the decisions that have supported the view that the time charterer was not liable even though they issued the bill of lading, have been decided under the principle of agency. By relying on the principle of agency the courts have found that the bill of lading is a contract between the shipper and the shipowner and not a contract with the time charterer / issuer of the bill of lading. By finding that the time charterer was not a party to the contract the courts have held that it is unnecessary to rule on the issue of the validity of the demise clause since the charterer was not bound to the contract.

In reaching their conclusions in this area courts have mentioned the idea that the shipper could easily locate the owner of the vessel by examining Lloyd's Register of Ships. Unfortunately I have not seen a decision where a court has sufficiently taken into account the realities of modern shipping such as the facts that the demise charterer will not appear in Lloyd's Register of Ship's, that there are flag of convenience vessels (Liberia, Panama), dual registered vessels and single vessel paper companies who are in reality vessel owners with no assets except for the vessel.

I summarize a few of these decisions as follows:

One frequently cited English case on the subject is the *Berkshire* ([1974] 1 Lloyd's Rep. 185), an English Queen's Bench decision which actually involved a vessel called the *Lancashire*. The *Berkshire* was a sister vessel.

In the *Berkshire*, the consignee attempted to sue the shipowner alone and did not sue the time charterer. The shipowner took the position that the demise clause was unenforceable and therefore the time charterer should have been held liable as the bill of lading was issued on the time charterer's form. The court held that the receivers of the cargo could sue the shipowners as the shipowners were liable due to the demise clause and that the time charterer acted according to the terms of the time charter by signing the bills of lading on the shipowner's behalf.

Regarding the enforceability of the demise clause, the key wording in the decision was as follows:

> "the contract contained in or evidenced by the bill of lading purports to be a contract between shippers and the shipowners and not one between the shippers and the

charterers."

Unfortunately the words "and not one between the shippers and charterers" were used.[6] This wording was unnecessary because the charterer was not sued, therefore whether a contract existed between the charterer and the shipper was not a question before the court and this wording is obiter and is not binding as precedent.

While I agree with the court's holding that a shipowner should not be able to challenge the validity of their own or their agent's demise clause in order to avoid liability, it is unfortunate that the Judge here choose to say that the bill of lading was not a contract between the shippers and charterers because the *Berkshire* has been wrongly cited as establishing that a bill of lading does not obligate the time charterer contractually.

In Hong Kong an appeals court decision, *Mitsui & Company Ltd v Gold Star Line Ltd* (Civil Appeal No. 43 of 1974), found that the time charterer acted as agent when signing the bill of lading and therefore the time charterer was not a party to the bill of lading on the time charterer's own form. Since the time charterer was not found to be a party to the contract the court found that it was not necessary to decide the enforceability of the demise clause. Also the court found that it was irrelevant whether the actual principal was disclosed or not when the bill of lading was issued.

One Australian case which has given some support to the enforceability of the demise clause is a New South Wales Court of Appeals decision, *Kaleej International Pty. Ltd. v Gulf Shipping Lines Ltd.* ([1986] 6 NSWLR 596).

In the *Kaleej*, an agent of the time charterer signed the bill of lading.

"For and on behalf of the Masters and Owners ... As Agents only..."

The court found that because the bill of lading was signed "As Agents only" the time charterer was not contractually bound. Further the decision stated:

"The fact that the document does not identify master or owners by name is, of course, nothing to the point."

The reasoning of the court was that the cargo owner held the right to arrest the vessel or a sister vessel as a security for the claim, it was not necessary that the vessel ownership be explicitly identified on the bill of lading.

Although a discussion of the enforceability of the demise clause was unnecessary

---

[6] The problem caused by the use of this excess wording is discussed more extensively in WILLIAM TETLEY, MARINE CARGO CLAIMS 251-2 (3d ed. 1988).

because the court held that the contractual relationship did not exist, the Judge, admitting that the comments were obiter, explained why he had no fundamental problem with the demise clause, as in his opinion the demise clause did nothing to limit liability but only served to define who the carrier is.

Unfortunately this extra wording in *Kaleej International* is bound to cause further confusion, as the wording will be used to argue that the demise clause is enforceable under Australian law.

Regarding the U.S. position in this area, recently I happened to note a headline in a shipping publication that stated that the identity of carrier clause was admitted in the U.S. in a case called the *Kamtin* (*Daval Investors, Inc. v. M/V Kamtin* ([1995] AMC 151 (1993)). This headline regarding the *Kamtin* was misleading because the clause was only admitted so that a cargo claimant could pursue the shipowner. Therefore the decision was actually in support of the first view I mentioned above.

5. The Test for Identifying Who Is the Carrier

In identifying who is the carrier from the bill of lading, the construction of the wording on the bill of lading should be construed by the intentions of all of the involved parties and the perspective of the holder of the bill of lading should be considered with particular care.

Sometimes carriers will insert in their own standard form of contract wording to the effect that "we are the agent, not the carrier in this transaction". Then the carrier will rely on this tricky clause if there is a cargo loss. From this type of clause we can draw the conclusion that the forwarder is an agent of the carrier or is the carrier itself. This type of ambiguous wording is also used on contracts related to the carriage of goods by air[7] and land.[8]

---

[7] For example, a clause of this type contained in an air waybill might read:
INTERNATIONAL AIR WAYBILL, clause 7:
Any exclusion or limitation of liability applicable to Carrier shall apply to and be for the benefit of Carrier's agents, servants and representatives and any person whose aircraft is sued by the Carrier for carriage and its agents, servants and representatives. For purposes of this provision Carrier acts herein as agent for all such person.

I am sometimes of the opinion that such a defense of agency clause in an IATA Uniform International Air Waybill functions well, because the Warsaw Convention should apply to the actual carrier. This is in conformity with demands of practice. However, some of these clauses can be very tricky, as they are on occasion only intended for the purpose of obscuring the carrier's liability. In such a situation, the agency clause should be null and void.

6. The Original Purpose of the Demise Clause

The demise clause has a very interesting background and it appears that some courts have failed to consider the history behind the original drafting of the clause.

Lord Roskill of England was one of the original drafters of the demise clause. In a note published at pages 403 - 406 of Volume 106 of the Law Quarterly Review in 1990, Lord Roskill explained the environment in which the demise clause came about.

According to Lord Roskill, the demise clause was developed during World War II at a time when it became necessary for the British government to requisition vessels to be under government control. At this time there existed an English law, which continued in effect until 1958, that provided that only a shipowner or demise charterer could limit their liability for losses. As the British government gained control of the vessels through time charters, it became necessary for the government to have the same limitations from liability as the actual owners or demise charterers.

Specifically if a government owned ship or a ship belonging to a liner service which was time chartered to a third party and that third party issued bills of lading in their own name, then in such a situation the third party vessel operator would be liable in contract for the losses but they would not be allowed to limit their liability. To protect against this difficulty the demise clause was drafted and along with its close relation the identity of carrier clause, remains today, although according to Lord Roskill's own words "It is quite unnecessary and has been unnecessary ever since 1958".[9]

7. Conclusion

Japanese judges and academics have a tendency to be much too theoretical when analyzing shipping law as their ideas have strayed far from actual shipping practice and the common sense of ordinary business people in the trade, the clients of the carrier and eventually the bill of lading holders.

Today there is a possibility that a lot of carriers in various forms are involved in the carriage of goods by sea. In old times, the owner was the operator and the captain was the comprehensive representative of the owner. Now the situation is much more complex as many more factors are involved in the process. For example, one particular vessel may have a registered owner, several demise charterers, several time charterers, several

---

[8] In an English decision, *Lee Cooper v. Jenkins* ([1967] 2 QB 1), the forwarder was held as principal, not agent, in carriage, and he could not rely on his standard trading conditions to limit liability.

[9] As mentioned above, 1958 was the year the law which allowed only shipowners and demise charterers to limit liability, was repealed.

voyage charterers, an operator, a manning company, a managing company and a mortgagee.

We can identify the registered owner by identifying the flag of the vessel and then obtaining a certificate of the ship registry from her country. But we can not identify whether or not the vessel is demise chartered, time chartered, or voyage chartered, as these are a matter of private contract not available to the public. This chain of relationships involving one vessel is very complex and almost all of the relationships have no meaning to the cargo owner, the client of the carrier.

Although there are a lot of parties and potential carriers involved with a particular vessel, there is normally only one contractual carrier and also there is only one actual carrier. The actual carrier means the party that actually possess the vessel by controlling the captain and crew. If the owner would like to take the initiative in assuming contractual liability by means of the demise clause, then bill of lading holder has no reason to refute this responsibility.

For example, a shipper presented with a bill of lading with the following signature "For the Master, By X SHIPPING, as Agent" and "Y LTD., SHIPPING AND TRANSPORT, AS AGENTS RABAUL", would not normally be able to interpret who is the party to the contract from the signature and the problem is even more complicated for the ordinary business man and other cargo interests who are indirectly involved in the results of the shipping arrangements such as the seller, the consignee and any banking interests.

When the cargo owner enters into a carriage of goods contract with the contractual carrier, often this contract is made through a shipping agent and the shipping agent does not mind or even consider the form of the signature applied to the bill of lading. For example, the shipping agent is not greatly concerned whether the signature states, "for the master", "as agents", or whether there is a demise clause contained on the reverse side of the bill of lading. If the carrier were to explain the meaning of the demise clause and then were to declare "I am an agent of the owner of the vessel and am not liable for loss of cargo", he would likely lose business.

In the case of the *Jasmin* where the name of the charterer was shown at the top of the bill of lading and where the bill was signed "for the master", the court found that the merchant was supposed to know that the bill was not a charterers bill of lading and that the charterer was not a party to the contract. As discussed above such a conclusion is not reasonable as this conclusion does not take actual shipping practice into consideration.

Further the argument that the bill of lading was signed "for the master" and that the meaning of this wording is clear in the industry, is not persuasive as it does not take into account the development of the use of this wording, as until the 19th century bills of lading were regularly signed by the master as a matter of course. It is due to this tradition that modern bills of lading often contain the expression "for the master" at the place provided for the signature.

My position is that if the name of the charterer is shown at the top of the bill of lading and the bill of lading is signed "for the master" by the charterer's agent, then the third party holder of the bill of lading is justified in concluding that the charterer is the carrier. It is unreasonable to expect that a third party holder is responsible for investigating and understanding all the relationships between the parties. This is particularly unreasonable due to the fact that many of the relationships are based on private contracts which a third party holder would not have access to.

The bottom line is that the most ready and practical reference available to the shipper is the name on the top of the bill of lading. It is reasonable that a company placing their name at the top of a bill of lading should expect to be held accountable for the agreement represented by that bill of lading. If the bill of lading honestly intends for only the actual shipowner to be held accountable, then the actual shipowner's name should appear at the top of the bill of lading.

I am surprised that a court would find that where a party's name appears at the top of a contract, that party could then deny liability for the terms of that contract by signing the contract "as agents" and placing a clause in small print on the back.

By a court enforcing the demise clause, a court is only encouraging vessel owners to disguise the actual ownership of their vessels and to own vessels through single vessel corporations registered in flag of convenience countries.

As for Lloyd's Register of Shipping providing a reliable method of identifying ownership, it should always be kept in mind that Lloyd's Register does not provide names of demise charterers. I believe that at minimum the principal's name should be disclosed at the time of contracting. Further if the time charterer employs their own form bill of lading, then they should be held accountable, regardless of the manner in which the bill of lading is signed.

Further regarding the Japanese court decisions in the *Camfair* and the *Jasmin* the court failed to take into account that there are unique difficulties in a cargo owner enforcing their rights against the vessel under Japanese law, as Japanese law does not recognize an action in rem as is recognized under English law.

We appreciate that eventually the *Camfair* comes close to recognizing actual practice, but to understand the reasoning in the judgment is very difficult for me. We do not need to analyze "for the master", "as agents", or the meaning of the demise clause on the bill of lading let alone the nature of the time charter and other forms of charter on the vessel. If these are intended to be written for a special reason that is disfavorable to the cargo owner, then all of these terms are simply part of an adhesion contract, which is a standardized contract offered on a take it or leave it basis and allows the party entering into the agreement no realistic basis to bargain and therefore unfair terms in such a contract should not be enforced.

As for my conclusion, for purposes of business efficacy[10] judgments in this area should be decided more simply and rely on the identification of the carrier from a bill of lading holders perceptive. A more practical approach is needed in order to insure that all the realities of the modern shipping industry are taken into account. ■

---

10 A discussion on the widespread use of the demise clause and an argument that it should be done away with for purposes of business efficacy is provided in an August 30, 1994 Lloyd's List article by Mr. Anthony D. Smith entitled "TIME IS RIGHT TO KILL OFF THE UNPOPULAR DEMISE CLAUSE". According to Mr. Smith, the adoption in 1994 of the International Chamber of Commerce new rules for documentary credits and standby letters of credit, known as the "UCP 500" Rules, provides the impetus to do away with the demise clause. The UCP 500 Rules, which were drafted for the banking industry, require that if the bill of lading was signed by the time charterer as agent for the master, then the master's name must be inserted on the face of the bill of lading. Some banks further require that the name of the carrier be specifically shown on the face of the bill of lading. As this requirement goes against the intent of the demise clause, which is to make an unnamed carrier liable, Mr. Smith argues that the demise clause should be done away with for the reason that banks are very important customers in the shipping industry and their needs and requirements should be taken fully into account.

BREAKING TONNAGE LIMITATION OF LIABILITY: THE OLD AND THE NEW

Peter S.K. KOH*

Since time immemorial, shipowners and sea-adventurers have been exposed to all forms of maritime hazards. Negligence, whether on the part of the shipowner or his employees, often resulted in shipowners facing a myriad of claims from third parties. Where the amounts at stake were high, the shipowner was frequently in real danger of financial ruin.

For more than a century, the English Parliament recognised the need to encourage shipping activities without imposing an onerous burden on shipowners. A series of Merchant Shipping Acts culminated in the English Merchant Shipping Act of 1894 (the "1894 Act"). The 1894 Act allowed a shipowner to his liability for all claims arising out of any one incident based on the tonnage of his vessel. For shipowners, this was a welcome break with one exception. To be able to claim the benefit of limitation, they would have to show that the event causing the damage took place without their "actual fault or privity". This concept is examined further below.

This 1894 Act was the central source of limitation activities throughout the Commonwealth. Singapore, for example, has adopted the tonnage limitation provisions contained in the 1894 Act in the form of section 272 of the existing Singapore Merchant Shipping Act. Similarly, Canada has also incorporated the limitation provisions of the 1894 Act in its tonnage limitation provisions which are now found in Part IX of the Canada Shipping Act.

Despite the widespread adoption of the limitation regime of the 1894 Act, the frequency with which plaintiffs were able to successfully break limitation led to some dissatisfaction. In 1976, the International Maritime Organization proposed an alternative regime which resulted in the 1976 London Convention. The London Convention made it harder for claimants to break the tonnage limitation. In exchange, the limits of liability were raised significantly.

On December 1, 1986, England discarded the 1894 Act in favour of the London Con-

---

* Peter S.K. Koh is admitted to practise law in B.C. Canada, Singapore and in England and Wales. He is an author/ editor of several shipping law texts, including "*Marine Insurance and the New Institute Time Clauses*" and "*Carriage of Goods By Sea*".

The writer expresses his gratitude to Glenn Morgan, a partner at Davis & Company for his invaluable comments on the legal position on tonnage limitation of liability in Canada.

vention. Section 17 of the UK Merchant Shipping Act 1979 came into force on that date and gave effect to the London Convention.

Not all countries, however, have followed suit. In particular, Canada and Singapore still operate under the old regime.[1] The juxtaposition of the old and the new poses interesting tactical questions on the extent to which a plaintiff may choose a forum that maximizes the quantum recovered. This article will discuss a recent decision of the English court that deals specifically with this issue. At the same time, the article will also highlight the considerations that should come into play in deciding in the first place which regime would be preferable from the standpoint of recovery.

1. The 1894 Act: "Without Actual Fault or Privity of the Owners"

For a shipowner to avail himself of tonnage limitation protection, he has to convince the court on a balance of probabilities that the damage did not result from any "actual fault or privity" on *his part.*[2]

Before analyzing the concept of "actual fault or privity", it is helpful to consider whose "fault or privity" one should look at. The 1894 Act points to the fault or privity of the owner of a ship. Where the owner is an individual, the answer is obvious enough. It is where the owner is a company that questions arise as to who represents the company.

The Company's "Alter Ego"

The courts have resolved this question by looking to the person who is the "alter ego" of the company. The "alter ego" is a person who is so closely identified with the company that his acts or omissions are treated as the acts or omissions of the company. He is considered to be the "directing mind" of the company rather than the "limbs". He formulates corporate policy rather than executes it.

Where the authority to formulate corporate policy is vested in more than one person, there can be more than one "alter ego" of the company. In this respect, however, Canadian courts are probably more ready to recognise the geographical decentralization of this authority than are English courts. In the case of *R v. Canadian Dredge & Dock Co*,[3] Estey J. had this to say about the delegation of corporate governing executive authority:

---

1 Canada will soon follow England in adopting the London Convention. The first reading of Bill C-58 in the House of Commons of Canada took place on September 19, 1996. Bill C-58 amends the Canada Shipping Act to give effect to the London Convention.

2 "His part" meaning the personal fault of the shipowner, as opposed to the fault of his employees or servants, for which he would be vicariously responsible even without any personal fault on his part.

3 [1985] 19 D.L.R. (4th) 314, at pg 336.

> "[A] corporation may, by this means have more than one directing mind. This must be particularly so in a country such as Canada where corporate operations are frequently geographically widespread. The transportation companies, for example, must of necessity operate by delegation and subdelegation of authority from the corporate centre; by the division and subdivision of the corporate brain, and by decentralizing by delegation the guiding forces in corporate undertaking. The application of the identification rule in *Tesco*[4] may not accord with the realities of life in our country..."

This approach should be contrasted with the *Tesco* case, a decision of the English House of Lords. There, the court held that a branch manager did not possess the executive governing authority to be a "directing mind" of the company.

Governing executive authority, however, should not be confused with the extensive discretion given to an experienced master on matters of navigation. Such discretion does not, by itself, make the master the company's directing mind.[5]

Where the owner of a vessel is also the Master, it is his conduct in his capacity as an owner rather than his conduct in his capacity as a Master that determines whether he is able to limit his liability.[6]

Actual Fault or Privity

A shipowner (whether an individual or the "alter ego" of the company) is at *fault* where he does something or fails to do something which leads to the damage.

A shipowner is *privy* to the loss where he knows or ought to have known of a dangerous practice carried out by others, concurs with it explicitly or implicitly, and the practice ultimately leads to the loss. For privity to occur, the shipowner need not actually know of the practice. It is sufficient if in the circumstances, a reasonable shipowner ought to have known of the practice.

The sufficiency of constructive knowledge is borne out in the case of *The Lady Gwendolen*,[7] a decision of the English Court of Appeal. In this case, *the Lady Gwendolen* collided with another vessel, *the Freshfield*, because the Master had sailed at excessive

---

4 *Tesco Supermarkets Ltd. v. Nattrass*, [1972] A.C. 153, House of Lords.

5 *Rhone v. Peter A.B. Widener*, Supreme Court of Canada, [1993] 101 D.L.R. (4th) 188.

6 See *Conrad v. Snair* [1995] 131 D.L.R. (4th) 129, Nova Scotia Court of Appeal.

7 [1965] 1 Lloyd's Rep 335.

speed in thick fog. The Master had in fact been in the habit of sailing at excessive speed for some time. The court found that although the shipowner did not know about the dangerous practice, he ought to have known because he could have found that out by examining the ship's log book. In the circumstances, the shipowner could not rely on the limitation provisions.

The Standard of Care

What is the standard of care required when ascertaining how the shipowner should have acted? In this connection, the English and Canadian authorities are in agreement. The standard required is not one of perfection, but centres on what a reasonable shipowner would have done in similar circumstances.[8] While the industry standard may be a good indication of the type of conduct required, it is not necessarily conclusive of what is reasonable.

The standard of conduct required by the courts has changed over the years. In England, the initial attitude of the court was that as long as shipowners hired competent crew and personnel in navigation, they had fulfilled their role in the supervision of navigation.

From the 1960's until the adoption of the London Convention, the English courts began to insist that shipowners do more than simply hire competent people. They required shipowners to take a more active role in supervising navigation by conducting regular checks for dangerous practices, enforcing safety standards and passing on relevant information to their personnel. Failure to have a system in place to address these issues would probably result in the shipowner being denied the protection of tonnage limitation. Wilmer L.J.'s comment in *The Lady Gwendolen*[9] captured the court's attitude:

> "It seems to me that any company which embarks on the business of shipowning must accept the obligation to ensure efficient management of its ships if it is to enjoy the very considerable benefits conferred by the statutory right to limitation."

For the most part, the development of the law in Canada has been similar. Recently, however, the courts appear to be moving away from a rigorous approach. An examination of some English and Canadian cases dealing with fault and privity will highlight the different approaches.

---

8 See Meeker Log & Timber Ltd. v. *Sea Imp VIII* (The), British Columbia Supreme Court, per Lowry J. [1994] 1 B.C.L.R. (3d) 320, at pg 327; upheld on appeal to the British Columbia Court of Appeal, [1996] 21 B.C.L.R. (3d) 101; The *Dayspring* [1968] 2 Lloyd's Rep 204, at pg 213, a decision of the English High Court.

9 Supra, note 7, pg 346

The Degree of Causation Required

Before examining case law, it is important to note that there must be a causal link between the shipowner's "actual fault or privity" and the loss in order to break tonnage limitation. The owner's act or omission, however, need not be the *sole* or even the *principal* cause of the loss. As long as there was a "reasonable likelihood" that a change in the shipowner's conduct would have made a difference, that is sufficient to deprive him of the protection.

2. English Case Law on "Actual Fault or Privity"

The Norman, (House of Lords) 1960 [10]

When the fishing vessel, *the Norman*, collided with uncharted rocks, the widows and children of the crew members who had perished brought an action against the owners of the vessel.

The court found that shortly after the vessel had left port, the owners received information from the insurers on uncharted rocks in the casualty area. They did not inform the crew because the skipper was already aware of the hazardous nature of that area.

At the time of the collision, visibility was very poor due to heavy fog. Although the vessel had been equipped with radar, the vessel still collided with an uncharted rock. In fact, the location of the rock that destroyed the vessel was mentioned in the insurer's circular but was erroneously described.

Two issues arose for decision:

a) Should the owners have passed the information on?
b) Was it reasonably likely that the information would have made a difference in the circumstances?

The House of Lords answered both questions in the affirmative. On the second issue, they reasoned that although the given location of the rock was erroneous, the information would have alerted the crew, who would then probably have been more cautious in navigation.[11]

What probably motivated this result was the fact that had the limitation provisions

---

10 [1960] 1 Lloyd's Rep 1, House of Lords.

11 Notwithstanding the vessel's radar system.

applied, the widows and children would have been entitled to a paltry sum of GBP 420 each.

The Dayspring, English High Court, 1968 [12]

The Dayspring collided with a motor tanker. Before the collision, the mate had spotted the motor tanker but he left the wheelhouse without giving any instructions to the helmsman. The helmsman, who was then alone in the wheelhouse, failed to avoid the collision because he was not keeping a look out for obstacles and also because of his poor vision.

It is likely that had the mate stayed in the wheelhouse, the collision would not have occurred. In fact, the owners had posted in the wheelhouse standing orders to the effect that at any time, there should be at least two men in the wheelhouse and that a logbook should be kept. These orders had not been complied with.

The court found that the owners were still at fault for not following up with more positive action and for ensuring that the logbook was properly kept. In the Court's view, had the owners insisted on the proper keeping of the logbook, that would have impressed on the crew the seriousness of non-compliance. The crew would then have been more inclined to comply with the written standing orders posted in the wheelhouse.

Again, the court appears to be trying its best to allow full recovery.

The Marion (House of Lords) [13]

In the process of anchoring, *The Marion* caused damage to an undersea pipeline.

The damage occurred because the Master had relied on an out of date chart which did not reflect the undersea pipeline, even though there was a current chart on board the vessel.

The court found that the owners were responsible for not ensuring that there was a proper system to monitor the currency of the charts on board the vessel. It was not enough for the owners to supply a current chart. The backdated chart should have been removed, and a proper system implemented by the owners would have ensured that this was done.

Although the owners had delegated the maintenance of charts to their managers, the court held that the delegation did not exempt them from their duty.

---

12 [1968] 2 Lloyd's Rep 204.

13 [1984] 2 Lloyd's Rep 1.

Summary of English Cases

These are some of the things that an owner should consider in maintaining a proper system so that he can claim tonnage limitation protection:

* The owner should relay relevant information to the crew. These include details of by-laws, navigational charts and other information that would assist in navigation.
* The owner should hire and maintain qualified and competent crew.
* The owner should insist that proper records such as logbooks be kept.
* The owner should constantly review ship operations for dangerous practices and take steps to rectify them immediately.

3. Canadian Case Law on "Actual Fault or Privity"

Unlike the English courts, the Canadian courts appear to take a less demanding approach in assessing the conduct of shipowners.

The Chugaway 2, Exchequer Court (Admiralty) Canada, 1973 [14]

Here, the vessel, *The Chugaway 2*, had caused damage to a bridge because the vessel was too high to pass safely under the bridge. The owners had provided a chart which showed the height of the bridge above water. The Master did not rely on the chart but used a rule of thumb method to estimate clearance. Unfortunately, the Master made some errors in the estimation. The court rejected the plaintiff's argument that the owners were at fault in failing to instruct the Master to use the chart and held that the owners were entitled to the benefit of the limitation provisions.

Continental Bank of Canada v Riedel International, Inc., Federal Court of Appeal, Canada, 1991 [15]

The boom of a crane on a barge caused damage to a bridge, as the height of the boom exceeded the maximum clearance height of the bridge. The owners of the barge sought to rely on the limitation of liability provisions. They argued that there was no actual fault or privity on their part because they had left it to the Master's discretion to decide if it was safe to proceed. The Master had not attempted to estimate the height of the boom

---

[14] [1973] 2 Lloyd's Rep 159, Exchequer Court (Admiralty) of Canada.

[15] [1991] 78 D.L.R. (4th) 232, Federal Court of Appeal, Canada.

but simply relied on an erroneous estimation of height. This was because he had little experience in doing so and also because the owners had not provided him with any means to do so accurately.

The court found that the owners were at fault for not implementing a system in which the Master could estimate the height of the boom accurately. The court contrasted the facts of this case to those in The *Chugaway 2*.[16] First, the owners in *The Chugaway 2* had a system in place to enable the Master to decide if it was safe to pass under the bridge. In contrast, there were no instructions from the owners here. Second, in the case of *The Chugaway 2*, it was possible for the vessel to pass under the bridge except under certain tidal conditions. Here, it was impossible for the vessel to pass under the bridge in any conditions.

The court held that the owners were responsible for the full amount of damages.

Meeker Log & Timber v. "Sea Imp VIII", British Columbia Supreme Court, 1994[17]*, Affirmed on Appeal to the B.C. Court of Appeal, 1996*[18]

The owners of the tug, *Sea Imp VIII*, were sued for loss of cargo carried on the barge it was towing when it ran aground in Cordero Channel due to negligent towage. The Master of the tug, who was a man of experience, accepted responsibility for the accident. The accident arose because the Master had failed to keep the barge in safe water when he attempted to transit a passage of water on a significant following tide.

The cargo owners alleged that the tugowners were at fault in permitting the Master to continue with a dangerous practice.They relied on expert evidence and on "The Sailing Directions for the British Columbia Coast" issued by the Department of Fisheries and Oceans. This document contained specific recommendations for transiting the Cordero Channel:

> Directions: Due to the strength of the tidal streams and the turbulence that develops in various areas, navigation of Yuculta, Arran, Dent and Greene Point Rapids, and Gillard and Barber Passages, should not be attempted other than at or near slack water, at which time they can be taken without difficulty *[emphasis added]*.

The tugowners introduced expert evidence to the effect that these recommendations

---

16 Supra, note 14.

17 [1994] 1 B.C.L.R. (3d) 320, British Columbia Supreme Court.

18 [1996] 21 B.C.L.R. (3d) 101, British Columbia Court of Appeal.

were not compulsory but were useful where a less experienced master was navigating. They were not a substitute for the local knowledge of an experienced master. They also adduced evidence to show that the Master had previously crossed the channel in similar tidal conditions frequently without incident.

Notwithstanding that the Sailing Directions were not followed, the court held that the owners were entitled to the benefit of tonnage limitation.

4. The London Convention

The chain of English decisions sent shock waves to the shipping community not only in the UK, but worldwide. Shipowners and underwriters were unhappy with the alarming manner in which the judicial hands took away their statutory rights to limit their liability. The dissatisfaction finally culminated in the 1976 London Convention. Under the Convention, the limits of liability were raised significantly.[19]

Breaking the limitation provisions, however, would now be more difficult. Except in cases of deliberate or reckless conduct on the part of shipowners leading to the loss, the limitation provisions would remain effective.

Article 4 of the Convention provides:

> A person liable shall not be entitled to limit his liability if it is proved that the loss resulted from his personal act or omission, committed with the *intent to cause* such loss or *recklessly and with knowledge* that such loss would probably result *[emphasis added]*.

In *Goldman v. Thai Airways*,[20] the English Court was construing the meaning of similar wording in the Warsaw Convention. The court held that the person had to be reckless and know that the loss would probably, and not simply possibly, result.

It is also likely that constructive knowledge would suffice for recklessness. In *R v. Caldwell*,[21] a decision of the House of Lords, the court said that recklessness usually

---

19 See Article 6 of the London Convention which sets out the amounts (excluding passenger claims) on a progressive scale in proportion to the ship's tonnage. The limits of liability start at 1 million Units of Account. A Unit of Account is the Special Drawing Right as defined by the International Monetary Fund. Article 7 deals with the limits for passenger claims, which is 175,000 Units of Account multiplied by the number of passengers which the ship is authorized to carry according to the ship's certificate.

20 [1983] 3 All ER 693.

21 [1982] A.C. 354.

involved circumstances that ought to have drawn the attention of an ordinary prudent individual to the potentially harmful consequences.[22]

5. Forum Selection and Tonnage Limitation

One important factor which will decide this issue is the extent to which the shipowner was at fault in causing the loss.

If, for example, in a case where the damages are substantial, there is strong evidence to show that the shipowner was at fault, it would probably be advantageous to argue that the case should be tried in a forum where the "actual fault or privity" regime applies, because it would be easier to break tonnage limitation. On the other hand, if the evidence shows little prospect of finding fault or privity on the part of the shipowner and therefore little chance of breaking tonnage limitation, it may[23] be better to argue that the case should be tried in a forum where the London Convention applies, as there are higher limits of liability.

This is precisely what motivated the plaintiffs in the recent English decision of *Caltex Singapore Pte Ltd v. BP Shipping Ltd* [24] to start an action in England, despite the fact that the shipowners had commenced limitation proceedings in Singapore.

In this case, the vessel *British Skill*, collided with the plaintiff's jetty in Singapore. The plaintiff was a Singapore company and the vessel was owned by a company in England. Under Singapore law, the "actual fault or privity" regime was in force, whereas in England, the London Convention had the force of law. The plaintiff commenced an action in England, probably hoping to rely on the higher limit of liability there. The shipowners applied for a stay of the English action on the ground that Singapore was the more appropriate place to try the issue.

One interesting issue that arose during the proceedings was whether under English conflict of law rules, tonnage limitation provisions under the London Convention formed part of "English substantive law" or "English procedural law". This was important because if such provisions were part of procedural law, the English court would apply the law of the forum which was the London Convention. This would in turn support the plaintiff's argument that if they were forced to litigate in Singapore, they would be deprived of a legitimate juridical advantage (a crucial issue on a stay application).

---

22 Supra, note 21, at pg 354C.

23 "May" because the amount at stake may be within the limits of the old regime, in which case it may not matter which regime is chosen.

24 [1996] 1 Lloyd's Rep 286, English High Court.

On the other hand, if the tonnage limitation provisions were part of England's substantive law, an English court would not necessarily apply the law of the forum, namely English law and particularly the London Convention. If the law of the forum no longer determined the tonnage limitation applicable, it would make no difference whether the case proceeded in England or in Singapore. Accordingly, the plaintiff could not then complain of being deprived of a legitimate juridical advantage if the court ordered that the case be moved from England to Singapore.

The court held that such provisions were part of England's procedural law. As such, if the circumstances were such that the case was more appropriately tried in England, an English court hearing the case would apply the law of the forum, namely English law. The plaintiff would therefore "lose out" by litigating in Singapore where the "fault or privity" regime would apply. After considering this factor together with the other facts of the case, the English court held that the case had a stronger link with England than Singapore, and that the action should be allowed to continue in England.

It is important to realise that a plaintiff may not always have an unfettered choice of forum. For one thing, the classification of the tonnage limitation provisions as "substantive" or "procedural" depends on the conflict of law rules of the jurisdiction in question. However, if the amount at stake is large enough, it would certainly be worthwhile to explore the choice of forum issue.

6. Conclusion

There is much to be said in favour of the London Convention. Generally, plaintiffs benefit from the higher limits. The Convention also provides a great deal more certainty in the law regarding breaking limitation. Not every country has adopted the London Convention and until the Convention becomes the international standard, complex issues on conflicts of law will still continue to be relevant. ■

Issued 13/ 2/1960
Amended 4/ 4/1967
Amended 18/ 7/1974
Amended 1/ 3/1995
Amended 15/10/1997

The Documentary Committee of The Japan Shipping Exchange, Inc.

NANYOZAI CHARTER PARTY

Adopted by the Documentary Committee of The Baltic and International Maritime Council

1. Place & Date (Cl. 1)	CODE NAME **NANYOZAI 1997 (PART I)**
2. Owners/Chartered Owners (Cl. 1)	3. Charterers (Cl. 1)
4. Vessel (name/GT/DWT)(Cl. 1) When built ¦ Class ¦ Flag Bale/Grain Capacity (abt.)	5. Cargo (also state quantity)(Cl. 1)
6. Present Position (Cl. 1) ¦ 7. Expected ready to load (Cl. 1)	
8. Laydays/Cancelling date (Cl. 10(a), (b))	
9. Loading port(s) or place(s)(Cl. 1)	10. Discharging port(s) or place(s)(Cl. 1)
NOR to be given to (Cl. 3(c)):	NOR to be given to (Cl. 3(f))
11. Freight(Cl. 2): Rate Payment	
12. Laytime(loading) (Cl. 3(a))	13. Laytime (discharging) (Cl. 3(d))
14. Demurrage (Cl. 5(a))	15. Despatch money(Cl. 5(b))
Place of settlement (Cl. 5(c)) ¦ (loading): ¦ (disch.):	Place of settlement (Cl. 5(d)) ¦ (loading): ¦ (disch.):
16. Days on demurrage(Cl. 9(a))	17. General Average(Cl. 18)
Numbers of additional clauses attached:	

It is mutually agreed that this Contract shall be performed subject to the conditions contained in the Part I and Part II (Cl. 1 to Cl. 26)of this Charter Party. In the event of conflict of conditions, the provisions of Part I shall prevail over those of Part II to the extent of such conflict but no further.

Signature (Owners)	Signature (Charterers)

NANYOZAI 1997 (PART II)

1. Owners, Vessel, Position, Charterers, Where to load, Cargo, Destination

IT IS MUTUALLY AGREED on the day and year written in Box 1 between the party mentioned in Box 2 as Owners or Chartered Owners (hereinafter as "the Owners") of the Vessel named in Box 4 with particulars stated in the same Box 4, now in the position as stated in Box 6 and expected ready to load under this Charter Party about the date as described in Box 7 and the party mentioned in Box 3 as Charterers (hereinafter as "the Charterers") that the Vessel shall, with all convenient speed, sail and proceed to the loading port or place indicated in Box 9 or so near thereto as she may safely get and lie always afloat, and there load, with her own tackle, a full and complete or part cargo of Logs as described in Box 5, which the Charterers bind themselves to load, and being so loaded the Vessel shall, with all convenient speed, proceed to the discharging port or place indicated in Box 10 or so near thereto as she may safely get and lie always afloat and there deliver the said cargo in the customary manner.

2. Freight

(a) Freight shall be prepaid on Bills of Lading quantity as specified in Box 11.

(b) Freight shall be considered as earned upon completion of loading, the Vessel and/or cargo lost or not lost.

3. Laytime for Loading and Discharging

(a) Cargo shall be loaded at the average rate stated in Box 12 per weather working day of 24 consecutive hours, Sundays and Holidays excepted unless used.

(b) Laytime shall commence at 1 p.m. if notice of readiness to load is given at or before noon and at 6 a.m. next working day if notice given after noon unless worked sooner whereupon laytime shall begin.

(c) Notice of readiness at loading port(s) shall be given during office hours to the Charterers or their nominees stated in Box 9.

(d) Cargo shall be discharged at the average rate stated in Box 13 per weather working day of 24 consecutive hours, Sundays and Holidays excepted unless used.

(e) Laytime shall commence at 1 p.m. if notice of readiness to discharge is given at or before noon and at 6 a.m. next working day if notice given after noon unless worked sooner whereupon laytime shall begin.

(f) Notice of readiness at discharging port(s) shall be given during office hours to the Charterers or their nominees stated in Box 10.

(g) Time lost in waiting for berth shall count as laytime.

(h) Laytime for loading and discharging shall be non-reversible.

4. Rotation

Rotation of loading and discharging ports shall be at the Owners' option.

5. Demurrage and Despatch Money

(a) Demurrage shall be paid to the Owners at the rate as agreed in Box 14 per day of 24 running hours or pro rata for any part thereof, payable day by day, for all time used in excess of laytime at loading or discharging port(s).

(b) Despatch Money shall be paid to the Charterers at the rate as agreed in Box 15 per day of 24 running hours or pro rata for any part thereof for laytime saved at loading or discharging port(s).

(c) Demurrage at loading port(s) and/or at discharging port(s) shall be settled at the place stated respectively in Box 14.

(d) Despatch Money at loading port(s) and/or at discharging port(s) shall be settled at the place stated respectively in Box 15.

6. Free In and Out

(a) The Charterers shall load, stow and discharge the cargo free of risks and expenses to the Owners. The Charterers shall have the liberty of working all available hatches.

(b) The Vessel shall provide motive power, winches, gins and falls at all times and, if required, shall supply light for night work on board free of expenses to the Charterers.

7. Overtime

(a) Overtime for loading and discharging shall be for account of the party ordering the same.

(b) If overtime ordered by Port Authorities or any other Governmental Agencies, the Charterers shall pay extra expenses incurred.

(c) Officers' and crew's overtime shall always be paid by the Owners.

8. Deck Cargo

The Owners shall have the option to load cargo on deck at the Charterers' risk within the limit of the Vessel's seaworthiness, in which case the Owners shall not be responsible for wash away and/or any other damage to on-deck cargo.

9. Days on Demurrage

(a) Number of days of 24 running hours on demurrage for loading stated in Box 16 shall be allowed the Charterers at loading port(s).

(b) Should the Charterers be unable to load within the above period, the Vessel shall have the liberty to sail with the cargo then on board, the Charterers paying the dead-freight and demurrage incurred.

10. Laydays and Cancelling Date

(a) Laydays shall not commence before the date stated in Box 8.

(b) Should the Vessel not be ready to load (whether in berth or not) at or before noon on the cancelling date stated in Box 8, the Charterers shall have the option of cancelling this Charter Party; such option shall be declared, if demanded, at least 48 hours before the Vessel's expected arrival at the port of loading.

11. Owners' Responsibility and Exemption

(a) The Owners shall, before and at the beginning of the voyage, exercise due diligence to make the Vessel seaworthy and properly manned, equipped and supplied and to make the holds and all other parts of the Vessel in which cargo is carried fit and safe for its reception, carriage and preservation.

(b) The Owners shall properly and carefully handle, carry, keep and care for the cargo.

(c) The Owners shall not be liable for loss of or damage to the cargo arising or resulting from: unseaworthiness, unless caused by want of due diligence on the part of the Owners to make the Vessel seaworthy, and to secure that the Vessel is properly manned, equipped and supplied, and to make the holds and all other parts of the Vessel in which cargo is carried fit and safe for its reception, carriage and preservation.

(d) The Owners shall not be responsible for loss of or damage to the cargo arising or resulting from: act, neglect or default of the Master, mariner, pilot, or the servants of the Owners in the navigation or in the management of the Vessel; fire, unless caused by the actual fault or privity of the Owners; perils, dangers and accidents of the sea or other navigable waters; act of God; act of war; act of public enemies; arrest or restraint of princes, rulers or people, or seizure under legal process; quarantine restrictions; act or omission of the Charterers or of the shippers or owners of the cargo, their agents or representatives; strikes or lock-outs or stoppage or restraint of labor from whatever cause, whether partial or general (provided that nothing herein contained shall be construed to relieve the Owners from responsibility for their own acts); riots and civil commotions; saving or attempting to save life or property at sea; wastage in bulk or weight or any other loss or damage arising from inherent defect, quality or vice of the cargo; insufficiency of packing; insufficiency or inadequacy of marks; latent defects not discoverable by due diligence; any other cause arising without the actual fault or privity of the Owners or without the fault of the agents or servants of the Owners.

12. Responsibility for Cargo

The Owners shall not be responsible for split, chafing and/or damage unless caused by the negligence or default of the Master or crew.

NANYOZAI 1997 (PART II)

13. Stevedore Damage

(a) The Charterers shall be responsible for proved loss of or damage (beyond ordinary wear and tear) to any part of the Vessel caused by stevedores at both ends.

(b) Such loss or damage, as far as apparent, shall be reported by the Master to the Charterers, their agents or their stevedores within 24 hours after occurrence.

14. Deviation

The Vessel shall have the liberty to call at any port or ports en route, to sail without pilot, to tow and/or assist vessels in all situations, and to deviate for the purpose of saving life and/or property or for bunkering purposes or to make any reasonable deviation.

15. Owners' Lien

(a) The Owners shall have a lien on the cargo for all freight, dead-freight, demurrage, damages for detention, general average and all and every other sum of money which may become due to the Owners under this Charter Party.

(b) The Charterers shall remain responsible for above sum only to such extent as the Owners have been unable to obtain payment thereof by exercising the lien on the cargo.

16. Measurement

Cargo shall be measured by official measurers or sworn measurers according to Brereton Scale/Hoppus Scale before loading.

17. Bills of Lading

The Master shall sign Bills of Lading at such rate of freight as presented without prejudice to this Charter Party, but should the freight by Bills of Lading amount to less than the total chartered freight, the difference shall be paid to the Owners in cash on signing Bills of Lading.

18. General Average

General average shall be adjusted and settled at the place indicated in Box 17, according to the York-Antwerp Rules, 1994 or any modification thereof.

19. Agency

In every case the Owners shall appoint their agents both at loading and discharging port(s).

20. Strike Clause

(a) Neither the Charterers nor the Owners shall be responsible for the consequences of any strikes or lock-outs preventing or delaying the fulfilment of any obligations under this Charter Party.

(b) If there is a strike or lock-out affecting the loading of the cargo or any part of it at the time when the Vessel must start on or during her voyage to the port(s) of loading, the Charterers or the Owners shall have the option of cancelling this Charter Party.

(c) If such strike or lock-out is going on at or occurs after the Vessel's arrival at port(s) of loading, the Charterers have the right either to keep the Vessel waiting paying full demurrage or to cancel this Charter Party. Such cancellation shall take place within 24 hours after the Vessel's arrival or 24 hours after the subsequent occurrence of such strike or lock-out.

(d) If part of the cargo has then already been loaded, the Owners must proceed with same if requested by the Charterers, having the liberty to complete with other cargo at the same loading port or any other nearby port(s) for the same destination or any other nearby port(s) for their account.

(e) If there is a strike or lock-out affecting the discharge of the cargo at the time of the Vessel's arrival at or off the port(s) of discharge, or occurring after the Vessel's arrival, the Charterers shall have the option of keeping the Vessel waiting until such strike or lock-out is at an end against paying half the demurrage for the time the Vessel is delayed or, of ordering the Vessel to nearby safe port(s) where she can safely discharge her cargo without risk of being detained by strike or lock-out, against paying all extra expenses incurred; such option shall be declared within 36 hours after the arrival at or off the port(s) of discharge or the subsequent occurrence of the strike or lock-out. On delivery of the cargo at such port(s), all conditions of this Charter Party and of the Bill of Lading shall apply and the Vessel shall receive the same freight as if she had discharged at the original port(s) of destination.

21. General War Clause

(a) If the nation under whose flag the Vessel sails should be engaged in war and the safe navigation of the Vessel should thereby be endangered either party shall have the option of cancelling this Charter Party, and if so cancelled, cargo already shipped shall be discharged either at the port(s) of loading or at the nearest safe place at the risk and expense of the Charterers.

(b) If owing to outbreak of hostilities the cargo loaded or to be loaded under this Charter Party or part thereof becomes contraband of war whether absolute or conditional or liable to confiscation or detention according to international law or the proclamation of any of the belligerent powers, each party shall have the option of cancelling this Charter Party as far as such cargo is concerned, and the contraband cargo already loaded shall then be discharged either at the port(s) of loading or at the nearest safe place at the expense of the Charterers. The Owners shall have the right to fill up with other goods instead of the contraband.

(c) Should any port(s) where the Vessel has to load under this Charter Party be blockaded, this Charter Party shall be null and void with regard to the goods to be shipped at such port(s).

(d) No Bills of Lading shall be signed for any blockaded port(s), and if the port(s) of destination is declared blockaded after Bills of Lading have been signed, the Owners shall discharge the cargo either at the port(s) of loading, against payment of the expenses of discharge if the Vessel has not sailed thence or, if sailed, at any safe port(s) on the way as ordered by the Charterers or if no order is given at the nearest safe place against payment of full freight.

22. Both-to-Blame Collision Clause

(a) If the Vessel comes into collision with another ship as a result of the negligence of the other ship and any act, neglect or default of the Master, mariner, pilot or the servants of the Owners in the navigation or in the management of the Vessel, the owners of the cargo carried hereunder will indemnify the Owners against all loss or liability to the other or non-carrying ship or her owners insofar as such loss or liability represents loss of or damage to, or any claim whatsoever of the owners of said cargo, paid or payable by the other or non-carrying ship or her owners to the owners of said cargo and set off, recouped or recovered by the other or non-carrying ship or her owners as part of their claim against the carrying Vessel or the Owners.

(b) The foregoing provisions shall also apply where the owners, operators or those in charge of any ship or ships or objects other than, or in addition to, the colliding ships or objects are at fault in respect to a collision or contact.

23. Indemnity

Indemnity for non-performance of this Charter Party shall be proved damages.

24. Sublet

The Charterers shall have the option of subletting whole or part of the Vessel, they remaining responsible for due fulfilment of this Charter Party.

25. Arbitration

Any dispute arising from this Charter Party shall be submitted to arbitration held in Tokyo by the Tokyo Maritime Arbitration Commission (TOMAC) of The Japan Shipping Exchange, Inc., in accordance with the Rules of TOMAC and the award given by the arbitrators shall be final and binding on both parties.

26. Charter Party Holder

This Charter Party has been signed by both parties and shall be in the custody of the Owners.

Japanese Sentiment, Today and Tomorrow

– To Compromise or Not to Compromise –

Takao TATEISHI - *Editor*

The revised Japanese Code of Civil Procedure came into force as from January 1, 1998. This is the first major reform to the Code since its institution in 1890, though some minor alterations involving procedures for the courts of first instance were made in 1926. The most noticeable amendment this time is that it has shifted greatly to the equality of the parties in terms of the production of evidence. In civil cases, most of the crucial evidence tends to be in the hands of one party, which is often a big company, pushing the other party on the leeward. The new Code, modifying its stance of ordering the submission of evidence only in limited circumstances, now allows the courts, when they deem it necessary to clarify the point in dispute, to force the party in possession of such evidence to surrender it unless that party is entitled to non-compliance in some exempted instances. In addition, the Code imported the idea of discovery and permits a party to send to the other a document enquiring matters necessary to prepare its own pleadings.

The Code also aims at "user friendly" and expeditious proceedings. As it is written in modern Japanese, it will be exonerated from the long-standing criticism among the public for the incomprehensibility because of its old-fashioned style and phraseology. Furthermore, the Code has brought in various measures so as to implement speedy and therefore less expensive proceedings. Above all, small claims for payment of ¥300,000 or less will in principle be tried and adjudicated in a single day, with no appeal basically granted. Regrettably, the new Code left the chapter of arbitration procedure intact as a separate law, which is expected to be renewed two or three years later.

Historically speaking, Japan's civil law system was initiated with the advent of *Goseibai-Shikimoku* promulgated by *Hojo Yasutoki* in the year 1232. The law was basically a samurai version of *Ritsuryo* (literally code and ordinance), which, before the samurai age, had been the basis for bureaucracy and administration maintained by nobles. For some time after samurai warriors took the reign in 1192, both civil and criminal cases had been decided in consideration of precedents and practices - a kind of common law. But in the age of *Yasutoki* Japanese law made a clear turn to civil law - and was to be finally entrenched when the Government followed the example of German law in its modernisation policy during the Meiji Restoration period. The legal shift *Yasutoki* made coincided, or maybe interconnected, with the change in the social system, from horizontal to vertical, which was made the most of later by *Iyeyasu* to kick off a top-down society in the Edo era. And for that systematic change, one of the traits the Japanese are said to have inherited

from ancient times as an agricultural tribe must have provided a solid ground.

That is the nature of endurance. If one by birth is placed down the wind and pushed around by another in an overriding position, one will give vent to the grievance sooner than later. But perseverance would possibly deter the rupture to a greater extent so as to stabilise the entire system. The recent relationship between shippers and shipowners in cabotage is viewed in an analogous picture. Some of the shippers, taking advantage of their bargaining power, have often plied the shipowners with demands for deductions from hire or even termination of the contract during the charter period. However, this lopsidedness, if aggravated by economic doldrums and perennial over-tonnage, often exceeds the limits. When the shipowners bring arbitration proceedings against the shippers claiming damages or compensation, that means they cannot stand it any longer.

But, at this very moment, their looks may still disguise their true feelings, for *bigaku*, or paradigm of beauty, makes Japanese people feel bad about showing what they harbour in this respect. This inclination was confirmed in a recent research by a Japanese sociologist, who conducted a survey among Japanese and American students about the feelings these two groups hesitate to display either in public or in private. The majority of the Japanese were reluctant to show feelings of hatred most and then anger, followed by fear and sorrow. (Corresponding order for the Americans : sorrow, anger, fear and hatred.)

I notice that there is a growing interest in amicable settlement in western countries on recognition that it would save time and money. In this sense mediation or conciliation may be a more practical means of dispute resolution than arbitration. But the driving force for amicable settlement among the Japanese is not, in my view, of practical nature. They appeared before the arbitrators rather calmly - which should be interpreted as disgustedly - but once they blew off enough steam at the hearings and prevailed, *bigaku* seemed to emerge again and overtake the hostility - that is the tendency to save face for the defeated. In case they were losing compassion often came from the other party who, by that time, had become much reflective on their past conduct. Consequently, amicable settlement has traditionally been the most common dispute resolution in Japan.

Japan has twice undergone *kaikoku* open country in its history: one was towards the end of the Edo era; another subsequent to the end of World War II. During the Meiji Restoration period pursuant to the Edo era, Japan was inundated with western culture and Japanese people hastily adopted it into their life. In the post-World War II era, perhaps due to the numbing effect of affluence, Japanese people, especially younger ones, appear to have discarded the good old *bigaku* and become individualistic. Now, the deregulation policy by the Japanese Government which is said to open up the third *kaikoku* period, is inevitably bringing about free and fierce competition both domestically and internationally. When the Japanese have to bring suit at all, they will do it sooner and more drastically than before, if not for the merits the new Code of Civil Procedure intends to grant. ■

JSE 1998.3

THE JAPAN SHIPPING EXCHANGE, INC.
(Nippon Kaiun Shukaisho)
Wajun Building, Koishikawa 2-22-2,
Bunkyo-ku, Tokyo 112-0002, Japan
TEL: 81 3 5802 8361
FAX: 81 3 5802 8371
TELEX: 2222140 (SHIPEX)