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THE ENFORCEMENT OF THE ARBITRATION AGREEMENT UNDER JAPANESE LAW

-In order to bring an aberrant party back onto the right track-

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INTRODUCTION

The arbitration agreement must have been invented to provide a forum where third party arbitrators, not the court, would better resolve the parties' disputes that could not be done so, in particular, through the parties' own interpretation of the contract terms and/or trade usage. Therefore, it seems quite unreasonable if the parties to such arbitration agreement invoke invalidity of the arbitration agreement and/or non-arbitrability of the subject matter simply because they do not now want arbitration. It would of course be understandable to raise an objection to arbitral proceedings in such exceptional cases as where the capacity of a party who entered into an arbitration agreement is challenged or where arbitrability of the subject matter is doubted because the arbitration agreement seems to have been induced by fraud. In most other cases, however, the existence of an arbitration agreement in a commercial contract should be *prima facie* evidence of the parties' intention to resolve any and all of their disputes by arbitration, and such intention should be respected accordingly.

If the parties to an arbitration agreement nevertheless employ dilatory tactics they may risk "vengeance" of law. Under Japanese law it could amount to forfeiture of their right to claim. For example, a bill of lading holder brought an action against the carrier claiming damages for the late arrival of the cargo in defiance of the TOMAC[1] arbitration clause in the bill. While a claim based on the delayed delivery might otherwise have been heard by the court under Japanese law, he was later compelled by the court to arbitrate in accordance with the agreement. In such rejected cases, however, there is a delicate problem of limitation because neither the court nor the arbitral tribunal has virtual competence to grant extension of a time limit under Japanese law.

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Other cases where one party lawfully referred disputes to arbitration and the other party refused to take part and moved to set aside the proceeding invoking non-arbitrability of the subject matter and/or invalidity of the arbitration agreement under Japanese law seem to provide food for reflection as well. It may not only be a matter of time and money but of good faith, which could affect business opportunities.

Thus, it would be useful for the parties to know, before deciding by themselves whether to invoke any dilatory tactics, how the Japanese legal system has advanced in terms of the enforcement of an arbitration agreement. I will analyse in Part I the validity of the arbitration agreement under Japanese law, with a specific focus on good faith of the parties. In Part II I will discuss the issue of arbitrability. I will note the time limit as well as cite the latest cases: A Supreme Court's decision in late 1997 in favour of the American defendant where subjective arbitrability was affirmed; and a Tokyo District Court's decision in 1998 in which the court rejected a subrogated cargo claim in favour of arbitration. In Part III I will make an overview of the recognition of an international arbitration agreement under Japanese law, with proper regard to the New York Convention. In Part IV I will note certain problems in and after the enforcing of an arbitration agreement under Japanese law and discuss them in connection with the expected revision to the Arbitration Act.

I. VALIDITY OF THE ARBITRATION AGREEMENT UNDER JAPANESE LAW

1.1. Legitimacy of Arbitration

The Arbitration Act provides for the legitimacy of arbitration:

> "Article 786
> An agreement to submit a dispute to one or more arbitrators is valid only where the parties have the right to make a compromise regarding the subject matter in dispute.
> "Article 787
> An agreement to submit a future dispute to arbitration shall have no effect unless it relates to a particular relation of right and a dispute arising therefrom."

The legality of arbitration as an outside-the-court dispute resolution under the Arbitration Act was first affirmed by the Great Court of Cassation (former Supreme Court), which held on 15 April 1918:[2]

[2] 24 Daihan Minroku 856.

> "An arbitration agreement provided for in the Arbitration Act is an agreement to let the arbitrator to resolve civil disputes; the parties to the agreement are thereby entitled to raise an objection to the suit before the court. An arbitral award made in accordance with the agreement shall have the same effect as a final and conclusive judgment of a Court of Justice."

More recently, the legitimacy of arbitration was considered in connection with its constitutionality by the Tokyo District Court.[3] In that case, one of the parties took issue with the arbitration by the Construction Dispute Resolution Commission to be conducted in accordance with Articles 800 and 801 of the Arbitration Act[4] and contended that it should not be allowed pursuant to Article 32 of the Constitution.[5] The Court held on 30 August 1985 that arbitration by the Construction Dispute Resolution Commission did not contravene Article 32 of the Constitution.

Accordingly, it can be said that the parties to the arbitration agreement are bound to refer their disputes to arbitration under Japanese law as long as the agreement is valid.

1.2. Separability of the Arbitration Agreement

Naturally, it frequently happens that one of the parties to an arbitration agreement brings a motion to dismiss the arbitral proceedings invoking invalidity of the arbitration agreement. Some merely allege that they did not agree to the main contract that contained an arbitration clause. Others say that such main contract became null and void. Here, the separability of the arbitration agreement is now widely recognised around the world. In Japan, the

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[3] Docket: Showa 58 (wa) 13644; Hanrei Times No 594 p 113.

[4] Article 800

An award shall have the same effect as a judgment which is final and conclusive between the parties.

Article 801

1. Motion for dismissal of an award may be made in the following cases:
   (1) In case an arbitration procedure should not be allowed; (2) In case an award condemns a party to perform an act the performance of which is prohibited by law; (3) In case the parties were not represented in accordance with the provisions of law; (4) In case the parties were not examined in the arbitration procedure; (5) In case the award is not accompanied by reasons; (6) In the case of items (4) to (8) of Article 338 para 1 of the Code of Civil Procedure, there exist conditions allowing a suit for retrial.
2. Dismissal of an award may not be made by the reasons as mentioned in items (4) and (5) of this Article in case parties have otherwise agreed.

[5] Article 32 of the Constitution

No one shall be deprived of his or her right of trial at court.

Supreme Court held on 15 July 1975:[6]

> "The effect of an arbitration agreement incorporated into the main contract shall be judged independently of the main contract unless otherwise expressly agreed between the parties and any defect in the formation of the main contract would not affect the validity of the arbitration agreement."

In that case, a promoter of a corporation in New York had concluded, before it was incorporated, an exclusive agency contract for sale of locks with the plaintiff Japanese maker. The contract contained an arbitration clause that provided to the effect that any disputes concerning the agency contract should be submitted to arbitration in Tokyo. When the American corporation brought arbitral proceedings in Tokyo claiming damages for the plaintiff's non-performance of the contract, the plaintiff, after having appointed his arbitrator and filed his defence, challenged the existence of the agency contract before the Court. Arguments centered upon the capacity of the defendant, who was nonexistent at the time of the conclusion of the contract, to enter into such contract. However, the Court rejected the plaintiff's action as unlawful, holding that the arbitration agreement was validly concluded irrespective of the validity of the main contract.

In the matter of the validity of the arbitration agreement after the termination of the main contract, the Tokyo District Court affirmed its separability on 25 January 1958.[7] The Court, in connection with its power to appoint an arbitrator on behalf of the defaulting party, held:

> "The arbitration agreement is separable from the main contract under Japanese law and it is still valid after the termination of the contract of sale."

Furthermore, the Tokyo District Court held on 17 October 1973 that the arbitration clause attached to a construction contract was still valid after the main contract itself had terminated pursuant to liquidation of one party.[8]

1.3. Arbitrator's Competence

In addition, under Japanese law, the arbitrators may proceed with their function even if

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[6] Docket: Showa 49 (o) 1125; 29 Minshu 1061.

[7] 9 Kakyu Minshu 111.

[8] Docket: Showa 46 (wa) 11502; 24 Kakyu Minshu 738.

the parties challenge the validity of the arbitration agreement. The Arbitration Act provides in Article 797:

> "Article 797
> If the parties contend that the arbitration procedure entered upon is not one which is to be allowed, or in particular, that no legally binding agreement of arbitration has been made, or that the arbitration agreement does not relate to the controversy to be settled, or that the arbitrators have no power to exercise their office, nevertheless the arbitrators may proceed with their function and make an award."

Although Article 797 anticipates a wider range of problems surrounding the arbitration agreement, i.e., the issue of arbitrability and jurisdiction of the arbitrators over the subject matter, the Arbitration Act properly gives the arbitrators competence to decide by themselves on the validity of the arbitration agreement.

1.4. Formal Validity of the Arbitration Agreement

As we see in the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 1958 (the New York Convention), an arbitration agreement is required to be "in writing."[9] Japanese law is more liberal on this matter. An arbitration agreement is not required to take the form of writing to be valid under Japanese law; it can be oral, although TOMAC Arbitration Rules expressly require a document evidencing the agreement to arbitrate.

In a case where the parties had pleaded on the merits of the dispute before the arbitrators without invoking non-existence of the arbitration agreement, the Supreme Court held on 12 October 1972:[10]

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[9] The New York Convention provides in Article II:

> Article II
> 1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.
> 2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.
> 3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

[10] Docket: Showa 47 (o) 372.

"It shall be reasonable to assert that an arbitration agreement in respect of the instant dispute was implicitly concluded between the parties."

As far as Japan's maritime arbitration is concerned, the problem of formal validity of the arbitration agreement rarely arises. This is because, apart from some exceptional cases where the claims are not based on their contractual rights as in collision damages, virtually all claims are based on their rights arising under the standard contracts that the Japan Shipping Exchange, Inc. has drafted with the TOMAC arbitration clause in them.

1.5. Substantive Validity of the Arbitration Agreement

A decision of the Tokyo District Court on 25 August 1988 demonstrated the uselessness of pleading unawareness of the existence and/or effect of the arbitration agreement.[11] In that case, the plaintiff Israeli corporation concluded an agency agreement for sale of merchandise with the defendant Japanese maker. The agreement had no provision on the governing law of the contract and provided for arbitration without any reference to the place or the applicable law thereof, which stipulated "[a]ny dispute ... arising out of or related to this Agreement, ... shall not be brought into the court of law but shall be judged by arbitration according to law." The plaintiff sued the defendant for damages arising from the defendant's wrongful termination of the contract and non-payment of commission orally agreed upon. The defendant moved to set aside the suit invoking the arbitration clause in the agency agreement.

The Court, after applying the laws of Japan in accordance with Article 7 of the Horei,[12] a private international law of Japan, held that the arbitration clause was valid under Japanese law in respect of all disputes between the parties including the matter of unpaid commission, and rejected the suit.

That choice of the laws of Japan was based on the facts that the agreement had been executed in Japan and that the president of the plaintiff who had signed the agreement had his registered address in Tokyo. On the plaintiff's allegation that the fine print clauses in the standard form were only used as referential text for the agreement, the Court held:

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[11] Docket: Showa 61 (wa) 7282; The JSE Bulletin No 18 p 20.

[12] Article 7 of the Horei

(1) As regards the formation and effect of a juristic act, the question as to the law of which country is to govern shall be determined by the intention of the parties.

(2) In case the intention of the parties is uncertain, the law of the place where the act is done shall govern.

> "Both the Plaintiff and the Defendant are engaged in international commercial activities so that both are believed to have sufficient knowledge of the definition of arbitration."

In another case, the Osaka High Court held on 26 June 1987 that "the validity of the arbitration agreement was properly established when the parties agreed to let one or more of third party arbitrators to make binding judgment on their current or future disputes." The Court further stated about the validity of the arbitration agreement:[13]

> "It has nothing to do with the validity of the arbitration agreement whether the parties expressly agreed to waive their right to bring suit. The validity of the arbitration agreement shall not be impaired if one of the parties, unaware of its effect of blocking suit, concluded the arbitration agreement, because such ignorance or belief to the contrary does not constitute an element of a judicial act but only represents a mistake of a motive."

Another claim for liquidated damages brought to the Tokyo District Court was based on a standard construction contract that had an arbitration clause in it.[14] The arbitration clause stipulated that all disputes concerning the contract should be submitted to arbitration by the Construction Dispute Resolution Commission. The plaintiff pleaded that he had not been aware of the arbitration clause and hence that he had not agreed to arbitrate. However, the Court rejected on 29 May 1975 the plaintiff's action, holding:

> "As long as the parties had the intention to enter into agreement on the basis of the standard contract form, the arbitration agreement attached properly to the main contract shall be legally binding on the parties. In such cases, it is so even if the plaintiff was not aware of the existence of the arbitration agreement, provided that the arbitration agreement itself is not unreasonable."

Hence, an arbitration clause invariably contained in a contract based on the standard form may be enforced as far as the parties to the contract are such sophisticated people as shipowners, charterers or shippers, even if one or more of them pleads ignorance of the existence of the arbitration clause.

On the contrary, in some cases the courts actually denied the existence of the arbitration

13 Docket: Showa 60 (ne) 1607; Kinyu Shoji Hanrei No 795 p 24.

14 Docket: Showa 50 (wa) 606, 607, 608, 1006.

agreement. The Tokyo District Court held on 11 November 1980 that there was no agreement between the parties to arbitrate despite the fact that an operation contract of a vessel contained an arbitration clause.[15] In another case, the Kobe District Court, in determining whether an offeree was entitled to refuse the offer to terminate an operation contract of a vessel, held on 27 May 1988:[16]

> "The arbitration clause in the contract shall not be taken as binding on the parties because it is a boilerplate clause or served only as referential text for the agreement. The refusal to terminate, however, would constitute abusing of rights and therefore shall not be allowed on the ground of the principles of trust and good faith."

In such peculiar cases as where one party was induced by fraud to agree to the contract that contained an arbitration clause, whether the arbitral tribunal has jurisdiction over the dispute arising out of such contract remains to be seen, because, to my knowledge, the Japanese courts have never decided on such issue.

1.6. Good Faith Violated

As we have seen above, it would be rather odd if a party thinks that it would be possible to set aside the arbitral proceedings by pleading that he did not enter into the main contract after having exchanged a recap letter that included an arbitration clause. The parties' intention to arbitrate their disputes should be certified by the existence of such an exchange of documents and hence one party's conduct to obstruct arbitral proceedings in such cases should be labeled as a dilatory tactic.

Under Japanese law, party autonomy is maintained and given a maximum guarantee. For example, the Civil Code provides in Article 420 for liquidated damages and purports to abide by the doctrine of the freedom of contract:

> "Article 420
> (1) The parties may determine liquidated damages payable in the event of non-performance of an obligation; *in such case the Court cannot increase or reduce the amount.* (emphasis added)
> (2) The determination of liquidated damages shall not prejudice the obligee's right to demand performance or rescission.

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15 Docket: Showa 51 (wa) 1503; Hanrei Jiho No 1019 p 105.

16 Docket: Showa 55 (wa) 1310; Hanrei Times No 687 p 242.

(3) A penalty is presumed to be a determination of liquidated damages."

Accordingly, liquidated damages even when they are unduly excessive would not necessarily be illegal under Japanese law. However, this should not mean that under Japanese law the parties to an agreement might exercise their rights solely invoking the terms of the agreement. In determining the validity of liquidated damages, for example, due regard should at least be had as to whether the parties properly agreed on it after they negotiated in good faith. This is in accordance with the principles of good faith and trust, for which the Civil Code provides in its very first section:

"Article 1.
(1) All private rights shall conform to the public welfare.
(2) *The exercise of rights and performance of duties shall be made in good faith and in accordance with the principles of trust.* (emphasis added)
(3) No abusing of rights is permissible."

In a recent case, the *Jasmine*, decided on 27 March 1998, the Supreme Court appears to have properly preserved the principles of freedom of contract again.[17] The Supreme Court upheld the decisions by the Appeal Court that the identity of the carrier under a bill of lading must be decided in accordance with what were set out in it. The bill of lading, although in the time charterers' form, had been signed "for the Master" by the sub-charterers' agent and the demise clause ("identity of carrier" clause) which nominated the owner as carrier was printed on the reverse side.

In other words, under Japanese law it is seemingly required to comply with the terms of agreement as long as the parties have reached an agreement in good faith, whether it is in writing or oral. One exception to the party autonomy is, however, that the capacity of the parties to enter into an arbitration agreement must be determined by the application of the law of their respective nationality in accordance with Article 3(1) of the Horei.[18]

II. ARBITRABILITY UNDER JAPANESE LAW

Whether the subject matter of a dispute can be an object of arbitration under Japanese law may best be known if we study case law.

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[17] Docket: Heisei 5 (o) 1492; The JSE Bulletin No 37 p 1.

[18] Kawakami, Foreign Arbitration Agreement Keiyakuho Taikei Vol. VI p 257, etc.

2.1. Objective Arbitrability

The Tokyo District Court rejected on 27 August 1998 a subrogated cargo claim on the grounds that the arbitration agreement as evidenced by an arbitration clause in a bill of lading had been validly entered into between the parties.[19]

In that case, a cargo of fish was shipped from Iceland to Japan on board the MV *Amber Atlantic* and bills of lading were issued by the carrier. The B/L holder received the cargo in a damaged condition and claimed insurance money from their insurer. The plaintiff who had paid the insured as regards cargo damage brought a subrogated cargo claim to the Court against the carrier.

The defendant moved to reject the case as illegal on the grounds that the bill of lading issued by the carrier on request from the shipper contained the arbitration clause of TOMAC in the printed form. The plaintiff refuted that any provisions in the printed form of the bill of lading should be regarded as "voluntary" and that it should expressly have been agreed upon in order for such provisions to bind the parties. The plaintiff further argued that the contract evidenced by the bill of lading that had been issued to the order of the shipper was only between the carrier and the shipper so that it could not be binding on the holder of the bill of lading. They also contended that it would constitute forfeiture of the right to bring suit to the court and that the alleged arbitration agreement would not apply to the present case because it was brought against the carrier in tort.

The Court held:

> "The bill of lading contained an arbitration clause and any disputes arising out of the contract evidenced by the B/L should be referred to arbitration by TOMAC. The arbitration agreement in the printed form should bind the B/L holder (and the subrogated insurer) in the light of the nature of the bill of lading as provided for in Article 572 of the Commercial Code.[20] In addition, the Japanese COGSA shall apply to in tort actions against the carrier for damages and therefore there was no reason to admit the claim of the plaintiff."

Also, the Tokyo District Court demanded on 18 May 1977 in a case where the parties

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19 Docket: Heisei 9 (wa) 22375; Maritime Law Review No 147 p 45.

20 Article 572 of the Commercial Code [Bill of Lading - Effect]

In case a bill of lading was issued matters between the carrier and the holder of the bill as regards carriage of the goods shall be governed by the terms of such bill.

entered into a construction contract that contained an arbitration agreement, that the parties refer their disputes concerning the contract to arbitration.[21] In that case, the constructor had brought suit against the customer for complete payment on promissory notes. The Court held that the arbitration agreement was valid for the instant case and rejected the suit as unlawful on the grounds that it lacked the benefit of lawsuit.

In a similar but substantially different case, the Osaka High Court held to the contrary on 31 May 1984:[22]

> "The effect of an arbitration agreement that was concluded between the parties to settle the disputes related to promissory notes does not extend to the assignees of the promissory note unless an agreement is concluded afresh between the original parties to enure for such benefit of the assigns."

2.2. Subjective Arbitrability

On 4 September 1997 the Supreme Court of Japan handed down an important decision on subjective arbitrability.[23] The plaintiff contested the defendant's capacity to be a party to arbitration under Japanese law or the arbitrability of a dispute covered by the arbitration agreement. In that case, a Japanese entertainment producer claimed damages in tort against an American representative, alleging that the defendant made fraudulent misrepresentations concerning performances of a circus. In spite of the arbitration agreement, the plaintiff brought suit to the court on the grounds that under Japanese law the effect of an arbitration agreement concluded between legal persons did not extend to private persons like representatives of a corporation.

The Court, in determining the validity of the international arbitration agreement, first applied the conflict of law rules, i.e., Article 7 of the Horei, a private international law of Japan,[24] to select the law to govern the arbitration agreement and upheld the lower courts' decisions:

> "In cases where the parties designated the place of arbitration it shall be deemed, absent exceptional circumstances, that the parties implicitly agreed to apply the law

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21 Docket: Showa 51 (te-wa) 3670; Kinyu Shoji Hanrei No 531 p 45.

22 Docket: Showa 59 (ne) 34; Kinyu Homu Jijo No 1077 p 35.

23 Docket: Heisei 6 (o) 1848; Hanrei Jiho No 1633 p 83.

24 See footnote 12.

of the seat of arbitration as the governing law of the arbitration agreement."

The Court then applied the law of the seat of arbitration, i.e., US Federal Arbitration Act and US case law, as the governing law of the agreement, and dismissed the appeal by the plaintiff-appellant on the grounds that the dispute had subjective arbitrability under American law. In addition, in the lower courts of this case[25] the application of Article 33 (Public Policy) of the Horei[26] to arbitrability of the subject matter in international arbitration had been denied.

However, this case took nearly eight years since first brought to the Tokyo District Court in 1989 until finally demanded to refer to arbitration. The parties will have to, if they still wish to, fresh start the entire proceedings in arbitration. I will return to this problem later in Part IV.

With the case above, one can say that the Japanese courts now generally determine arbitrability of the dispute by applying the law designated explicitly or implicitly by the parties to govern the arbitration agreement.

2.3. Arbitrability under Japanese COGSA

A dispute arose between a bill of lading holder and the carrier as regards the late arrival of the cargo. The bill of lading contained an arbitration clause bearing that "any dispute arising out of the shipment shall be referred to arbitration by TOMAC in Tokyo." In defiance of the arbitration clause the plaintiff B/L holder filed a suit with the Oita District Court in Northern Kyushu claiming damages for the delayed delivery.[27] The Carriage of Goods by Sea Act of Japan (Japanese COGSA), national legislation of the principles of the Hague-Visby Rules, diversified a little bit from the Rules especially in that it allows a claim for the late arrival of the cargo under Article 3:

"Article 3

(1) The carrier shall be liable for loss of, damage to or late arrival of the goods carried which is caused by his own or his servant's failure to exercise due

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25 The Tokyo District Court on 25 March 1993, Docket : Heisei 1 (wa) 14708; Hanrei Times No 816 p 233 and The Tokyo High Court on 30 May 1994, Docket : Heisei 5 (ne) 1423.

26 Article 33 of the Horei

In case the law of a foreign country that contains provisions contrary to public policy is to govern, such provisions shall not be applicable.

27 Docket: Heisei 8 (wa) 1341.

> diligence in the receipt, loading, stowage, carriage, custody, discharge and delivery of the goods carried."

However, as was expected, the Court rejected the plaintiff's action on 29 July 1997 and referred the parties to arbitration by TOMAC, holding:

> "The arbitration clause in the bill of lading is valid and the parties shall settle their dispute, if any, by arbitration as agreed between them."

About the Time Limit

In connection with this sort of dilatory tactics, due regard should be paid to the fact that under Japanese law dismissal or withdrawal of a legal suit does not serve to toll the limitation period.[28] What was lucky for the plaintiff in that case was that the Court was so efficient that they rejected the case within the one-year limitation period so that the plaintiff could properly avoid having their right to claim time-barred.

Incidentally, as it was decided by the Great Court of Cassation (former Supreme Court) on 27 October 1926 that "arbitral proceedings have the effect of interrupting negative prescription,"[29] it is duly understood that "suit" within the meaning of Article 14 of Japanese COGSA shall include arbitral proceedings.[30] Under the TOMAC Rules the limitation period ceases to run on the day of the application for arbitration.

In addition, Japanese COGSA is applicable in respect of the carriage of goods between ports outside Japan. In a case decided by the Tokyo District Court on 11 July 1984, a B/L issued for the carriage of a cargo from a Chinese port to a German port contained a governing law clause that designated Japanese COGSA as applicable law.[31] The plaintiff insurers brought through subrogation an action to recover the loss in respect of the damaged cargo from the carrier. By applying Article 7 of the Horei the Court held that Japanese

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28 Article 149 of the Civil Code

> A demand by way of judicial proceedings shall not have the effect of interrupting prescription, if the action is dismissed or withdrawn.

29 Docket: Taisho 15 (o) 549.

30 Article 14 (1) of Japanese COGSA

> The carrier shall be discharged from his liability in respect of the goods carried unless a legal suit is brought within one year from the date of delivery of the goods carried (or the date when the goods should have been delivered in the case of the total loss of the goods).

31 Docket: Showa 52 (wa) 6394; Maritime Law Review No 62 p 46.

COGSA was applicable to the carriage, although dismissing the claim on the grounds that there was no evidence to support the submission that the damage to the cargo occurred prior to the discharge. The relevant part of Japanese COGSA at that time read:

> "The provisions of this Act shall apply to the carriage of goods by ship from a loading port or to a discharging port, either of which is located outside of Japan."

Furthermore, Japanese COGSA does not limit, as does the Hague-Visby Rules, its application to the carriage in respect of which a bill of lading was issued:

> "Article 1
> The provisions of this Act (except Article 20bis) shall apply to the carriage of goods by ship from a loading port to a discharging port, either of which is located outside of Japan, and Article 20bis shall apply to the carrier's and his servant's liability for damage to goods caused by their tort."

III. ENFORCEMENT OF THE INTERNATIONAL ARBITRATION AGREEMENT

3.1. Non-discrimination against International Arbitration Agreement

Japan ratified the New York Convention on 20 June 1961 and put it into force on 18 September 1961. Apart from the Convention, there are no specific statutes or provisions under Japanese law concerning the validity of an arbitration agreement governed by foreign laws (hereinafter an "international arbitration agreement"), except Article 8 of the Horei.[32]

If we compare the relative provisions in the Arbitration Act and the New York Convention, the effect given to a domestic arbitration agreement and to an international arbitration agreement is virtually the same. Actually, the Tokyo District Court on 10 April 1953, affirming the non-discrimination, held:[33]

> "Arbitration is a means of dispute resolution based on the parties' agreement and as far as the parties' agreement shall be respected there is no reason to discriminate

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[32] Article 8 of Horei
(1) The form of a juristic act shall be governed by the law applicable to the effect of such act.
(2) The form in accordance with the law of the place of the act shall be valid notwithstanding the provision of the preceding paragraph, provided that the same shall not apply to juristic acts either of creating or disposing of *jus in re* or other right to be registered.

[33] 4 Kakyu Minshu 502.

against arbitration agreement governed by a foreign law in favour of that by Japanese law."

Accordingly, it can be said that there is no distinction between international and domestic arbitration agreements in the enforcement thereof under Japanese law and that thus the Japanese courts recognise an international arbitration agreement as long as it is valid pursuant to its governing law.

3.2. Validity of the Arbitration Agreement under the New York Convention

The validity of the arbitration agreement under the New York Convention was determined by the Yokohama District Court on 30 May 1980.[34] In that case, a Japanese corporation entered into an exclusive agency contract of sale with an American corporation. The contract was governed by the laws of the State of New York and provided *inter alia* for arbitration in New York under the ICC rules. The Japanese corporation sued the American corporation in Yokohama for wrongful termination of the contract. The defendant raised an objection before the court, invoking Article II.3 of the Convention. The Court held:

> "Absent an expressly designated law of the arbitration agreement, the validity of the arbitration agreement under the New York Convention shall be determined by the law implied by the parties as the proper law of the agreement. The arbitration agreement is valid even after the renewal of the main contract made not in writing, by the application of such law, i.e., the laws of the State of New York, which are the governing laws of the contract and also the laws of the place of arbitration."

The Osaka District Court judged similarly on 11 May 1959.[35] In that case, a Japanese charterer issued a bill of lading for the cargo shipped. A Japanese B/L holder brought an action against the charterer to recover damages in respect of the cargo. The B/L incorporated by reference an arbitration clause in a charter party that designated London as the place of arbitration. The Court held:

> "The arbitration agreement is valid under English law that is implied by the parties as the applicable law of the charter party and hence the action shall be rejected."

In summary, the Japanese courts have determined the validity of an international arbitration

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[34] Docket: Showa 50 (wa) 1552.

[35] 10 Kakyu Minshu 90.

agreement by applying the governing law of the arbitration agreement in accordance with the private international law of Japan (the Horei). Such governing law is the law expressly or impliedly designated by the parties (Article 7(1) of Horei) or, failing which, the law of the place of acting (Article 7(2)).[36] A valid arbitration agreement under the New York Convention is given a legal effect under Japanese law as a demurrer against court proceedings. However, the Japanese courts have judged separability of the arbitration agreement by the application of Japanese law.[37]

IV. DRAFT TEXT OF THE ARBITRATION ACT

I now turn to the problems in and after the enforcing of an arbitration agreement under Japanese law and discuss them in connection with the expected revision to the Arbitration Act. While the Arbitration Act is just beginning to be reviewed on the basis of the Draft Text made in 1989 by Arbitration Law Study Group, one will have to wait several more years to see the Ministry of Justice of Japan put the bill before the Diet. The Draft Text is primarily based on the UNCITRAL Mode Law but more elaborate. It is intended to apply to both international and domestic arbitrations. I will preview on the basis of the Draft Text how the current problems could be solved by the possible alterations to the Arbitration Act.

The Problems

Commentators often raise the following problems in this regard:

(1) Do the parties have to start the arbitral proceedings all over again, after the dismissal of the lawsuit? Besides, under Article 802(1) of the Arbitration Act,[38] the party who wishes to enforce an arbitral award will have to bring an action in the Recognition Court for an execution judgment. This might also mean that the parties have to fresh start the entire process. Because of judicial economy, it makes a good point to contend that the case should be settled by the court alone.

(2) In cases where the third arbitrator is required, what if the two arbitrators appointed by the parties fail to agree on the third arbitrator? The current Arbitration Act is silent

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36 See footnote 12.

37 Iwasaki, Application of the New York Convention by Japanese Courts, The JSE Bulletin No 10 p 8.

38 Article 802(1)

Execution to be undertaken by virtue of an award shall be made only when an execution judgment has been rendered for the admissibility thereof.

on this point and the Japanese courts have been reluctant to make such designation on behalf of the parties.

(3) Do the arbitrators have the power to make: i) an interim award or partial final award; ii) to consolidate relevant arbitrations; or iii) to allow a third party's intervention to arbitration?

(4) A motion to have an arbitral award vacated is permitted under the Arbitration Act.[39] Should the parties not be allowed to make an appeal from an arbitral award to the court? Under the Arbitration Act no such recourse is currently available against arbitral awards.

4.1. Court Proceedings to be Stayed

In order to cut short of the process, the Court might be able to stay the proceedings after reviewing the minimum requirements for the valid arbitration agreement, instead of getting into the merits of the subject matter. The Draft states:

> Article 9 (Effect)
> (1) When a party to an arbitration agreement commences court proceedings, the court shall, upon motion by another party to the arbitration agreement, stay the proceedings by a *kettei* decision if it determines that the arbitration agreement is valid and executable.

However, the Draft does not provide for any measures that might cut short of the enforcement process of an arbitral award. In case of the non-compliance of the losing party, the winning party would still have to bring an action to the Recognition Court for an execution judgment persuant to Article 22 of the Civil Execution Code.[40]

4.2. Third Arbitrator to be Appointed

If two arbitrators fail to agree on the appointment of the third arbitrator, the Court might intervene:

> Article 15 (Appointment)

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[39] See footnote 4.

[40] Article 22 [Title of Debt] of the Civil Execution Code provides *inter alia* that foreign judgments and arbitral awards shall be executed compulsorily on a final execution judgment. Also see footnote 38.

(3) The court shall, upon motion of a party to the arbitration agreement, make the appointment in the following cases:

ii) when a party fails to appoint an arbitrator within 30 days after the receipt of a notice to do so under subsection (2) ii), or when, if an odd number of arbitrators are to be appointed, *the already appointed arbitrators cannot agree on the appointment of the last arbitrator.* (emphasis added)

4.3. Arbitrator's Power

The arbitrator might be given greater competence in respect of rendering interim awards and ordering interim measures:

Article 24 (Interim Measures)

(1) Unless otherwise agreed by the parties, the arbitrator may, at the request of a party, order the other party (or any person related to the case) to surrender property, enjoin activity or order any other interim measure he deems proper.

Article 29 (Kinds of Arbitral Award)

(2) When a part of a claim has become ready for decision, the arbitrator may give a final arbitral award only as to such part. An independent action may be brought to set aside such arbitral award.

(3) The arbitrator may make, if necessary, an interim award as to any dispute arising during the arbitral proceedings. An interim award is not subject as such to an action to set aside.

4.4. Parties' Right to Appeal

Under the current Arbitration Act, parties to arbitration are not permitted to make an appeal from an arbitral award. They are only allowed to bring a motion to set aside an award. Probably because of the trend in the opposite direction worldwide, the Draft does not provide for parties' right to appeal. However, as the Draft does not adopt Article 34(4) of UNCITRAL Model Law,[41] it seems unclear whether the court will remit an arbitral award to the arbitrator where there are grounds for setting aside, or whether the court

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[41] Article 34(4) of UNCITRAL Model Law

The court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside.

will declare in certain circumstances that the arbitration agreement is null and void, hence allowing the parties to bring suit to the court.

4.5. Requirements for Valid Arbitration Agreement Specified

Under the Draft Text the requirements for the valid arbitration agreement are specified so as to minimize the contention about its validity:

> Article 7 (Form)
> (1) An arbitration agreement shall be in writing.
>
> Article 8 (Separability)
> The arbitration agreement does not become invalid even if the principal contract is void or has been rescinded.
>
> Article 42 (Law Applicable to Arbitration Agreement)
> The existence and effect of the arbitration agreement shall be determined according to the law designated by the parties. If there is no such designation, it shall be determined according to the law of the place of arbitration and, when the place of arbitration has not yet been settled, it shall be determined according to the law of the place where the arbitration agreement was concluded.
>
> Article 43 (Applicable Law to the Form of Arbitration Agreement)
> The form of the arbitration agreement shall be determined according to Article 7 of this Law notwithstanding the provision of Article 8 of the Horei.[42]

CONCLUSION

Although some further amendments to the Act might be necessary, the procedural rules of arbitration organisations can bridge the gap. For example, since TOMAC revised its Arbitration Rules in September 1996, all the tribunals formed for international arbitrations have opted to hear the case in English. In addition, as opposed to the requirements by the Japanese courts, TOMAC arbitrators never ask the parties to translate their pleadings or evidence into Japanese if those are in English. Furthermore, the Foreign Lawyers Law modified in 1996 permits foreign lawyers to represent parties in international arbitrations in Japan. On balance, I believe that the parties to a Japanese arbitration agreement will find good reason in abiding by their agreement. ■

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[42] See footnote 32.

The Scope of Arbitration Clauses in International Commercial Contracts

David BAILEY*

"Referring the parties to arbitration in respect of contractual claims against WBC, while the balance of the proceedings against WBC and the whole of the proceedings against KMC continue in this court, would have the unfortunate result that Hi-Fert and WBC would be litigating similar issues in different tribunals. The result is unfortunate in so far as the parties may be required to litigate similar issues in two places." Emmett J. Federal Court of Australia, judgment in *Hi-Fert Pty Ltd v. Kiukiang Maritime Carriers Inc.*[1]

All too often litigation before the courts serves to remind us of the need for care in the drafting of dispute resolution clauses in international contracts.[2] A dispute resolution clause is often deceptively simple, perhaps for this reason it may be regarded by some drafters as another 'boilerplate' provision, hardly deserving of special consideration. Unfortunately, the consequences of a dispute clause not being effective can be expense, delay and uncertainty leading to the loss of valuable time and business opportunities. Instead of the parties being able to proceed with the efficient resolution of their dispute and having it disposed of in accordance with a procedure which they have chosen they may be faced with costly and time consuming litigation in an inappropriate jurisdiction simply to determine the ultimate forum for the determination of their dispute. Sometimes the litigation may be conducted in more than one jurisdiction adding further to the cost and uncertainty.

The *Hi-Fert* Case

A recent Australian decision of the Full Federal Court of Australia provides a sobering reminder of the difficulties attendant upon an arbitration provision which was held not to clearly describe the range of disputes that could be referred to arbitration.[3] The case

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[1] *Hi-Fert Pty Ltd v. Kiukiang Maritime Carriers Inc.* (1999) 159 ALR 142 at p 168.

[2] For example, *Oceanic Sun Line v. Fay* (1988) 79 ALR 9; *Voth v. Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538; *Sedgwick Ltd v. Bain Clarkson Ltd* (1955) 129 ALR 493.

concerned the shipment of a cargo of fertiliser from the United States of America to Australia. The cargo could not be unloaded at its destination in Australia because it was found likely to be contaminated with a quarantineable disease under Australian law and the Australian quarantine authorities refused to allow the cargo to be unloaded at an Australian port. The cargo had to be taken elsewhere, and disposed of at a loss. The cargo had been carried under a contract of affreightment between Hi-Fert Pty Ltd (Hi-Fert) as consignee and Western Bulk Carriers Australia Ltd (WBC) the charterers. The vessel subject to the charter was the MV *Kiukiang Career* owned by Kiukiang Maritime Carriers Inc. (KMC). The vessel was under a long term charter, Hi-Fert had an option for a number of voyages in each year.

Prior to the entry of an addendum to the charter in respect of the cargo in question it was alleged by Hi-Fert that its representative had a discussion with the operations manager of WBC about the need to ensure that the holds of the *Kiukiang Career* were clean and free of any residue of prior cargoes. There was a telephone conversation between the respective representatives of each party in which it was alleged that WBC's representative assured Hi-Fert's representative that there were in place procedures to ensure the cleanliness of the holds of any vessel provided under the charter contract. This was subsequently confirmed by facsimile sent by WBC in Melbourne to Hi-Fert in Adelaide confirming that WBC had implemented a stringent inspection procedure for all vessels at the load port prior to proceeding to Australia.

Under the nomination and acceptance provided for in the addendum the *Kiukiang Career* was loaded at Tampa, Florida with a cargo of three different kinds of fertiliser. Each was subject to a bill of lading which was expressed to be subject to the conditions of the charter party including the arbitration clauses. The cargo was carried from Tampa to Newcastle, New South Wales in Australia. On arrival the vessel was boarded by the Australian Quarantine and Inspection Service (AQIS). The AQIS found that the cargo was contaminated by residues from a previous cargo of wheat which had a source in the United States of America. The vessel was placed in quarantine and then an order was made that the cargo was not to be discharged at an Australian port. Wheat is a prohibited import into Australia. Wheat from the United States of America could be infected with "karnal bunt" a disease of wheat that is not prevalent in Australia. The possible importation of wheat infected with karnal bunt is a major concern to AQIS since it could have potentially devastating effects upon the Australian wheat industry.

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[3] *Hi-Fert Pty Ltd v. Kiukiang Maritime Carriers Inc.* (1999) 159 ALR 142. Other reported proceedings relating to this litigation are reported in (1997) 150 ALR 54; (1997) 150 ALR 345; (1998) 155 ALR 94; (1998) 155 ALR 328.

The consequence of the cargo of fertiliser having to be discharged outside Australia was that Hi-Fert had to sell the cargo outside Australia and it alleged that as a result it suffered a significant loss. The loss was the difference in the value of the cargo if it had been landed in Australia in sound condition as compared with the amount it actually received from the sale of the cargo outside Australia.

The Arbitration Clause

The charter party and the bills of lading were subject to an arbitration clause which was in the following terms.

*"Any dispute **arising from this charter or any Bill of Lading issued hereunder** shall be settled in accordance with the provisions of the Arbitration Act 1950, and any subsequent Acts, in London....*

The charter party shall be governed by and construed in accordance with English law.

The Arbitrators and Umpire shall be commercial men normally engaged in the Shipping Industry." (emphasis added)

The Claims

Hi-Fert and the consignor of the fertiliser Cargill Fertiliser Inc.(Cargill) instituted proceedings in Australia under the Admiralty Act 1988(Cth). The claims covered breach of contract, negligence and breach of section 52 of the Trade Practices Act 1974 (Cth) in respect of misleading and deceptive conduct. The claims were thus divided into pre-contractual and contractual matters. The defendants/respondents applied for a stay of the proceeding on the basis that the whole of the dispute embraced by the claims should be referred to arbitration in London in accordance with the clause in the charter party.

Application for a Stay of the Proceeding in the Federal Court of Australia

The stay application was based upon section 7 of the International Arbitration Act 1974 (Cth), which, among other things, gives effect to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the New York Convention).[4]

[4] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 1958.

The section is in the following terms -

"*(1) Where*

(a) the procedure in relation to arbitration under an arbitration agreement is governed, whether by virtue of the express terms of the agreement or otherwise, by the law of a Convention country;

this section applies to the agreement.

(2) Subject to this Part, where;

(a) proceedings instituted by a party to an arbitration agreement to which this section applies against another party to the agreement are pending in a court;

and

(b) the proceedings involve the determination of a matter that, in pursuance of the agreement, is capable of settlement by arbitration,

on the application of a party to the agreement, the court shall, by order, upon such conditions (if any) as it thinks fit, stay the proceedings or so much of the proceedings as involves the determination of the matter, as the case may be, and refer the parties to arbitration in respect of the matter."

For the purposes of the New York Convention, the United Kingdom is a Convention country. It was accepted by the parties that section 7 of the International Arbitration Act 1974 (Cth) would apply to the arbitration agreement contained in clause 34 of the charter party.

"Arising from this Charter" - What Disputes Did the Arbitration Clause Cover?

A number of issues arose in the litigation. An important issue was whether all of the claims made by Hi-Fert against WBC could be characterised as disputes "arising from this charter" within the meaning of clause 34 of the charter party and thus be subject to the operation of a stay in terms of the New York Convention and section 7 of the International Arbitration Act 1974 (Cth). This issue exercised the attention of the single instance

judge as well as the Full Federal Court, acting a court of appeal. At first instance Tamberlin J. found that the words "arising from" should be given a wide meaning and were wide enough to encompass both the pre-contractual as well as the contractual claims. The broad question was whether the words covered claims under the Trade Practices Act 1974 (Cth) as well as claims based on the collateral contracts or warranties and claims for negligence. The judge noted that the trend of the authorities, in Australia and elsewhere, was to give a wide interpretation to the meaning of arbitration clauses, and, that there were a number of cases in which the claims under the Trade Practices Act 1974 (Cth) were held to be capable of being the subject of arbitration.[5]

Tamberlin J. considered a number of recent cases which supported a wide approach to the interpretation of arbitration clauses.[6] He referred to these cases as supporting "one stop adjudication". The same approach had also been taken in England. He held, on the basis of this approach, that the arbitration clause was sufficiently wide to cover both the pre-contractual as well as the contractual disputes.

On the question of whether or not a stay should be granted Tamberlin J. found that a stay should be granted, and the proceedings referred to arbitration. Aside from the New York Convention and the International Arbitration Act 1974 (Cth) he also found that Australia was clearly an inappropriate forum for the determination of the dispute and it should be referred to arbitrators in London.

The Full Federal Court Limits the Operation of the Arbitration Clause

There were further court applications in the *Hi-Fert* case which resulted in a number of reported judgments. With regard to jurisdiction, the decision of Tamberlin J. went on appeal to the Full Federal Court of Australia. The main finding of the Full Federal Court was that the arbitration clause should not be interpreted so as to cover the pre-contractual claims by Hi-Fert. The claims in respect of misleading and deceptive conduct under section 52 of the Trade Practices Act 1974 (Cth), the alleged breach of collateral warranties and the claim in respect of negligent misrepresentation thus did not have to be referred to arbitration, but could be litigated in Australia.

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[5] *IBM Australia Ltd v. National Distribution Services Ltd* (1992) 22 NSWLR 466; *Government Insurance Office of NSW v. Atkinson-Leighton Joint Venture* (1981) 146 CLR 206; *Francis Travel Marketing Pty Ltd v. Virgin Atlantic Airways Ltd* (1996) 39 NSWLR 160; *Ethiopian Oilseeds and Pulses Export Corp v. Rio del Mar* [1990] 1 Lloyd's Rep. 86.

[6] See for example, *Government Insurance Office of NSW v. Atkinson-Leighton Joint Venture* (1981) 146 CLR 206; *IBM Australia Ltd v. National Distribution Services Ltd* (1992) 22 NSWLR 466.

The reasoning of the Full Federal Court judges was to place a literal interpretation upon the words of clause 34 - "arising from this Charter". In the words of Beaumont J.:

"*But to read cl. 34 as contemplating a reference to such persons* [the arbitrators] *of a problem of considerable private international legal complexity, let alone the application of a foreign* [Australian] *law in the form of the Trade Practices legislation, would seem to contradict a desire for a practical outcome. We should not attribute such a bizarre intention to these parties. It is not likely that they intended to refer to these arbitrators in London any dispute however remotely connected with the charter party or the bill of lading and however special its legal characteristics in terms of English law.*"[7]

Emmett J. (with whom the other judge, Branson J. agreed) found that the reference to "this Charter" comprehended matters arising from the contract of charter itself and not to any pre-contractual or ex contractual matters such as pre-contractual representations or warranties. With regard to the specific claim alleged under the Trade Practices Act, while the judge acknowledged that Trade Practices Act claims could be the subject of arbitration proceedings, the wording of the arbitration clause in this case was not sufficiently wide enough to include Trade Practices Act claims. In cases where such disputes were regarded as covered by the arbitration clause the wording of the clause was wider and the expression "related to this agreement or any breach thereof " or similar wording was adopted.[8] In respect of other cases which supported a wide interpretation of arbitration clauses he found that they were not in respect of conduct antecedent to the contract in question, but that the conduct complained of arose during the performance of the contract.

The case serves to highlight the need for careful drafting of arbitration clauses in international contracts. The unfortunate result of the *Hi-Fert* case is that the parties have two different forums for the determination of their dispute. The Australian Federal Court will deal with the pre-contractual claims, the English arbitrators will deal with the claims arising under the charter party. This will involve expense, inconvenience and delay. It could also result in divergent results in the decisions of the respective tribunals. The result is hardly satisfactory.

Would the Full Federal Court have decided the matter differently had the arbitration clause been drafted more widely? Australian courts have shown that they can indulge in judicial chauvinism, and interpret contractual provisions in such a way as to assume jurisdiction,

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[7] *Hi-Fert Pty Ltd v. Kiukiang Maritime Carriers Inc.* (1999) 159 ALR 142 at p 146.

[8] *Hi-Fert Pty Ltd v. Kiukiang Maritime Carriers Inc.* (1999) 159 ALR 142 at pp 154 - 159.

when one might have concluded that the result should be otherwise.[9] It is always possible that the Full Federal Court might still have tried to decide the case so as to confer on the Australian party the benefit of having the Trade Practices Act issues decided in Australia. But one would hope that a clear and unmistakeable reference to arbitration of all relevant disputes including pre-contractual matters and matters arising outside contract should evince a clear enough intention to attract the operation of the bar on litigation created by the New York Convention. To decide otherwise would severely inhibit the operation of that Convention, and, in the process make Australia a less attractive forum for the resolution of international commercial disputes.

After *Hi-Fert*

The consequences of the *Hi-Fert* decision should be heeded by parties involved in shipping charters with Australian parties. If it is intended that any and all disputes are to be dealt with by arbitration as the preferred dispute resolution method then the terms of dispute resolution clauses in all relevant contracts should be reviewed. Presumably the arbitration clause in the *Hi-Fert* case was a standard clause commonly used in shipping documents issued by the chartering company. It may be a form of clause with industry wide acceptance. Such clauses should be reviewed to consider matters such as the width of the reference to the nature of the disputes arising. The words "arising from" need to be broadened, if it be the intention to cover pre-contractual issues. To cover pre-contractual issues wording such as "all disputes relating to or concerning [the agreement] its formation, construction, performance and discharge" might be adopted.

Arbitration rests in the agreement of the parties, and the agreement is important for the application of the New York Convention. Many of the issues which come before arbitral institutions are related to the effectiveness of arbitration and dispute resolution clauses. The administrators of leading arbitral institutions such as the Court of Arbitration of the Hong Kong International Arbitration Centre have pointed to the frequency of these issues arising.[10] Problems arise from ambiguity in reference to the arbitral institutions nominated. Sometimes the parties designate a non existent body or incorrectly specify the place where

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[9] See *Oceanic Sun Line v. Fay* (1988) 79 ALR 9.

[10] Peter S. Caldwell, *Contemporary Problems in Transnational Arbitration*, A paper presented to the APEC Symposium on Alternative Mechanisms for the Settlement of Transnational Commercial Disputes, Bangkok, April 1998.

Stephen R. Bond, *How to Draft an Arbitration Clause (Revisited)*, The International Court of Arbitration Bulletin, (1990) Vol. 1, p. 14.

the arbitration is to be held. The *Hi-Fert* case is another reminder that the scope of the disputes to be referred to arbitration is an important matter to be dealt with.

In the end the parties and their advisors must take the responsibility for defining the arbitration clause and its intended scope of operation. The process must be done carefully taking into account the issues canvassed in cases such as *Hi-Fert*. The clause need not be lengthy or complex, indeed simple, succinct and clear, is a good drafting guide to adopt.

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First Arbitration under the SCAP Rules

The first ever arbitration proceedings brought under the SCAP Rules finished, with an award issued by the Arbitrator on 3rd June 1999 upon the conclusion of the once-only hearing held on the same day. It took just 2 months after the filing of the claim until the issuance of the award. TOMAC of the Japan Shipping Exchange, Inc put into force last February its new Rules for the Small Claims Arbitration Procedure (SCAP) which are applicable to claims of up to Yen 5 million.

In that arbitration, the claimant buyers (PRC) of a vessel demanded the return of the deposit because the licence to import the vessel had not be granted. The claimants alleged that the respondent sellers (Panama) refused to release the deposit notwithstanding the MOA (NIPPONSALE 1993) had been entered into "subject to Import Licence". The sole arbitrator recognised the validity of such "subject to contract" and awarded the deposit to the claimant.

PRIVITY OF CONTRACT
- ENGLISH LAW YIELDS AT LAST

Stuart BEADNALL*

England is well-known for holding stubbornly to its traditions long after other countries have moved on to more modern ideas. The House of Lords, mileage, sterling and warm beer still survive against the odds, but a flag-bearer of English peculiarity - the Doctrine of Privity of Contract - is about to yield. The Contracts (Rights of Third Parties) Bill 1998 which seeks to "*make provision for the enforcement of contractual terms by third parties*" - thereby driving a coach and horses through the Doctrine of Privity - is expected to come into force at the beginning of next year. The purpose of this Article is to examine its impact on familiar shipping contracts.

The Doctrine of Privity of Contract

The Doctrine comprises two rules: one is that a contract cannot, generally, impose obligations arising under it on any person except the parties to it. Therefore, if A and B agree that C should pay B £1,000, and C does not pay, B cannot sue for the payment. Quite reasonably, A and B cannot impose an obligation on C without C's agreement. This rule does not change. The other rule is that a contract cannot confer rights upon a third party - this rule is almost entirely replaced by the new legislation.

There are two aspects of the rule against conferring rights on a third party. The first is found in *Tweddle -v- Atkinson* [1]. A and B were due to marry. A's father and B's father agreed between them that each would pay an agreed sum to the happy couple; and if either did not pay, A would have the legal right to enforce payment. In breach of contract, B's father failed to pay. In accordance with the agreement made between the two fathers, A, the bridegroom, sued B's father for payment. A's claim failed on the grounds that he was not a party to the agreement, even though the two fathers had expressly agreed that A should have a right to sue them.

The Court dismissed A's claim not because he was claiming something to which he was

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[1] Queen's Bench Division (1861) B & S.393; 9 W.R.781.

not reasonably entitled, but simply because his claim is inconsistent with the English law principle that only a party to a contract can rely on its terms. This principle has been much criticised as introducing a bar to what otherwise may be seen as a perfectly valid claim, but has nevertheless continued to be applied by the English Courts.

The second aspect of this rule applies to clauses which exclude or limit liability. This is best demonstrated by *Scrutton -v- Midland Silicones Limited*[2] in which a stevedoring company, whilst unloading a vessel, negligently damaged part of the cargo. Under the bill of lading, the shipowners' liability for loss or damage to cargo was limited to US$500. Under a contract between the stevedores and the shipowners, the stevedores' liability for loss or damage to cargo was limited to the amount ".....afforded by the terms..... of the bills of lading". The cargo-owners brought an action against the stevedores to recover damages. The stevedores admitted their negligence but claimed their liability was limited to US$500 by virtue of the contract of carriage (evidenced by the Bill of Lading). It was held that the stevedores could not rely upon the limitation provided under the Bill of Lading since they were not a party to the contract of carriage made between the cargo-owners and shipowners. Again, the decision was based simply on the principle that only a party to a contract can rely upon its terms.

A stevedore who is a servant or agent of the carrier, and not an independent contractor, is entitled to rely on the defences and limits of liability to which the carrier is entitled under the Hague Visby Rules pursuant to Article IVbis (2) of those Rules. In order to extend a similar protection to stevedores acting as independent contractors, a "Himalaya" clause is frequently inserted into bills of lading or charterparties. Such clauses state that the contractor is entitled to the same exemption or limitation to which the shipowner is entitled under that contract. At first sight, it may be thought that Himalaya clauses provide useful protection to a stevedore, but as a consequence of the Doctrine of Privity of Contract, stevedores are not able to rely upon the protection of Himalaya clauses under English law.

The Proposed Changes

The new law will give a third party the right to enforce a contractual term if the contract so provides, or the term purports to confer a benefit on the third party; unless on a proper construction of the contract it appears that the parties did not intend the term to be en-

[2] House of Lords [1962] A.C. 446.

forceable by the third party.[3]

It will also be necessary that the contract expressly identifies the third party, either by name, as a member of the class, or as answering to a particular description; but the third party need not be in existence when the contract is entered into.[4] Where a term of a contract excludes or limits liability in relation to any matter, the provisions of the Act apply as though the exclusion or limitation confers a benefit.[5]

The parties to the contract cannot deprive the third party of rights conferred on him by the contract by subsequently terminating or varying the contract, unless the third party consents.[6]

These provisions do not apply to rights of a third party in the case of a contract for the carriage of goods by sea *except* that a third party may avail himself of an exclusion or limitation of liability in a contract to which the new provisions apply.[7]

The Fall of *"Tweddle -v- Atkinson"*

This Act comes 140 years too late for the disappointed bridegroom who sued his father-in-law; but it may be beneficial to disappointed shipbrokers. Where commission is due to a broker under a charterparty, for example under clause 15 of GENCON or clause 27 of the NYPE Form, the broker will be able to sue for commission notwithstanding that he was not a party to the charterparty. There are English law examples of where a broker has been able to sue for commission due under a charterparty;[8] but in those cases it was necessary for the broker to establish a trust for his benefit and also to join both contractual parties to the Court proceedings. These obstacles will have been removed, provided that the broker is sufficiently identified in the relevant commission clause. It is obviously sufficient if the broker is identified by name. It would be sufficient also if the broker were to be identified as a member of a class, e.g. *"for division with sub-broker"*. However, the broker's rights may not be so clear where the commission clause states only that payment or deduction is *"for division"* or *"for brokerage/commission"*. A successful

[3] Section 1 Contracts (Rights of Third Parties) Bill 1998.

[4] Section 2 of the Contracts (Rights of Third Parties) Bill 1998.

[5] Section 1 of the Contracts (Rights of Third Parties) Bill 1998.

[6] Section 1(3) of the Contracts (Rights of Third Parties) Bill 1998.

[7] Section 6(5)(a) of the Contracts (Rights of Third Parties) Bill 1998.

[8] See *Walford and Atlas Shipping -v- Suisse Atlantique* [1995] 2 Lloyd's Rep 188.

broker would need to establish that this expression is sufficient to bring him within an expressly identified class or description. In short, the more clearly a broker is identified in the commission clause, the more easy it will be for him to assert his right to claim his commission as a contractual right.

The most familiar shipping context in which a party seeks to enforce rights under a contract to which he is not a party is where a bill of lading has been assigned to the receiver of the goods. The third party's rights under a contract of carriage are expressly unaltered by the provisions of the new Act. The reason for this is that the rights (and obligations) of the holder of a bill of lading under English law are already well established. The lawful holder of a bill of lading has transferred to and invested in him all rights of suit under a contract of carriage as if he had been a party to that contract.[9]

The new Act may perhaps enhance the warranty rights of a shipowner entering into a shipbuilding contract. Where a sub-contract or a contract of supply under a shipbuilding contract expressly provides that the warranty rights given under that contract are enforceable by the shipowner, the Doctrine of Privity will no longer prevent the shipowner enforcing those rights directly against the supplier or sub-contractor. Where a supplier is keen to persuade a shipowner to nominate him as the nominated supplier under the shipbuilding contract, the shipowner may like to insist that the supplier in return should provide in the supply contract that the shipowner will have rights against the supplier direct.

The new Act will not have a fundamental impact on chartering practice - although a head-charter clearly anticipates that the vessel will carry cargo on behalf of parties other than the charterer, there is no express intention in typical charter forms that sub-charterers or cargo-owners should have rights under the head-charter. However, if there are circumstances where the charterer would wish the owner to agree that the sub-charterer can enforce rights under the head-charter direct against the shipowner, perhaps where the charterers and sub-charterers are associated companies, and a suitable clause is inserted in the head-charter, the Doctrine of Privity of Contract will no longer be a bar to the sub-charterer enforcing those rights.

The Fall of *"Scrutton -v- Midland Silicones Limited"*

Although the Act does not confer rights in the case of a contract for the carriage of goods by sea, it nevertheless expressly provides that a third party may rely on an exclusion or

[9] Section 2(1) COGSA 1992.

limitation of liability in such a contract.[10] Therefore, it will now be possible for stevedores to rely upon any exclusion or limitation of liability in a bill of lading or charterparty which is intended to have that effect. Therefore, where a contract includes a *"Himalaya"* clause the stevedores will be able to take advantage of this, provided the clause is sufficiently drafted to include them. It should be noted also that the BIMCO standard form *"SHIPMAN"* also includes a *"Himalaya"* clause which may be enforced to the benefit of any employee, agent or sub-contractor of the managers.

Conclusion

No doubt the readers of this Article will be able to identify other situations where shipping contracts may usefully be amended to confer rights upon third parties which may be enforced direct in appropriate circumstances. The most important point to note is that where the draftsman of a contract under English law wishes to confer an enforceable benefit on a third party, this intention must be made clear in the contract itself and the third party must be sufficiently identified: The Doctrine of Privity relating to third party rights is not dead, but its glory days are about to end.

The precise date of the coming into force of the new provisions will be announced in this Bulletin, and will be posted on the legal information page of www.srtlaw.com.

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[10] Section 6(5) Contracts (Rights of Third Parties) Bill 1998.

REVISION OF U.S. COGSA

-Will it pave the way to a multimodal convention?-

Shelley CHAPELSKI*

"Good laws lead to the making of better ones; bad ones bring about worse"
wrote Jean Rousseau in his *Social Contract.*

The United States is moving towards complete revision of its *Carriage of Goods by Sea Act* and in doing so, is charting its own course away from the rest of the world. Not surprisingly, their position is that their draft carriage of goods legislation is a good law that should inspire the international community to follow suit. However, many members of that community have expressed their dismay and their view is that the Americans have ensured the fragmentation of laws governing the international carriage of goods by sea.

It is with reservations that I write about proposed changes to American legislation. I am not an American attorney trained in that country's constitutional foundation. Furthermore, a country's freedom to enact domestic legislation is a basic principle of international law.

However, in international fields of endeavor one country's domestic legislation can have such impact on the business affairs of citizens of other countries, that those countries and non governmental organizations have cause to rise to comment and, if appropriate, lobby against the legislation.

One such example is the proposed rewriting of the American *Carriage of Goods by Sea Act.*

To support international ocean trade an enormous infrastructure exists. The infrastructure operates across national boundaries and includes ships, railways, motor carriers, freight forwarders, stevedores, terminals, warehousers, brokers, insurers and dispute handlers (i.e. the claims people and lawyers).

Approximately 70% of Canada's trade and 30% of Japan's trade is with the United States.

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American domestic legislative changes will fundamentally affect the liabilities and responsibilities of the international transportation infrastructure including the business affairs of Canadian and Japanese domiciles.

I write to summarize the history of COGSA reform, its principal components, criticisms of it, the American responses to those criticisms and to make observations about the concerns which remain unanswered.

I add that it is difficult for one neighbour to understand the dynamics of the family that lives next door. Some behaviours that appear inexplicable can only be appreciated once the foundation of a family is understood.

It is likewise difficult for the writer, a Canadian lawyer, to stand in judgment on the legal affairs of the United States. Whenever I have occasion to deal with American legal procedure I am constantly surprised at how very different it is from my own, especially considering that Canada and the United States are common law sister states.

HISTORY OF THE PROPOSED COGSA AMENDMENTS

In 1936 the US effectively enacted the principles of the Hague Rules dealing with the carriage of goods by legislating the *Carriage of Goods by Sea Act* ("COGSA").

For the international community generally, the Hague Rules became dated with the advent of containerization and other improvements in shipping. The $500 per package limitation that may have been an appropriate compromise on liability in the 1930's had become, with some cargos, less than the cost to file a law suit to recover the limitation amount. The shortcomings in the Hague Rules were addressed in a further international convention, the Hague Visby Rules (1968) ("Visby Rules"). Some 67% of the US's trading partners now ascribe to the Visby Rules, and most of those also to the SDR Convention. The result of the foregoing Conventions raised the limitation of liability amount to 666.67 SDRs (Special Drawing Rights) per package or 2 SDRs per kilogram of weight, whichever is the higher.

The Visby Rules are now 30 years old and are also showing their age. A further convention, the Hamburg Rules (1978), was promoted by UNCITRAL. However, only some 2% of U.S. trade is conducted with countries that have adopted the Hamburg Rules. There has been no rush to accept the Hamburg Rules and it appears that widespread acceptance will never be obtained.

Responding to the desire to update COGSA, which remains based on the Hague Rules as it was never amended to incorporate the changes of the Visby Rules let alone the Hamburg Rules, the U.S. Maritime Law Association ("MLA") in 1996 took the lead in drafting a new carriage of goods statute for its country. Its draft proposal was modeled on the format of 1936 COGSA legislation. The intent of the draft was to recognize the modern forms of transportation and carriage arrangements and to adopt the Visby limits. Its draft was overwhelmingly approved by the MLA members in 1996 and presented to a Senate Committee in 1998. Following the MLA's draft, the Senate has rewritten the document several times. One of the most recent versions, dated April 16, 1999, is the version to which I refer (hereinafter "COGSA '99").

Since the 1936 enactment of COGSA there has been a great increase in the value of cargo carried by sea and new intermodal technologies. As well, a "growing dissatisfaction with the lack of uniformity which has developed between the U.S. and its trading partners, as an increasing number has adopted the Hague/Visby Rules" was recognized.[1]

Members of the MLA have written that there was a deadlock on COGSA reform in the American community of cargo and ocean carrier interests between supporters of Visby Rules and the Hamburg Rules. Either faction had the power to veto the other and the federal government would not move on COGSA reform unless there was a general consensus of the affected (domestic) parties as to the means of reform.[2]

Recognizing the domestic deadlock and the lack of any new international standard on the horizon, the MLA decided to draft an entirely new regime to govern the carriage of goods.

American writers have advised that certain compromises had to be made to obtain the full support of its members for the COGSA reform project. Some of those compromises are included amongst the complaints of the foreign community. It is the view of some American authors on the subject that without those compromises, COGSA reform would never have progressed[3] and those compromises cannot now be revisited.

To the apparent consternation of the MLA, their proposal was rewritten by Senate staff

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[1] Hooper, Chester and DeOrchis, Vincent "Amending COGSA would solve the 'multimodal muddle', *American Shipper* September 1995 p. 43.

[2] Sturley, Michael, "Proposed Amendments to US Carriage of Goods by Sea Act: A Response to the English Criticisms" (to be published).

[3] *ibid.*

members who specialize in drafting "plain English" legislation in conformity with mandatory Federal statutory writing standards.[4] The unfortunate result for interpreters of the legislation and non-Americans concerned about it is that the proposal no longer parallels the structure and language of COGSA or the Visby Rules.

Vincent DeOrchis, the chair of the MLA committee that handled the drafting of COGSA reform, has advised me that he hopes that the COGSA '99 bill will be introduced to the Senate this fall and ultimately passed as legislation in year 2000.

NON-CONTENTIOUS CHANGES TO COGSA

Some of the relatively non-contentious changes to COGSA, and accordingly, to the Hague Rules principles as practiced by the U.S., are as follows:

1. The one year time bar to start suit is extended to arbitration and there are time prescriptions for indemnity pleadings.
2. Deck cargo is not excluded from the definition of goods.
3. The package and kilogram limitations of the Visby Rules are adopted.
4. All types of contracts of carriage including electronic documents are covered (although still excluding charterparties).

POINTS OF COMPLAINT

There are vehement international critics of COGSA '99 including Professor William Tetley (author of *Marine Cargo Claims*). His views have been published in international shipping magazines.[5]

Others that have publicly opposed COGSA '99 include the International Chamber of Shipping, the International Group of P&I Clubs and the Baltic and International Maritime Council (BIMCO).[6] They have urged that the amendments be rejected in the interest of international uniformity and comity.

I add that the critics of COGSA '99 are not all consistent in their criticisms. Professor

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[4] *ibid.*

[5] *Fairplay* Magazine October 15, 1998; April 22, 1999 at p. 40 and June 17, 1999 at p. 24.

[6] Mottley, Robert "Toward a user-friendly COGSA" *American Shipper* June 1996 at p. 40; "US Cogsa disaster threatened" *Fairplay* April 22, 1999 p. 26.

Tetley, for example, is a proponent of the Hamburg Rules and applauds the COGSA '99 provisions that mirror or echo the Hamburg Rules. The groups representing ship owning interests, on the other hand, are quite critical of those provisions.

Nevertheless, certain complaints about provisions appear to be universal amongst the critics of COGSA '99.

1. Application of COGSA '99 to the Movement of Goods to and from the United States

Critics have complained that COGSA '99 is applicable to both **inbound** and outbound cargo.[7] Generally, other countries' carriage regimes apply mandatorily to outbound cargo only which reduces the conflicts of several governments claiming jurisdiction and application of their laws over the same transaction.

The American response is that COGSA since 1936 has always applied to both inbound and outbound. Therefore, there is no change.[8]

There is, however, a consideration that is relevant to a number of the points of complaint herein. COGSA, although applying now to both inbound and outbound cargo, presently follows the Hague Rules and Visby Rules in using the same definition of carrier and applying only "tackle to tackle" (meaning the period of time from when goods are loaded onto the ship until they are discharged). COGSA '99 covers the entire period of time from when the goods are first received by a carrier to the time when they are delivered to a person authorized to receive them.

If cargo is inbound to the U.S., there may be a conflicts of law problem between COGSA '99 applying mandatorily to inbound cargo and the mandatorily applicable outbound cargo legislation of the shipping country. This same situation exists now with the current COGSA. However, the current COGSA liability regime is not nearly so expansive in its application and is based on the internationally recognized Hague Rules. Therefore, the actual conflict between the legal provisions is lessened and is often just a conflict between the Hague or Visby limitation amounts.

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[7] Tetley, *supra;* Government of Canada: Transport Canada backgrounder Note dated May 4, 1999; Canadian Maritime Law Association ("CMLA") letter to U.S. Maritime Law Association ("MLA") dated February 2, 1999.

[8] MLA letter to the CMLA dated March 29, 1999.

The MLA has stated that the only time U.S. law is applied mandatorily to a shipment from Canada to U.S. is if suit is filed in the U.S.[9] That is not accurate. Common law courts might also be asked to apply U.S. law to a case involving U.S. inbound cargo on the basis that it is a mandatorily applicable regime. A Canadian Court would have to deal with the fact that there were two conflicting mandatorily applicable legal regimes in those circumstances (Canada = Visby and U.S. = Hague) and, if there was a material difference between them applicable to the facts of the case, chose which legal regime to apply using conflicts of laws principles.

If COGSA '99 is enacted, it imposes a new liability regime on a class of potential non-American defendants who previously, even if subject to the jurisdiction of American Courts, could be governed by their own domestic legal principles as being the proper law of their contract. In Canadian Courts, the mandatory application of COGSA '99 to US inbound cargo creates actual conflicts of laws where before there may have been effectively none because the laws of the two countries were so similar (i.e. Visby and 1936 COGSA). The only aspect of the two countries' legal regimes that has been reconciled is the limitation amount that the ocean carrier can rely upon.

The role of other governments and non-governmental organizations in lobbying the American government with respect to COGSA reform is very important when you take into account that these potential non-domiciled defendants have no opportunity to vote in the U.S. let alone in the MLA which drafted COGSA '99.

My view is that COGSA '99 should be applicable to outbound cargo only. However, the MLA's view is that to change this aspect of COGSA '99 counters an international trend (Australia, Germany and China apply their carriage laws both ways) and would be unacceptable to Congress.[10]

2. Multimodalism and Performing Carrier

This is probably the most contentious provision of COGSA '99.

The definition of performing carrier extends the application of COGSA '99 well beyond tackle to tackle, the traditional limits of the Hague and Visby Rules. It creates a multimodal regime, which in today's transportation world may be a much needed reform. However,

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[9] MLA letter to CMLA dated March 29, 1999.

[10] MLA letter to CMLA dated March 29, 1999.

doing it unilaterally and mandatorily applying it to inbound and outbound cargo has raised complaints of extra-territorialism.

"Truckers, railways, barges, terminal operators, non-vessel operating common carriers and vessel operators would all be covered by a single COGSA. The application of one set of laws through the entire carriage would avoid the 'multimodal muddle' of laws that now control the different parties involved in land and water transportation."[11]

The thrust of COGSA '99 is not at domestic carriage, but international carriage. Therefore, the parties identified in the above quote are not just American. They include Canadian/Mexican truckers and railways and foreign parties who heretofore have never been subject to carriage of goods legislation that governed only tackle to tackle.

The means by which the application of COGSA '99 is extended is found in the definition of "performing carrier". The MLA insists that the criticism of extra-territorialism is unwarranted because COGSA '99 cannot create jurisdiction over performing carriers who are not already subject to American law.[12]

Performing Carrier

COGSA '99 identifies three carriers as being a Performing Carrier, a Contractual Carrier and an Ocean Carrier. Performing Carrier is defined as:

> Sec. 2(a)(3) The term performing carrier means
> (A) a contracting carrier;
> (B) a person that performs, or undertakes to perform, any of a contracting carrier's responsibilities under a contract of carriage, regardless of whether that person is a party to, identified in, or has a legal responsibility under the contract of carriage; or
> (C) a person (including ocean carriers, inland carriers, stevedores, terminal operators, consolidators, packers, warehousers, and their servants, agents, contractors, and subcontractors) that performs, undertakes to perform, or procures to be performed any incidental service that is a contracting carrier's responsibility to facilitate the carriage of goods, regardless of whether that person is a party to, identified in, or has legal responsibility under the contract of carriage.

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[11] Hooper and DeOrchis, *supra* at 43.

[12] MLA letter to CMLA dated March 29, 1999.

The MLA states that the legislative intent is to capture only the subcontractors of the ocean carrier,[13] although that does not appear explicitly clear. The MLA submits that the benefit to including the subcontractors of the ocean carrier within the COGSA '99 regime is that presently:

1. they can be sued independently in any event for their own negligence even if they cannot be sued in contract;
2. the only defences presently available to them are Act of God, Act of Shipper and Inherent Vice, unlike the many defences available to the ocean carrier;
3. there are no limitations of liability; and
4. the time for suit would generally be three years.[14]

The primary ocean carrier may have a Himalaya clause in its bill of lading purporting to extend the benefit of the defences and limitations in the contract to its subcontractors. However, the enforcement of the Himalaya clause in the U.S. is not uniform nor easy to obtain.[15]

To use a practical example, if a container goes by truck from Vancouver to Seattle and then by ocean carrier to Japan, on a Vancouver/Yokohama through bill of lading, all participants would be subject to suit in the U.S. and the degree of liability imposed on each would be COGSA '99. Even under current COGSA, an American Court would likely claim personal jurisdiction over the Canadian trucker even if the damage to the container actually occurred before the trucker went across the border to the U.S., by reason of him doing business in the U.S. when delivering the container. However, his liability would likely be determined by the terms of his contract and/or Canadian law if that is where the contract was made. Under COGSA '99, his liability would be determined by American law, the wording of which he has had no choice and no opportunity to participate in as a foreigner.

Personal Jurisdiction

The MLA insists that COGSA '99 does not create extra-territorial jurisdiction.[16]

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[13] MLA letter to CMLA dated March 29, 1999.

[14] MLA letter to CMLA dated March 29, 1999.

[15] *ibid.*

[16] MLA letter to CMLA dated March 29, 1999.

The American response has been that the international critics have been betraying their lack of knowledge of the American legal system and constitution by suggesting that foreign parties will suddenly become subject to the jurisdiction of the American courts by reason of the definition of performing carrier.[17] COGSA '99 deals with the jurisdiction of a subject of legal matters - carriage of goods. However, the MLA states, COGSA '99 cannot create jurisdiction over a person where none existed before. COGSA '99 would not bring any new defendants to the United States. It would simply provide a single liability regime that would govern all present defendants, pre-empting inconsistent state law and common law theories.

Establishing in personam jurisdiction is the means by which an American Court will decide whether a foreign defendant should be asked to defend itself in the U.S.

For foreign defendants, in personam jurisdiction is generally established under the long arm statutes of the individual States, subject to the due process provisions of the U.S. Constitution.

I emphasize the description of in personam jurisdiction statutes as generally being described as "long arm".

I understand that the following is the general test for establishing in personam jurisdiction over a defendant in the U.S.:

1. If it transacts business in the state or contracts anywhere to supply goods or services in the state;
2. Commits a tortious act within the state
3. Commits a tortious act outside of the state if it
   i) regularly does or solicits business or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or
   ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce.
4. Owns, uses, or possesses any real property situated within the state.

The "Due Process" clause of the Constitution constrains the American courts in exercising personal jurisdiction over non-residents. This requires minimum contacts with the U.S. such that maintenance of the suit does not offend traditional notions of fair play and

[17] Sturley, *supra;* MLA letter to CMLA dated April 12, 1999.

substantial justice.

For example, consider the case of a Canadian terminal company which advertises its services in the U.S. transportation media to attract carriers to use its facilities when in Canada. It also employs an agent in New York to solicit business. Therefore, it appears that the terminal would meet the test of significant contacts in the U.S. that is necessary to establish in personam jurisdiction.

The Canadian terminal subsequently handles cargo for a Japanese vessel in Canada by providing pre-tackle warehousing. This contract with the Japanese vessel has nothing to do with the U.S. whatsoever except for the fact that some of the cargo handled by the Canadian terminal is discharged in the U.S. and found to be damaged. The terminal would seek to have its liability governed by its contract or tort theory of where the alleged tort took place (Canada). However, once COGSA '99 is enacted, an American Court would be obliged to determine that terminal company's liability using COGSA '99 even though the facts that establish in personam jurisdiction do not relate to the specific claim in question.

Another example is the warehouser in Vancouver, Canada which, on behalf of an ocean carrier, destuffs a container which had been carried on a through bill of lading from Yokohama to Vancouver, via Seattle, U.S.A. The goods are damaged during unloading. If that warehouser is sued in the U.S. and it is owned by a company which also conducts business in the U.S., its liabilities would be determined by COGSA '99, if enacted. Even if it is sued in Canada, there would be a conflict of laws issue for the Canadian court to resolve because COGSA '99 would purport to mandatorily apply to the warehouser's activities as a subcontractor of the ocean carrier even though their business of destuffing containers was conducted in Canada.

The difficulty is not the extension of in personam jurisdiction, it is the imposition of COGSA '99 to govern the liabilities of parties who have never previously been subject to carriage of goods by sea legislation.

Cargo claimants, when uncertain as to where the damage or loss arose, are in the practice of naming all possible handlers of the cargo as defendants. If a foreign defendant does not appear to challenge jurisdiction in the U.S. court, default judgment may go against it.

A number of countries, such as Canada, have taken the practice of "comity" to include

recognition of foreign default judgments. Canadian courts, if satisfied that there is a real and substantial connection between the claim and the foreign jurisdiction, will enforce the foreign judgment as a debt and afford no opportunity for the defendant to revisit the issues of liability and quantum. Therefore, if the Canadian terminal in the earlier example had ignored the American court proceeding and a default judgment was obtained against it with quantum based on the principles of COGSA '99, that judgment might be enforced as a simple debt by a Canadian court in the terminal's home jurisdiction.

Therefore, long arm jurisdiction is a matter which Canadian lawyers take very seriously. The imposition of COGSA '99 beyond tackle to tackle exposes our citizens to a unilaterally imposed and untested multimodal liability regime. The only way to avoid the regime is to not do business with Canada's overwhelmingly largest trading partner. The American response that COGSA '99 does not create new in personam jurisdiction is no doubt accurate. However, it does unilaterally impose a new liability regime on a whole new class of defendants who may be hooked by the "long arm" jurisdiction as practiced by the U.S.

There are two means by which the extra-territorial effect could be alleviated. The first is to exclude U.S. inbound cargo. The second is to exclude foreign subcontractors from the definition of performing carriers.

3. Forum and Arbitration Clauses

COGSA '99 provides that clauses specifying a foreign forum for litigation or arbitration are null and void. The parties can, however, both agree to a foreign jurisdiction after the claim arises.

This is considered to be the "Anti-Skyreefer" provision referring to a decision of the Supreme Court of the United States wherein the TOMAC arbitration clause was enforced and the American proceeding stayed. Until that point in time, foreign jurisdiction and arbitration clauses were generally not enforced by American courts as being seen as an impermissible lessening of a carrier's liability.

Furthermore, the COGSA '99 provision requires that on motion of either party, an American court will order that an arbitration proceed in the U.S. rather than the named foreign venue. This appears to be in contravention of their treaty obligations in the New York Convention 1958 on arbitration which requires the U.S. to recognize the awards of foreign arbitral proceedings.

The U.S. has been condemned for its decision to create its own forum clause rather than follow the Hamburg Rules on this issue.[18] The Hamburg Rules provides the cargo claimant with a choice of five jurisdictions. It is likely that Canada will adopt forum selection principles similar to those found in the Hamburg Rules in the next year or so.[19]

The wording of the forum subsection of COGSA '99 is as follows:

S.7(i) (2) Except as provided in paragraph (4), a provision in a contract of carriage or other agreement to which this subsection applies that specifies a foreign forum for litigation or arbitration of a dispute to which this Act applies is null and void and of no effect if:

(A) the port of lading or the port of discharge is, or was intended to be, in the United States; or

(B) the place where the goods are received by a carrier or the place where the goods are delivered to a person authorized to receive them is, or was intended to be, in the United States.

(3) Except as provided in paragraph (4), if a contract of carriage or other agreement to which this subsection applies specifies a foreign forum for arbitration of a dispute to which this Act applies, then a court, on the timely motion of either party, shall order that arbitration shall proceed in the United States.

(4) Nothing in this subsection precludes the parties to a dispute involving a claim under a contract of carriage or other agreement to which this subsection applies from agreeing to resolve the dispute by litigation or arbitration in a foreign forum if that agreement is executed after the claim arises.

It is interesting to note that the subsection provides that an order mandatorily requiring the arbitration to take in the United States may be obtained but there is no parallel provision with respect to litigation. The legislation simply provides that a foreign jurisdiction clause is of no force. This appears not to preclude a defendant from bringing a motion to have an American court decline jurisdiction on the grounds of forum non conveniens (meaning that another jurisdiction is more suitable and convenient).

As well, I cannot see how based on the plain reading of the subsection that a foreign court, if being asked to apply COGSA '99 as the proper law of the contract, would be

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[18] Tetley, William "The Proposed New US COGSA (The Important International Consequences)".

[19] Mr. DeOrchis has advised the writer that as of August 2, 1999, COGSA '99 may still be revised to incorporate the forum provisions of the Hamburg Rules.

obliged to stay the proceeding and direct that it continue in the United States. This may be the case with respect to arbitration, but not litigation.

The American response has been the forum provision does not prevent a cargo owner from suing in another jurisdiction and that only the American Courts would enforce this clause. I agree with their position.

A reconciliation, however, must still be ensured between the arbitration convention and COGSA '99. This has been acknowledged as a legitimate criticism and the subject of possible further revision to the COGSA '99 proposal.[20]

4. Negligent Navigation and Negligent Management of the Ship

As with the Hamburg Rules, COGSA '99 would eliminate these defences presently available to a carrier. This is one particular aspect of liability that the MLA has advised that it was absolutely necessary to include in order to obtain the backing of the cargo interests for reform.[21]

Not surprisingly, P&I Clubs are extremely critical of this position.[22] The Canadian government's position is that to eliminate these defences is to undermine the balance between cargo and ship interests currently found in the Hague and Visby Rules.[23]

The American response is that their Courts seldom, if ever, recognize the defence in any event.[24] Therefore, little is being lost.

However, COGSA '99 is intended to mandatorily apply to both outbound carriage *and* inbound. As well, the definition of carrier has been vastly expanded. Therefore, to move from the Hague and Visby standard defences (whether or not generally enforced by the domestic courts) is to impose a new regime on a large segment of the transportation infrastructure.

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20 Sturley, *supra.*

21 MLA letter to CMLA dated March 29, 1999.

22 "US Cogsa disaster threatened", *supra;* Mottley, *supra* at p. 40.

23 Government of Canada: Transport Canada backgrounder Note dated May 4, 1999.

24 MLA letter to CMLA dated March 29, 1999; Sturley, *supra.*

5. Exemption of U.S. Interstate Motor Carriers

U.S. interstate rail and motor carriers are exempted from application of COGSA '99 with respect to trucking and rail services. Such exemption is not granted for foreign inland carriers. For example, the Canadian trucker delivering containers from Vancouver to Seattle in the U.S. would be subject to COGSA '99, while a U.S. trucker carrying containers on the same route would not be.

This exemption to U.S. truckers is clearly discriminatory and would likely be challenged under North American Free Trade Agreement ("NAFTA") which is a treaty obligation of the U.S.

The American MLA response has been agreement that the word "foreign" should be added so as to include Canadian and Mexican interstate rail and motor carriers on the same basis as American carriers. Discussions are already underway with the appropriate American organizations and the U.S. Senate to add the word foreign to Section 3(b) of the proposal so as to exclude both foreign and interstate motor and rail carriers from the legislation.[25]

What Canada is doing

The Canadian Maritime Law Association has been corresponding directly with the MLA with respect to their concerns with COGSA '99. It has also prepared briefs for the Canadian government and the Canadian government has met with the American government to lobby with respect to the same. Canada has asked the Americans to:

1. be consonant with the business interests and practices of the tens of thousands of American and Canadian companies trading daily;
2. be consistent with the legal obligations of the NAFTA;
3. avoid unnecessary confusion among cargo interests in courts called upon to deal with disputes; and
4. avoid unnecessary complications with other countries.

At this time, there is no particular progress to report other than as described herein with respect to foreign trucking and railways and the arbitration provision.

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[25] MLA letter to CMLA dated April 12, 1999.

Conclusions

It is up to the U.S. to determine what conditions their carriage of goods legislation suffers from and what remedy is required. At the same time, because the proposed U.S. remedy (COGSA '99) is not just localized in its curative effects, the U.S.'s trading partners have legitimate concerns about it.

My view is that the concerns are not as extensive as other critics have suggested and those that remain can be alleviated by excluding inbound cargo or limiting the definition of performing carrier to exclude foreign parties.

The primary difficulty I have is with the unilateral American initiative to impose a multi-modal regime. The desire to see a multimodal regime is laudable. My view is that the U.S. underestimates the impact of their legislation on non-domiciles resulting from the long arm jurisdiction of its states and the fact that the regime is to apply mandatorily to inbound cargo as well as outbound.

COGSA '99 represents many years of work by American maritime legal minds responsive to the demands of their domestic constituencies. Some of the subjects of complaint, such as error in navigation, appear unresolvable because of the dynamics of the American maritime community. Other complaints, such as the forum selection clause, are not justified upon a close reading of the legislation itself.

International groups such as the CMI (Comite Maritime International) should take the American initiative as a call to commence work on a multimodal convention. However, until such time as international standards are reached, the U.S. should revisit COGSA '99 so as to reduce its application to non-domiciles who cannot participate in the American governing and legislative process.

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