

WaveLength

JSE Bulletin No. 42
March 2001

CONTENTS

Japanese Law: Japanese Interim Measures of Protection Available to Parties to Arbitration <i>Takao Tateishi</i>	1
TOMAC Arbitral Award: Disputes over Termination of Time-charter Vessel built under strict supply regulations and also on condition of long-term charter - Whether Charter lawfully terminated - Whether good faith and trust violated - Whether charterers pressing by abuse of their dominant position - Measure of damages	12
English Case: The "Sea Empress" Prosecution <i>Nick Greensmith</i>	21
Chinese Law: <i>Uberrimae Fidei</i> under Chinese Law <i>S M Chen</i>	33

General Editor

Takao Tateishi

Published by The Japan Shipping Exchange, Inc.

Wajun Building
Koishikawa 2-22-2
Bunkyo-ku
Tokyo 112-0002
Japan

ISSN 0448-8741

© The Japan Shipping Exchange, Inc. March 2001. All Rights Reserved.

All correspondence should be addressed to:

General Editor - The JSE Bulletin
c/o The Japan Shipping Exchange, Inc.

Tel: +81-3-5802-8363

Fax: +81-3-5802-8371

E-mail: tateishi@jseinc.org

Website: www.jseinc.org

JAPANESE INTERIM MEASURES OF PROTECTION AVAILABLE TO PARTIES TO ARBITRATION

Takao Tateishi*

Introduction

No provision in Japanese law deals with interim measures of protection *to be ordered*, let alone to be enforced, by the arbitrator.¹ The Law on Procedure for Public Notice and Arbitration (the "Arbitration Law") only provides for the assistance of the court in general terms at Article 796.² Further, a Tokyo District Court decision is said to have denied the power of the arbitrator to order interim measures.³ Thus most commentators have been reluctant to recognise the power of the arbitrator to order interim measures under Japanese law,⁴ and indicated that a party seeking such measures should bring an

* Administrator, Tokyo Maritime Arbitration Commission (TOMAC) of the Japan Shipping Exchange, Inc (JSE). Provisions of law as well as court decisions appearing in this article are translations by the Author from the original Japanese text.

¹ The Law on Resolution of Pollution Disputes, Article 33vis provides for such measures *recommendable* by the mediator: "The mediation committee may, before mediation is instituted, recommend the parties to restrict such acts as to disable or substantially obstruct the realization of the matters proposed for mediation and/or to take any other measures it deems necessary for the purpose of mediation." By way of Article 42 of the Law, this provision should apply *mutatis mutandis* to arbitral proceedings to be held under the Law. However, what the arbitrator may do here is recommendation, which has no binding force upon the parties.

² Article 796 <Assistance of the Competent Court>: "(1) Any act which the arbitrator considers necessary in the course of arbitral proceedings but he is unable to perform shall, upon application by the parties, be performed by the competent court, provided such application is deemed proper; (2) If a witness or an expert witness refuses to give evidence or an expert opinion, the court which ordered him to do so shall have the power to make any necessary adjudication."

³ Decision on 19 July 1954; Docket: Showa 29 (mo) 6554; 5 *Kakyu Minshu* 1110, at 1125. See discussions below.

⁴ On the other hand, UNCITRAL Model Law as well as arbitration laws in many other jurisdictions provide that the arbitrator has the power to order interim measures: see, e.g., the UK Arbitration Act 1996, Sections 38, 39 and 41; the Netherlands Arbitration Act 1986, Article 1051; the Swiss Federal Statute on Private International Law 1987, Chapter 12 Article 183; the German Arbitration Law 1998, Section 1041; the Australian Arbitration (Foreign Awards and Agreements) Act 1974/International Arbitration Amendment Act 1989, Articles 22 and 23; the Singapore International Arbitration Act 1994, Section 12. In addition, some laws even give binding force to such measures ordered by the arbitrator, particularly by way of enforcement of such orders written into an arbitral award: see, e.g., the Netherlands Arbitration Act; the Australian International Arbitration Act; the New Zealand Arbitration Act 1996. See Tatsuya Nakamura, "Zantei-teki Hozen-sochi wo Meiziru Chusai-nin no Kengen (1)" (The Power of Arbitrators to Order Interim Measures of Protection), JCA Journal, Vol 45, No 8 (August 1998), at 16-24.

application in the court in accordance with the Law of Civil Conservation, which provides for jurisdiction of the court over interim measures of protection.⁵ For these reasons or not, major arbitral bodies in Japan⁶ also have not introduced provisions as to such power of the arbitrator in their arbitration rules.

However, the gist of the arguments is that any interim measures if ordered by the arbitrator may be useless because of the lack of binding force upon the parties. On the other hand, some commentators suggest that the arbitrator should have such power inherent in his competence and may order interim measures especially where those measures may be voluntarily complied with.⁷ In this article, I will overview the current legal situation in Japan surrounding interim measures of protection and discuss whether and how the arbitrator can effectively order such measures.

Does the Arbitrator have no Power?

There is only one reported case where the court appears to have considered an issue of interim measures of protection to be imposed by the arbitrator on one of the parties to arbitration. That is the decision of the Tokyo District Court,⁸ in which the Court dismissed a motion by the defendant that an order issued by the Court for an interim measure should be set aside on the grounds of the existence of an arbitration agreement. The contentions of most commentators that the arbitrator has no power to order interim measures under Japanese law appears to be based primarily on this decision.

The facts of the case were as follows:

“The applicant placed an order to the defendant contractor for the construction of part of a power station and made provisional payments. The contractor failed to complete its part of construction by the agreed date. As the construction to be

⁵ Article 12 <Competent Court> of the Law: “(1) Either the court which shall have jurisdiction over the merits of the case, or the district court for the place where the object for provisional attachment and/or the subject matter is located, shall have jurisdiction for the case of an order of conservatory measures; (2) The court which shall have jurisdiction over the merits of the case shall be the court of first instance; in case the merits are on appeal, the appeal court shall have jurisdiction; (3)...”

⁶ I.e., TOMAC and JCAA. By way of Rule 1 of JCAA’s Commercial Arbitration Rules, however, parties may choose to apply UNCITRAL Arbitration Rules, which provide for interim measures of protection at Article 26. See note 28 below. On the other hand, ICC Arbitration Rules and AAA Arbitration Rules provide for the arbitrator’s power to order interim measures.

⁷ See, e.g., Kaoru Matsuura, “Arbitration and Interim Measures of Protection,” a paper presented to the 2nd Symposium of International Commercial Arbitration in Asia-Oceania Region in Nagoya in November 2000.

⁸ As note 3 above.

completed by the defendant was an indispensable part for the entire project, the applicant decided to do the job on his own and cancelled the contract in accordance with the relevant terms of the contract. The applicant brought an application in the Court for a provisional order to direct the defendant to surrender such part of the property as had been completed. The Court granted the order. The defendant moved to strike out the application and to set aside the order arguing *inter alia* that the application seeking an order for the interim measure contravenes the arbitration agreement in the contract and lacks interest of protecting rights.”⁹

The Court dismissed the defendant’s motion, holding:

“(1) If action was brought in respect of the merits of the legal relations in private law for the resolution of which an arbitration agreement exists between the parties, the court shall dismiss it as illegal upon a motion by the defendant; (2) however, the court should deny the right of action in such a case simply because civil disputes are more desirous to be resolved voluntarily without the assistance of the court if an arbitration agreement exists; (3) thus the existence of an arbitration agreement cannot affect the right of *conservation* and it should be permissible to grant interim measures of protection if necessary; (4) in such a case, the arbitration procedure should, as an alternative to court proceedings, become the merits of the interim measure; (5) in conclusion, the existence of an arbitration agreement should only have bearing on the right of action but not on the interest of protecting rights.”

Therefore, the correct reading of the judgment should be that the Court did not directly deny the power of the arbitrator to order interim measures of protection but refused to allow a motion to set aside an order for interim measures issued by the court even if an arbitration agreement existed between the parties. It may well be contended that the power of the arbitrator to order interim measures of protection has never been denied by the court. Admittedly, an order by the arbitrator for interim measures has no *executory* force in Japanese law, but this fact does not necessarily render such an order meaningless if and when the parties to arbitration may voluntarily comply with it.

In addition, what if the parties to arbitration expressly agree to the power of the arbitrator to order interim measures and/or to the enforceability of such an order? It is extremely doubtful that the arbitrator’s power to order interim measures should be denied in such cases, unless the proper law clearly voids such power of the arbitrator. Furthermore, the

⁹ As to the effect of arbitration agreement under Japanese law, see Takao Tateishi, “The Enforcement of the Arbitration Agreement under Japanese Law,” The JSE Bulletin, No 39, at 1 *et seq* and “Recent Japanese Case Law in Relation to International Arbitration,” 17 J.Int.Arb.4, at 63 *et seq*.

possibility of the compliance of the parties with such an order would become much stronger. In those cases, the arbitrator should no doubt order interim measures in accordance with the agreement. I will come back later to the issue whether and how the arbitrator can effectively do so, but let us first overview the current legal situation in Japan.

Kinds of Interim Measures under Japanese Law

Generally speaking, there are three categories of interim measures of protection which can be taken during the course of arbitral proceedings:¹⁰ (1) measures aimed at facilitating the arbitral proceedings, mostly as to the production and preservation of evidence; (2) measures to avoid loss or damage and/or to preserve the status quo until the dispute is resolved; (3) measures to secure the enforcement of an award at a later stage, e.g. prevention of transfer of assets, etc. The point at issue as regards interim measures to be taken by the arbitrator may be confined to items 2 and 3 only, because such measures as in item 1 can apparently be ordered by the arbitrator and the penalties for non-compliance can readily be materialised in his final award. When we talk about the scope of arbitrator's power to order interim measures, it is normally the case that we intend to include only the latter two categories.¹¹ I will discuss on the basis of these two types.

As mentioned above, there is no provision in Japanese law which grants power to the arbitrator to order interim measures. The Law of Civil Conservation provides for two kinds of interim measures of protection to be ordered by the court: (1) provisional attachments (*kari-sashiosae*)¹² and these may correspond to item 3 above; (2) provisional measures (*kari-shobun*)¹³ and these may correspond to item 2 above. These provisional remedies available in court proceedings are also available to parties to arbitration.¹⁴ *Kari-*

¹⁰ See Para. 63 of UNCITRAL Document A/CN.9/WG.II/WP.108.

¹¹ See, e.g., Matsuura, *supra*. Prof. Matsuura particularly distinguishes an interim measure for the prevention of loss or damage that an arbitral award will become useless, and one for the preservation of evidence for the purpose of examination, and discusses that those should be treated separately by legislation.

¹² Article 20 of the Law <Necessity of Orders for *Kari-sashiosae*> provides: "(1) Orders for *kari-sashiosae* may be issued where the court is satisfied that it may become impossible or extremely difficult to enforce the creditor's rights as regards payment of money; (2)..."

¹³ Article 23 of the Law <Necessity of Orders for *Kari-shobun*, etc.> provides: "(1) Orders for *kari-shobun* as regards the subject matter may be issued where the court is satisfied that it is to become impossible or extremely difficult for the creditor to exercise his rights in case of alteration of the status quo; (2) Orders for *kari-shobun* to set up a provisional status may be issued where the court is satisfied that it is necessary to avoid an enormous loss or imminent risk to be incurred by the creditor in relation to his right in dispute; (3)..."

¹⁴ T. Doi, *Japan (National Reports)*, 4 Yearbook Commercial Arbitration (1979) 115, at 129.

sashiosae, or provisional attachment, may particularly be useful in international cases where a party wishes to secure his claim by attaching assets owned by the other party and located in a foreign country, e.g. an ocean-going vessel, etc. The Arbitration Law, Article 796 only provides for the assistance of the competent court in general terms.¹⁵ In accordance with these provisions in law, a party to arbitration may currently bring an application in the court seeking an order for either *kari-sashiosae* or *kari-shobun*, as the case may be, prior to and/or in the course of arbitral proceedings. As we have already seen a case where the court granted an interim measure (*kari-shobun*),¹⁶ I will next examine particular procedures of provisional attachment.

Provisional Attachment

Prior to the arbitral proceedings being instituted, a party to an arbitration agreement seeking an order for provisional attachment against the other party may bring an application in either the district court for the place where the object is located or the court of first instance for the merits of the dispute. After a relevant order, the court will refer the parties to arbitration. In a recent arbitration at TOMAC, the creditor-buyer of a vessel brought an application in the Tokyo District Court to arrest the vessel while she was in *Nagasaki*, on the grounds that the sale contract of the vessel provided for arbitration by TOMAC in *Tokyo*. The Court granted an order to arrest the vessel, and upon posting security by the seller the vessel was released. In this case, the Tokyo District Court had jurisdiction as the court of first instance for the merits of the dispute, because the merits are now arbitral proceedings in accordance with Article 12(1) of the Law of Civil Conservation and its earlier decision.¹⁷

The peculiarity of this arbitration was that the buyer had, prior to the application for an attachment order, brought arbitral proceedings to TOMAC in accordance with the arbitration agreement in their sale contract, asserting that they were entitled to refundment of the deposit they remitted as part of the purchase price because the sale contract lawfully terminated. After the arbitral proceedings were properly instituted, the

¹⁵ As note 2 above.

¹⁶ See the decision of the Tokyo District Court on 19 July 1954 above.

¹⁷ See notes 3 and 8 above. There the Court held *inter alia* that the existence of an arbitration agreement cannot affect the right of conservation and that in such a case, *the arbitration procedure shall become the merits of the interim measure*. This should correspond to the provision in 12(1) of the Law of Civil Conservation: "Either *the court which shall have jurisdiction over the merits of the case*, or the district court for the place where the object for provisional attachment and/or the subject matter is located, shall have jurisdiction for the case of an order of conservatory measures." (emphasis added)

claimant-applicant brought an application in the Court for a provisional attachment order so as to secure his legal rights/conservate enforcement of his claims. Accordingly, when a party seeks an order for interim measures of protection where an arbitration agreement exists between the disputing parties, he may bring an application either in the court for the place of arbitration or in the district court for the place where the object is located, whether the arbitral proceedings already instituted or not.

Procedure to Arrest a Vessel

There are three categories of attachment in Japanese law: (1) provisional attachment (this is what we are discussing); (2) attachment under privileged rights such as maritime lien and mortgage; (3) attachment under executory titles such as court judgments and arbitral awards.¹⁸ An arrest of a vessel is a particular type of attachment. An arrest of a vessel can be effected by (i) a court bailiff taking possession of relevant documents such as a certificate of vessel's nationality, class certificates, etc. and/or (ii) entry to that effect into the ship registry.¹⁹ An application for provisional attachment should be brought, as mentioned above, in the district court for the place where the ship is located or the competent court which has jurisdiction over the merits of the dispute. In addition, by way of an entry into the ship registry, the court having jurisdiction over the port of registry is also competent.²⁰

In accordance with the Law of Civil Conservation, the creditor must prove that a creditor's right validly exists, that the debtor owns the vessel, and the urgency for attachment.²¹ The decision is usually made within the same day of application. The court normally requires posting of a counter security and the amount to be posed is in the discretion of the court.²² On the other hand, the debtor is required by the court to deposit money (cash only) to have the vessel released,²³ although the amount required is again in the discretion of the court.

¹⁸ Tameyuki Hosoi, "Arrest and Release of Vessels and Maritime and Possessory Liens under Japanese Law," *The JSE Bulletin*, No 20, at 10.

¹⁹ Hiroshi Kimura, "Arrest of Ship in Japan," at 1.

²⁰ Kimura, *supra*, at 3.

²¹ Article 13 <Application and Production of Prima Facie Evidence> of the Law provides: "(1) An applicant must, when seeking an order for interim measures of protection, clearly state the cause of application, the right or legal relations to be conserved, and the necessity of conservation; (2) The applicant must produce prima facie evidence as to the right or legal relations and the necessity of conservation thereof; (3)..."

²² As per Article 14 of the Law.

²³ As per Article 22 of the Law.

Practical Problems in Arresting Vessels

By way of example, I will cite a decision of the Asahikawa District Court, in which the Court affirmed an order for an arrest of a vessel on 9 February 1996.²⁴ The facts of the case were as follows:

“The Korean ship repairer (applicant-creditor) repaired a fishing boat owned by the Russian fishing company (defendant-debtor) on the basis of a repair contract dated 7 May 1993. The repairs were completed and the debtor accepted delivery of the boat on 25 June 1993. When the debtor failed to pay part of the repair costs, both parties agreed to terms and conditions for the full payment of the outstanding amount, but the debtor failed again to perform his obligations under the agreement. The creditor, while purporting to bring suit for performance of the agreement by the debtor, brought an application on 13 October 1995 for an order to arrest the boat for fear that the debtor might sell the boat, which was the only asset of the debtor. The creditor asserted the necessity and urgency of the attachment so as to conserve enforcement of his claims, on the grounds that it would become extremely difficult to enforce creditor’s rights because the boat, on completion of discharging the cargo, was scheduled to leave the port Wakkanai and one could not reasonably expect if and when the boat would come back to the Japanese territory. The Court granted an order on the day and sent a court bailiff to confiscate the boat’s certificate of nationality, etc. The bailiff executed the procedure on the following day and held the boat chain-locked at the wharf.”

The debtor moved to set aside the order, arguing (1) the Court had no jurisdiction because the repair contract contained a Korean jurisdiction clause; (2) the boat could not be arrested because it had already been ready to sail;²⁵ (3) there was no necessity to arrest the boat.

Issue 1: Whether the court has jurisdiction

As to the first issue, the Court decided in favour of the applicant, holding:

“As no law exists directly related to international jurisdiction over the case of

²⁴ Docket: Heisei 7 (mo) 542; *Hanrei Times* No 927, at 254; *Hanrei Jiho* No 1610, at 106. The Court had granted an order for the arrest of the vessel on 13 October 1995 (Docket: Heisei 7 (yo) 74).

²⁵ Article 689 <Limitations to Enforcement of Attachment or Provisional Attachment of a Vessel> of the Commercial Code provides: “No attachment or provisional attachment (except a provisional attachment by way of registration) may be enforced on a vessel which has completed preparations for commencing a voyage. This shall not, however, apply where the vessel’s obligations arose in relation to the preparations for commencing the voyage.”

provisional attachment, the court has no way but rely on *Jori* (common sense) with the notion of equity between the parties, judiciary propriety and expedition to decide as in an ordinary civil litigation. Article 12(1) of the Law of Civil Conservation, gives jurisdiction in this matter to the court which has jurisdiction over the merits of the case as well as to the district court for the place where the object is located.²⁶ This provision is deemed to have been made on the grounds that it should be reasonable to render jurisdiction to the former due to an ancillary nature of an attachment order to the merits of the case, and to the latter for the purposes of effecting attachment on the basis of the location of the object, irrespective of jurisdiction over the merits.

The issue of international jurisdiction over provisional attachment should also be considered by applying this provision *mutatis mutandis* because the ancillary aspect as well as the effecting purposes should be the same. In view of the fact that no procedure is currently available outright to enforce in Japan an attachment order rendered by a foreign court, it is deemed most appropriate, for the purposes of effecting attachment expeditiously, to obtain and to enforce an attachment order in the Japanese court which has jurisdiction over the place where attachment is to be effected. In addition, where the right to claim is to be finally decided in a foreign court and it is to be possible to take enforcement procedure in Japan upon the object in accordance with the judgment, the ancillary nature to the merits of the case should also be satisfied. In such a case, jurisdiction of the Japanese court over the attachment order should be reasonably recognised, even if it could not have jurisdiction over the merits of the case.

The merits of the case are now pending in the Pusan District Court and the judgment to be rendered in the Korean court in the future could have *prima facie* enforceability in Japan. The factors the court should, at the stage of a provisional attachment order, consider in deciding on the future enforceability in Japan of a foreign judgment should only be items 1 and 4 in Article 200 of the Code of Civil Procedure.²⁷ On the evidence, the instant case satisfied the above test. The Court

²⁶ As note 5 above.

²⁷ Article 200 is now Article 118 <Effect of a Final and Conclusive Judgment of a Foreign Court> in the revised Code: "A final and conclusive judgment of a foreign court shall only have effect upon fulfillment of all the following conditions: (1) that jurisdiction of the foreign court is recognised in laws/orders or treaties; (2) that the defeated defendant had received service of summons or any necessary orders other than by a public notice or similar ones, to commence court proceedings, or has responded without receiving such service; (3) that neither the judgment nor the procedure of the foreign court contravenes public order or good morals in Japan; (4) there exists mutual guarantee."

shall have jurisdiction over an attachment order.”

Issue 2: Whether the boat was ready to sail

As to the second issue the Court denied the readiness of the boat for departure, holding:

“As the provision of Article 689 of the Commercial Code sets an exception to the enforcement of the creditor’s rights on the property, the expression ‘completed preparations for commencing a voyage’ should be interpreted strictly and limited to such situations as the vessel can reasonably be said ready for immediate departure both practically and legally. On the evidence, it is apparent that the boat had not yet completed preparations for the voyage at the time of the issuance of the attachment order, because boat crew were out in town at that time and a permission for departure was obtained from the customs authority later on the day. Moreover, the vessel surrendered the departure permission because of bad weather with an intention to set sail on the following day. At the time the court bailiff commenced attachment procedure on the following day, no new departure permission had been issued yet, and in addition, the captain and chief officer were out in town again. In summary, the boat was in no such situations as being ready for immediate departure both practically and legally, at the time of the enforcement of the provisional attachment order.”

Issue 3: Necessity to arrest, amount of security, etc.

The Court also recognised, on the evidence, the necessity to attach the boat and affirmed the attachment order, holding *inter alia*:

“The debtor had failed to pay the balance of the repair price and, in case the boat had departed from the port, the debtor might well sell the boat which was his only asset. The Court would approve the necessity of conservation by way of an attachment order.

As to a counter security to be posted by the creditor, the Court would consider such facts as (1) the amount claimed for this case is US\$100,000; (2) the object of provisional attachment is estimated to have a value of at least JP¥30,000,000; (3) the security imposed by the attachment order for release of the boat is set at JP¥10,000,000. Also taking into account such factors as the enforceability of a foreign judgment on the merits of the case and other circumstances surrounding this application procedure, the Court decides it appropriate to levy JP¥5,000,000 as a counter security from the creditor.”

How Arbitrator can Effectively Order

I now turn back to the issue whether and how the arbitrator may *effectively* order interim measures of protection. When we speak of the effectiveness of an order for interim measures by the arbitrator, we imply its enforceability. Thus the problem of effectiveness can only arise in case of non-compliance with the order by a party or parties, and in which case enforcement thereof should eventually be effected by the assistance of the court. As the rules of procedure the court must follow in enforcing such orders vary from country to country, perhaps special domestic laws should be legislated for that purpose.

On the other hand, as seen above, there is no provision in Japanese law or court decision which *prohibits* or *denies* the power of the arbitrator to order interim measures. Where voluntary compliance with such order can reasonably be expected of the parties to arbitration, the arbitrator can effectively do so. To back this up, parties to arbitration agreement may agree to such power of the arbitrator in their contract; alternatively to select the arbitration rules which contain relevant provisions as to interim measures to be ordered by the arbitrator, as in the UNCITRAL Arbitration Rules.²⁸ If the parties have expressly agreed to the power of arbitrator in their contract or by the arbitration rules, the possibility of compliance will be much stronger.

Furthermore, in view of the fact that the court proceedings for enforcement may involve additional time and cost, the arbitrator should even be encouraged to order interim measures for the benefit of the parties. Of course, if we had a certain legal mechanism in which the arbitrator may effectively order interim measures, it might be better. However, legislation takes time.²⁹ Worse, the Draft Arbitration Law is said to have been out of the line during the course of time,³⁰ and thus an independent re-drafting attempt of the Law is

²⁸ UNCITRAL Arbitration Rules, Article 26 <Interim Measures of Protection>: "1. At the request of either party, the arbitral tribunal may take any interim measures it deems necessary in respect of the subject matter of the dispute, including measures for the conservation of the goods forming the subject matter in dispute, such as ordering their deposit with a third person or the sale of perishable goods. 2. Such interim measures may be established in the form of an interim award. The arbitral tribunal shall be entitled to require security for the costs of such measures. 3. A request for interim measures addressed by any party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of that agreement."

²⁹ The Arbitration Law Study Group under the auspices of Ministry of Justice made public in 1989 the Draft Arbitration Law which included provisions for interim measures. However, more than a decade has elapsed since then without any substantial progress in the amendment to the Law.

³⁰ Article 10 (Provisional Remedy by Court) of the Draft: "A party to an arbitration agreement may request a provisional remedy from the court either before or during the arbitral proceedings." Article 24 (Interim Measures before Arbitral Award): "(1) Unless otherwise agreed by the parties, the arbitrator may, at the

now in process.³¹

Conclusion

As seen above, even if the law provided for the power of the arbitrator to order interim measures, it could not be effected without the assistance of the court in case of non-compliance with the order. Therefore, it might be less useful if the new law would lack provisions as to how such orders might be effected, let alone how ordered. Until the legislation on interim measures of protection which could be ordered and enforced during the course of arbitral proceedings, arbitration organizations should be encouraged to consider the introduction of relevant provisions in their arbitration rules so as to better serve their users.

■

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; (2) In connection with any interim measure ordered under subsection (1), the arbitrator may require a party to provide appropriate security; (3) An interim measure ordered pursuant to the preceding two subsections has no executory force.”

Article 10 of the Draft is in substance the same as Article 9 of UNCITRAL Model Law on International Commercial Arbitration, which provides: “<Arbitration agreement and interim measures by court> It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure.” Article 24 of the Draft is different in sub-section 3 from Article 17 of UNCITRAL Model Law, which provides: “< Power of arbitral tribunal to order interim measures> Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order any party to take such interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject-matter of the dispute. The arbitral tribunal may require any party to provide appropriate security in connection with such measure.”

³¹ See Matsuura, *supra*, at 11 *et seq.* Prof. Matsuura’s draft is more advanced in that it provides for certain mechanism in which the arbitrator may issue enforceable interim measures with the assistance of the court as well as the one in which the parties may bring a motion to set aside/alter such an order. Prof. Matsuura’s intention is said to realise effectiveness of interim measures taken during the course of arbitral proceedings.

ARBITRAL AWARD IN RE DISPUTES OVER TIME CHARTER FOR LPG CARRIER "SG"

Claimants: Shipowners (Japan)

Respondents: Charterers (Japan)

With respect to the disputes between the above parties which arose in relation to termination of the time charter for the carriage of LPG by the LPG Carrier "SG", the undersigned Arbitrators, appointed in accordance with the Rules of Maritime Arbitration by TOMAC of the JSE, award as follows after having carefully considered the case.

FINAL AWARD

1. Respondents shall pay to Claimants the amount of Yen 40,000,000 plus interest at 6% per annum from the date of the arbitral award until the day such payment has been completed.
2. The costs required for the issuance of the arbitral award are Yen 4,179,000 and the parties shall share them equally.
- 3: The Tokyo District Court shall have jurisdiction over this arbitral award.

CLAIM AND DEFENCE

Claim of Claimants

1. Respondents shall pay to Claimants the sum of Yen 307,620,000 plus interest thereon at 6% per annum from the date of the arbitral award until completion of payment.
2. The costs of arbitration shall be borne by Respondents.
3. Claimants submitted Exhibits-C Nos. 1 to 13.

Defence of Respondents

1. The claim of Claimants shall be dismissed.
2. The costs of arbitration shall be borne by Claimants.
3. Respondents submitted Exhibits-R Nos. 1 to 20 and applied for hearings of witnesses Mr F, Mr K and Mr H.

FACTS

Claimant Owners of the LPG Carrier "SG" (hereinafter the "Vessel") brought the instant arbitral proceedings claiming damages for wrongful termination by Respondent Charterers of the time charter for the Vessel (hereinafter the "Charter"). Claimants alleged that the Charter was wrongfully terminated by an abuse of Respondents' superior position as charterers despite the fact that the Vessel had been built under a special approval given

by the tonnage-regulating authorities (hereinafter the "Authorities") in exchange for the guarantee by the Respondents for chartering the Vessel for the period of 16 years.

1. Time Charter

Claimants and Respondents entered into the Charter dated 29 March 1991 for the carriage of LPG by the Vessel along the coast, which contained following provisions:

- Name of the vessel: "SG"
- Gross tonnage: 988.00
- Capacity: propane - 800k/t; butane - 920k/t
- Built: March 1991
- Beginning of charter period: no earlier than 28 March 1991
- Charter period: 16 years, 10 days more or less at charterers' option
- Hire: as agreed. Rate may be renewed yearly.
- Date, place and method of payment: payable monthly in Tokyo

2. Building of Vessel

On 10 August 1990, prior to the conclusion of the Charter, Claimants submitted relevant application documents to the Authorities for approval of the construction of the Vessel. Among those documents were Claimants' plans for construction and funding, shipper's certificate of guarantee for shipment of LPG for 16 years and Charterers' certificate of guarantee for chartering the Vessel for 16 years, which contained following provisions:

- Type of cargo: LPG
- Guaranteed period: 16 years from 1 April 1991
- Type of charter: time charter
- Guaranteed hire rate: Yen 18,000,000/month

3. Change of Hire Rates

Hire was paid at the rate of no less than Yen 18,000,000/month until the end of March 1998. However, from April till June 1998 the rate was reduced to Yen 17,280,000/month. From July the rate was agreed by an addendum to be paid after adjustment based on the amount of shipment, and actually paid on average at Yen 14,540,000/month. The addendum in substance changed the Charter into an operation contract.

4. Sale of Vessel

Claimants hinted at the possibility of selling the Vessel to overseas sources when Respondents offered lower rates in the conferences for negotiation in June 1998. Later on Claimants arranged and conducted an inspection of the Vessel for a possible buyer but

never made prior notice of this to Respondents. On 11 August 1998, at the request of Claimants, Respondents signed and sealed an acceptance letter of termination of the Charter to be submitted to a state-run co-owner of the Vessel. However, due to some unknown reasons on the part of Claimants, the above attempt of sale did not materialize.

5. Operation Contract

Claimants and Respondents entered into an operation contract for the Vessel dated 1 April 1999 and agreed the period of operation to be from 1 April 1999 until the date of the sale of the Vessel or the end of June 1999, whichever was earlier. This period was later amended at the request of Claimants by an addendum dated 18 June 1999 to read: "until the date of the sale of the Vessel or the end of August 1999, whichever is earlier." However, as the sale of the Vessel was not effected, the operation contract was terminated at the end of August 1999.

ARGUMENTS

1. Guarantee of Hire Rates

Claimants

Despite the fact that the Charter stipulated that the hire rate might be renewed every year, Respondents guaranteed hire rate at no less than Yen 18,000,000/month over the period of 16 years as evidenced by the certificate of guarantee for chartering. Nevertheless, Respondents reduced the monthly hire twice in 1998 to the amount less than the guaranteed rate. This was contrary not only to the guarantee but to the Charter stipulation.

Respondents

Respondents never guaranteed minimum monthly rate. The certificate of guarantee did contain a stipulation of monthly rate in the amount of Yen 18,000,000 but this document was submitted solely for the purposes of obtaining approval from the Authorities. The Charter provides that the rate may be renewed every year. Furthermore, another certificate of guarantee for chartering submitted to the state-run co-owner of the Vessel only contained a hire rate at Yen 17,000,000 for the first year. Therefore, there was no breach of contract by Respondents. In addition, the second time the payment was amended with agreement from Claimants was when the Charter was changed into an operation contract. Thus it is out of focus to contend that the rate had been amended twice under the Charter.

2. Sale of Vessel and Termination of Charter

Claimants

Director Mr H of Respondents unilaterally notified us of their intention to reduce service tonnage in March 1998. Since April 1998 the Vessel was carrying cargoes of a different

shipper than one who had guaranteed shipment for 16 years. During the conferences for renewal of hire rates later that year, Respondents informally requested Claimants to consider selling the Vessel overseas. As a third person brought a sale business, Claimants negotiated for the sale with the consent from Respondents. As the Vessel is co-owned by us and the state-run corporation, Claimants were required to satisfy certain formality prior to a sale. To satisfy part of this, Claimants requested Respondents, on condition that the sale of the Vessel was to be successful, to sign an acceptance letter of termination of the Charter. Because the sale of the Vessel failed, Claimants did not submit this acceptance letter to the state-run corporation. Thus the Charter remains in full force and effect.

Respondents

Respondents were first informed of the progress of the overseas sale of the Vessel by its shipper in July 1998, which Claimants confirmed only on their inquiry. Prior to this, Respondents never heard from Claimants about the sale of the Vessel nor assented to the sale. Claimants then notified us of the conclusion of the sale contract as of 20 August 1998 and proposed to terminate the Charter shortly thereafter on the ground that the Vessel was to be delivered on 20 September 1998. Claimants never expressed such a condition that termination was subjected to an effected sale. Respondents agreed to terminate the Charter and signed the acceptance letter as requested. Therefore, the Charter was lawfully and effectively terminated as of 20 September 1998 and so was the guarantee of charter period. The failure of the sale of the Vessel was solely attributable to Claimants' misjudgment in business and the risk should be totally borne by Claimants, with the Charter effectively terminated. Moreover, at the request of Claimants, Respondents voluntarily continued to collaborate in operating the Vessel until the end of March 1999 beyond the termination of Charter, in view of the long-standing business relationships.

3. Operation Contract

Claimants

Respondents notified Claimants of their decision to reduce tonnage by a letter dated 9 March 1999 and of the offer to terminate the Charter as of 20 April 1999. Claimants responded with a request for continued operation until the sale of the Vessel arguing that the Vessel had been built based on a guarantee of charter period of 16 years in accordance with the strict building regulations for a particular type of tanker. On 1 April 1999 Respondents purported to convert the Charter to an operation contract, which Claimants refused to accept. Respondents then threatened to suspend payment of hire and Claimants had no way but to sign the operation contract, by which hire was down to Yen 10,916,000/month. Both parties then entered into an addendum dated 18 June 1999 to postpone the termination of the contract for another two months, by which the monthly

rate dropped to Yen 8,000,000. Respondents finally terminated the contract as of the end of August 1999. In the background to the tonnage reduction might there be sluggish economic situations, but it should be unfair if the charterers can shift the entire risk and responsibility arising from a drop of the sea-borne volume to the owners. It should be held illegal that Respondents terminated the Charter and the subsequent operation contract by an abuse of their superior position as charterers, in view of the fact that Respondents had guaranteed the charter period as well as hire rates.

Respondents

Claimants and Respondents entered into an operation contact dated 1 April 1999 with a date of termination to be the day when the Vessel was delivered for sale or the end of June 1999, whichever was the earlier. Respondents never threatened Claimants about anything. What Respondents told Claimants was that Respondents could not pay the freight for June 1999 until the hire under a time charter for another vessel owned by Claimants (which was terminated due to Claimants' own problems) was fairly adjusted. Later, at the request from Claimants, the operation period was extended. However, the sale of the Vessel was not effected and the contact terminated as of the end of August 1999 in accordance with the contract provision. Respondents never resort to abuse of superior power as a charterers' position so as to terminate the Charter or the operation contract.

DECISION AND REASONING

1. Guarantee of Minimum Hire

The certificate of guarantee by Respondents stipulates monthly hire rate at Yen 18,000,000 but never clearly states this as a minimum monthly guarantee for the period of 16 years as alleged by Claimants. In addition, another certificate of guarantee by Respondents later drafted for submission to the state-run co-owner contains a provision for monthly hire rate at Yen 17,000,000 for the first charter year. It is fairly recognised that the parties would normally agree specifically if it was the intention to have a minimum guarantee of monthly hire over the period of as long as 16 years. On the other hand, the Charter only provides that the monthly hire rate may be renewed ever year and there are no other evidence submitted to support the contention of Claimants that the minimum guarantee existed. Accordingly, the Arbitrators hold that an agreement to guarantee monthly hire at Yen 18,000,000 as a minimum never existed.

2. Overseas Sale of Vessel and Termination of Charter

It is recognised that, in the conferences held in June 1998 for negotiating hire rates for fiscal 1998, Claimants and Respondents exchanged views on a possible sale of the Vessel to overseas concerns. However, Claimants only complained that they had no way but to

try to sell the Vessel if Respondents continued to insist on a further reduction in hire rates. In fact, no negotiations were in progress to sell the Vessel at that time. When Claimants actually tried to sell the Vessel, they did not first get approval from Respondents. On the other hand, on the evidence, Respondents had never requested Claimants to consider selling the Vessel. When the sale of the Vessel finally failed because the buyers did not remit the deposit, Claimants did not submit the acceptance letter of termination signed by Respondents to the state-run co-owner.

Based on the above findings of fact and other evidence, it is recognised that both Claimants and Respondents acted on the precondition that the Charter had been terminated. Therefore, it should be reasonable to hold that an agreement had been reached between Claimants and Respondents to terminate the Charter. Claimants contend that they agreed to terminate the Charter on condition that the sale of the Vessel was to be successful. However, there was no evidence submitted to support their contention and also there is no such customs recognised in coastal trade in Japan. Accordingly, it should be held that the Charter was terminated as at 20 September 1998. The Charter was in substance converted into an operation contract by an addendum dated 1 July 1998. This addendum should also be held to have been terminated together with the Charter as at 20 September 1998. The fact that Respondents voluntarily collaborated to continue operating the Vessel until the end of March 1999 at the request from Claimants, could not prove, without evidence, that the charter period was extended until that time.

3. Operation Contract

On 9 March 1999, Respondents offered to cease operating the Vessel as at 20 April 1999 due to a decline in demand for tonnage. However, upon request from Claimants, they agreed to extend the operation period and both parties entered into an operation contract dated 1 April 1999. The period of the contract was later amended by an addendum "until the end of August or at the date when the sale of the Vessel is effected, whichever is earlier." However, as the sale of the Vessel failed, the operation contract was terminated as at the end of August 1999.

Claimants argue that the conversion of the Charter into the operation contract and the termination of the operation contract were intimidated/coerced by Respondents by an abuse of their dominant position as charterers and therefore that the termination of those contracts was illegal. However, as held above, there was no guarantee by Respondents as to monthly minimum rate. Also there is no evidence before the Arbitrators to support the contention that Respondents coerced Claimants into the operation contract. On the other hand, on the evidence, it is recognised that Claimants thought that the Vessel could be sold at a reasonable price at that time. Moreover, Claimants themselves requested an

extension of the operation period when the sale of the Vessel was unsuccessful and an addendum was entered into to this effect. Based on these findings of fact, it should be unreasonable to hold that the operation contract/addendum were concluded/terminated illegally by coercion/abuse of the dominant position of Respondents. Accordingly, the operation contract of the Vessel was (lawfully) terminated as at the end of August 1999.

4. Particular Situations in Building the Vessel

At the time of the construction of the Vessel, the Authorities, for the purposes of balancing supply and demand, regulated tonnage of general cargo carriers and oil tankers in coastal services by imposing a scheme of "Scrap & Build." Although, special tank vessels such as LPG carriers were excluded from this scheme, the Ministry of Transport (MOT) was careful not to induce over-tonnage in this category as well. Therefore, MOT, through the Authorities, imposed strict criterion for approval of new buildings of these special tankers. Among those criterion were: (1) there must be fixed shippers/cargoes/voyages for the vessel; (2) no additional cargoes can be permitted to carry; (3) the parties must have a long term transportation scheme for the vessel; (4) there must be guarantees by shippers as to shipment and by charterers as to chartering the vessel. In addition, before a vessel built under this scheme can carry other cargoes of the shipper/ cargoes of other shippers or engage in other navigations, a relevant procedure must be observed as instructed by MOT. Above all, if the vessel is to carry cargoes of other shippers, MOT imposed the same strict standards for approval as for new buildings. In short, the owners, charterers and shippers were in principle obliged to maintain the same transportation scheme for the vessel as originally approved at the time of the new building, and even if it was inevitable to change the scheme/shift the vessel to other cargoes/routes, due to circumstances peculiar to shippers/charterers, they were obliged to make utmost efforts to perform their obligations.

The Vessel had been built in this background. The Vessel was an LPG carrier and excluded from the "Scrap & Build" Scheme but, as seen above, guarantees of both shippers and charterers were required. Therefore, the shippers guaranteed to ship cargo over the period of 16 years and the charterers guaranteed to charter the Vessel over the same period. The particular reason why Claimants, Respondents and the shippers agreed to the guarantee for the period of 16 years was that because of the high construction price of the Vessel at that time, they could not have redeemed the cost in a shorter period, say, in 10 years.

5. Compensation for Violation of Good Faith

After the termination of the Charter and also of the subsequent operation contract, the Vessel has been kept moored at a quay in her registry port. As found above, both the

original Charter, which was dated 29 March 1991, and the subsequent operation contract had been terminated on or before the end of August 1999, only halfway through the guaranteed charter period, i.e. 16 years. The Arbitrators deem it proper that Respondents should compensate part of the damage Claimants incurred as a result of termination of the contract, on the grounds of Respondents' fault in violation of the principle of trust and good faith during the course of performance:

As seen above, the Vessel was built as a particular type of tanker with approval from the Authorities under the condition *inter alia* that the shippers and the charterers guarantee shipment/chartering for the period of 16 years. In accordance with this, Claimants and Respondents entered into the Charter which too provides for the charter period of 16 years. Nevertheless, when it became apparent to Respondents that the operational situations of the Vessel would drastically deteriorate due to a projected decline of LPG output by the shippers, Respondents, contrary to the above condition for building and operating the Vessel, strongly persuaded Claimants, halfway through the charter period, to agree to convert the Charter in substance to an operation contract dated 1 July 1998, thereby hedging the risk entirely upon Claimants. In addition, there was no fact found that during the course of performance Respondents had ever tried to negotiate as to the maintenance/improvement of shipment with the shippers, who were responsible for steady shipment as a guarantor. As a result Claimants' earnings sharply dropped so that they had difficulties repaying the cost of construction to the bank, who in turn recommended to Claimants that they try to sell the Vessel overseas. Even if Claimants are greatly to blame in that they tried to sell the Vessel during the charter period without consent from Respondents, in the circumstances in which both parties were placed at that time, it should be apparent that Respondents could easily foresee the conduct of Claimants and even wanted the sale of the Vessel. Therefore, Respondents should rather have collaborated in this respect.

Notwithstanding the above situation, Respondents, taking advantage of Claimants trying to sell the Vessel, terminated the Charter/converted it into a risk-free contract of operation and finally re-deliver the Vessel as at the end of August 1999. On the evidence, Respondents' financial situations must drastically have improved after re-delivery. Furthermore, Respondents contend to the effect that the guarantees as to shipment/charter were solely for the purposes of obtaining approval from the Authorities for new building and that they could terminate the Charter at any time even during the guaranteed period if and when ordinary formalities as to agreement are satisfied. However, those understandings fall foul of the guideline of MOT as to new buildings of tankers of particular types. In those circumstances, it can be said that Respondents, as a party to a bilateral/reciprocal contract, acted against the obligations they owed under the principle

of trust and good faith so as not to damage unduly the interests of the other party. Accordingly, the Arbitrators hold it necessary and equitable for Respondents to compensate part of the damage incurred by Claimants due to termination of the contract as at the end of August 1999.

6. Quantum of Damages

The Arbitrators now move on to the measure of damages. In our view, it is most reasonable to assess the loss incurred by Claimants based on the building cost of the Vessel, as both Claimants and Respondents submitted their building and operation plans of the Vessel based upon redemption of the construction cost (and the Authorities approved this).

At the time of re-delivery of the Vessel at the end of August 1999, she was 8 years old. Therefore, her book value is estimated at Yen 286,000,000 after depreciation at 9% per annum from the original price at Yen 812,500,000 with a minimum remaining value of 10%, as the legal term of life for this particular type of tanker is set at 11 years. The Arbitrators recognise that this redemption system is normally taken in coastal trading business. According to a market research the Arbitrators conducted, the Vessel has a sound value on the second hand market at about Yen 200,000,000 as at November 2000. Therefore, it is reasonably concluded that the discrepancy between the book value and the sound value, i.e. Yen 86,000,000, can be the net loss incurred by Claimants. Now the question is the quantum of damages for which Respondents should be held liable. The Arbitrators deem it appropriate, based on the above findings of fact, that Respondents should compensate Yen 40,000,000 for violation of the principle of trust and good faith between the parties. Accordingly, the Arbitrators hold that the claim of Claimants should be reasonable to the extent of Yen 40,000,000. The Arbitrators hereby award as above after due consideration of the totality of the arguments, the documentary evidence and the hearings.

10 November 2000

Tokyo Maritime Arbitration Commission (TOMAC) of JSE

Arbitrator: Takao Mine

Arbitrator: Keisaku Ebii

Arbitrator: Isao Suzuki



THE “SEA EMPRESS” PROSECUTION

*Nick Greensmith**

One of the most important cases in recent years involving ports, port authorities, pilotage and harbour masters, is the grounding of the Suezmax tanker “SEA EMPRESS” in February 1996 at the entrance to the port of Milford Haven in South West Wales, UK. The grounding resulted in extensive oil pollution and a major salvage operation which was carried out under the terms of a Lloyd’s Open Form (1995) Salvage Agreement by a consortium consisting of Smit Tak, Cory Towage and Klyne Tugs.

The “SEA EMPRESS” casualty led to an unprecedented criminal prosecution brought by the UK’s Environment Agency against the Milford Haven Port Authority and its Harbour Master. The prosecution has highlighted a number of undesirable consequences of invoking the sanctions of the criminal law in the context of a maritime accident involving salvage operations and has led not only to a fundamental review in the UK of the arrangements for harbour pilotage under the Pilotage Act 1987, but also to the development of a Marine Operations Code for Ports.

Over the last 30 years or so, protection of the environment against the risk of pollution from ships has featured prominently on the agendas of governments around the world and has been considered in detail by the IMO. There has been increased public awareness of the risks involved and increased public concern about the effects of maritime pollution on the environment.

Casualties like the “TORREY CANYON” (1967), the “AMOCO CADIZ” (1978), the “EXXON VALDEZ” (1989), “AEGEAN SEA” (1992), “BRAER” (1993), “SEA EMPRESS” (1996), “NAKHODKA” (1997) and most recently the “ERIKA” have also played their part in ensuring that maritime pollution from major tanker accidents has held the spotlight even though accidental and deliberate spills of ships’ bunkers and engine oils result in far more oil entering the marine environment on a day-to-day basis.

* The Author is a Solicitor and Partner in the international law firm of Clyde & Co, specialising in the investigation and conduct of a wide range of marine casualty cases, in particular collisions, salvage, total loss, wreck removal, general average, towage and ship repair disputes. This paper is based upon a presentation given by the Author to the International Harbour Masters’ Association 2nd Biennial Congress in Dubai in April/May 2000. For further information on this topic, he can be contacted on tel: 01483 55 55 55; fax: 01483 56 73 30; e-mail: nick.greensmith@clyde.co.uk.

The "Sea Empress" Prosecution

In recent years there have also been a series of cases around the world involving oil spills, with shipping companies and mariners increasingly finding themselves facing criminal prosecutions:

- in connection with the "EXXON VALDEZ" oil spill in Alaska, Exxon was fined US\$150 million for violations of three US statutes, two of which involved strict liability.
- following a collision in the Singapore Straits between the VLCC "ORAPIN GLOBAL" and the Suezmax tanker "EVOIKOS" in October 1997 which resulted in Singapore's largest ever oil spill, the Masters of both vessels ended up serving jail sentences in Singapore.
- in February 1997, the 89,427 dwt "NISSOS AMORGOS" ran aground in Venezuela's Maracaibo Channel spilling 4,000 tonnes of heavy crude oil. The Greek Master of the vessel was subsequently charged under the Venezuelan criminal code with causing pollution contrary to various environmental laws leaving him open to a US\$25,000 fine and up to 3 years in prison.

There are many other examples that you will be familiar with.

The "SEA EMPRESS" Prosecution

It is against this general background that it is interesting to look at the grounding of the "SEA EMPRESS" at the entrance to the port of Milford Haven in February 1996 and the subsequent criminal prosecution which was brought by the UK's Environment Agency against Milford Haven Port Authority and its Harbour Master, Captain Andrews, in connection with the resulting pollution.

Both Milford Haven Port Authority and Captain Andrews, faced charges based, firstly, upon the common law offence of public nuisance and, secondly, contravention of section 85(1) of the Water Resources Act 1991.

Public Nuisance

Under English law, public nuisance is both a criminal offence and a tort giving rise to potential civil liability. It is committed by any person who

- (a) does any act not warranted or justified by law, or
- (b) omits to discharge a legal duty, if the effect of the act or omission is to endanger the life, health, property, morals or comfort of the public, or to obstruct the public in the exercise or enjoyment of rights common to all her Majesty's subjects.

The traditional wording of the charge in a maritime context would normally refer to “interfering with the convenience and comfort of Her Majesty’s subjects, endangering the marine and coastal environment and posing a danger to public safety” and this was the wording adopted in the “SEA EMPRESS” indictment. It has been decided¹ that the defendant does not have to have actual knowledge that the nuisance would be created - it is enough that he ought to have known (in the sense that the means of knowledge was available to him) there was a real risk that a nuisance would be caused by his activity.

In other words, the offence is one of negligence which requires the prosecution (or the plaintiff in a civil action) to prove fault. This is in contrast with the type of strict liability offence which arises under section 85 of the Water Resources Act 1991.

Section 85(1) Water Resources Act 1991

This provides that:-

“A person contravenes this Section if he causes or knowingly permits any poisonous, noxious or polluting matter or any solid waste matter to enter any controlled waters.”

Accordingly, for the offence under section 85(1) to be committed it must be proved beyond reasonable doubt that the relevant defendant:-

- (a) causes or knowingly permits;
- (b) polluting matter;
- (c) to enter controlled waters.

Controlled waters are defined by s.104 of the Act as including the waters which extend seaward for 3 miles from the baselines from which the breadth of the territorial sea adjacent to England and Wales is measured; and coastal waters within the area which extends landward from those baselines as far as the limit of the highest tide.

There was no doubt in the case of the “SEA EMPRESS” that polluting matter had entered controlled waters. The “SEA EMPRESS” was carrying a cargo of about 130,000 m/t of Forties light crude oil when she went aground. By the time she was eventually salvaged and brought alongside the Herbrandston jetty in Milford Haven, she had lost to sea approximately 70,000 m/t of oil. The offence therefore turns upon the meaning of the words “causes or knowingly permits”.

¹ *R v Shorrock* [1994] QB 279.

A person convicted on indictment of the offence under section 85 is liable to imprisonment for up to two years, or an unlimited fine, or both.

Empress Car Case

The leading case on section 85(1) of the Water Resources Act 1991 is the decision of the House of Lords in *Empress Car Company (Abertillery) Ltd -v- National Rivers Authority*.² The facts of the case were as follows. One evening in March 1995 an unknown person opened an unlocked tap on a tank of diesel oil at the premises of the Empress Car Company in Abertillery. Diesel flowed out of the tank and through an extension pipe to a drum which the company had placed outside the protective bund surrounding the tank. The drum overflowed, causing the diesel to spill onto the ground and into a storm drain which discharged into a local river.

Officials of the National Rivers Authority (NRA), now the Environment Agency, detected the diesel in the river and traced it back to the car company's premises. Although the NRA failed to identify the vandal who opened the tap, it successfully prosecuted the Empress Car Company for causing a pollutant to enter controlled waters in breach of section 85(1) of the Water Resources Act 1991. The company was fined £3,000 with costs of £3,900 in the Magistrates Court. There then followed a series of largely unsuccessful appeals by the car company ending up with a final appeal to the House of Lords where the car company submitted that:

- the cause of the escape was not the way in which the diesel was kept, but the opening of the tap by a stranger; and
- "causing" for the purposes of section 85(1) required a positive act, and the escape had not been caused by any such act on the part of the car company.

Causation

The House of Lords held that a person caused pollutant to enter controlled waters within the meaning of section 85(1) of the 1991 Act if he actively did something, with or without the occurrence of other factors, which produced a situation in which the polluting matter could escape, even though what he did was not the immediate cause of the pollution. In other words, a prosecution in respect of "causing pollution" under section 85(1) involves a two stage enquiry:-

(1) Did the defendant do something?

² [1998] 1 ALL ER 481.

(2) If so, did that activity cause pollution?

What constitutes “doing something”? The House of Lords were at pains to emphasize that whilst there must be a positive act, the act need not be an immediate cause of the pollution. Thus, maintaining lagoons of effluent or operating a municipal sewage system would be a sufficient act (even though the immediate cause of the pollution may be a latent defect or the intervention of a third party).

If the defendant did something which produced a situation in which polluting matter could escape, but a necessary condition of the actual escape which happened was also the act of a third party (such as a vandal) or a natural event, the defendant’s act may still be regarded as having caused the pollution provided that the act of the third party (or the natural event) was not something extraordinary.

In upholding the conviction, Lord Hoffman noted that a breach of section 85(1) is a strict liability offence which does not require the prosecution to prove that the defendant was negligent and/or at fault. The only defence is that provided under s.89 of the Act which is discussed below. Lord Hoffman characterised the necessary act as

“doing something which produced a situation in which the polluting matter could escape”.

In his speech, Lord Clyde went further and put the matter in this way:-

“The maintaining of a system, the carrying on of an enterprise, and the management of a going concern may each constitute causative factors

In the light of this analysis of what acts are sufficient to constitute causative factors, it is not difficult to identify a number of scenarios that could arise in the day to day operations of a port which would be sufficient to constitute the offence under section 85 of the Water Resources Act, without there having been any fault or negligence by the port authority or its harbour master. Shipowners and others also face the same dilemma.

Statutory Defence

The only statutory defence available to the charge under section 85 of the Water Resources Act 1991 is that provided under s.89 of the Act which states:-

“A person shall not be guilty of an offence under section 85 in respect of the entry of any matter into any waters or any discharge made if:

(a) the entry is caused or permitted or the discharge is made, in an

- emergency, in order to avoid danger to life and health;
- (b) that person takes all such steps as are reasonably practical in the circumstances of minimising the extent of the entry or discharge and/or its polluting effects; and
 - (c) particulars of the entry or discharge are furnished to the Authority [now the Environment Agency] as soon as reasonably practicable after the entry occurs."

The defence is only available if all three conditions are satisfied.

In the "SEA EMPRESS" incident, even though paragraphs (b) and (c) could be met, paragraph (a) is only available if the actions are taken in order to avoid danger to life or health. This would have no application to the oil which was initially lost from the "SEA EMPRESS" as a result of the original grounding, neither would it apply in relation to the subsequent pollution which occurred during the conduct of the salvage operation because the salvage operation was focused on salvaging the ship and cargo and minimising damage to the environment, not avoiding danger to life or health.

Strict Liability Regime

In summary, section 85(1) of the Water Resources Act 1991 creates a regime of strict liability, subject only to proof of causation and the statutory defence under section 89. Having regard to the House of Lords' ruling in *Empress Car*, causation in this context does not involve proving that the act or omission complained of was the only, or indeed the proximate, or dominant cause.

In these circumstances, Milford Haven Port Authority pleaded guilty to the statutory offence under section 85(1) of the Water Resources Act 1991. At the hearing which was held in Cardiff Crown Court in January 1999, the case was presented by the Environment Agency on the basis of strict liability and was only admitted by the Port Authority on that basis. The case was put on the footing that the Port Authority maintained a system for entry into the port and that the maintaining of a system or the carrying on of an enterprise were specifically identified by Lord Clyde in *Empress Car* as potentially constituting causative factors. It was therefore accepted that the Port Authority put the pilot in a position where he could, and did, make an error of navigation which led to the grounding of the vessel and the pollution. Tracking the language of Lord Hoffman in *Empress Car*, neither the grounding nor the discharge of oil, either initially or during the salvage attempts, could constitute an extraordinary or abnormal event.

At the trial in Cardiff, the Environment Agency did not pursue the fault based charge of public nuisance against Milford Haven Port Authority and, furthermore, they presented no evidence against the harbour master on any of the three counts in the indictment which related specifically to him and which essentially mirrored the charges against the Authority. The harbour master was formally found not guilty and the Judge ordered that his costs should be paid from Central Government Funds.

Following the Port Authority's plea of guilty to the statutory offence under section 85, the trial Judge imposed a fine of £4 million plus costs upon Milford Haven Port Authority whilst accepting that he was passing a sentence for an offence of strict liability in respect of which there had been no admission of fault and no finding of negligence.³

The Port Authority's appeal against the level of the fine came before the Court of Appeal in March 2000⁴ and, as a result, the fine was drastically reduced from £4 million to £750,000. The Court of Appeal accepted that the fine of £4 million was "manifestly excessive" for the following reasons:-

- (1) firstly, it didn't fairly reflect the fact that the plea of guilty had been tendered by the Port Authority and accepted both by the Prosecution and the Judge on a strict liability basis without admission of fault;
- (2) secondly, it didn't give sufficient credit to the Port Authority for the plea of guilty which saved very substantial costs and avoided a trial which it had been estimated would last anything between 3 and 6 months and which the Judge described as being possibly the most unsuitable case for a jury trial he had ever seen;
- (3) thirdly, it didn't properly reflect the public trust status of the Authority whose profits are only used to promote the safe development of the Haven for the benefit of the public;
- (4) fourthly, it didn't fairly reflect the impact which a fine of £4 million was likely to have on the financial security of the Authority.

Nevertheless, the imposition of a £750,000 fine (more than US\$1 million) for a strict liability offence in a case where there has been no finding or acceptance of negligence, demonstrates that the English Courts will deal very severely with environmental offences.

³ *Environment Agency v Milford Haven Port Authority and Andrews* (Cardiff Crown Court) [1999] 1 Lloyd's Rep 673.

⁴ *R v Milford Haven Port Authority* - Court of Appeal (Criminal Division) - March 2000 (not yet reported).

Implications of the "SEA EMPRESS" Prosecution

This was an unprecedented prosecution under English law and has serious implications for the shipping and ports industry.

The legislation as it stands at the moment, as interpreted and explained by the House of Lords in *Empress Car*, results in a situation where port authorities and harbour masters, who are vested with responsibility for establishing systems to facilitate the safe movement of ships in harbours, run the risk of finding themselves exposed to a criminal prosecution if a vessel within their area of jurisdiction has an accident and pollution results, whether or not the port authority/harbour master has been guilty of fault or negligence. Shipowners and others are also exposed to prosecution under the Act.

Lord Donaldson's Review

The Environment Agency's decision to invoke the Water Resources Act for the first time in a maritime context in the case of the "SEA EMPRESS", has been severely criticised by Lord Donaldson.⁵ Lord Donaldson has questioned whether the Water Resources Act was ever intended to apply to pollution from a maritime source in circumstances where the internationally recognised MARPOL standards and legislation cover the situation. Lord Donaldson has suggested that it is more likely that the Act was intended to apply exclusively to pollution from a land based source which affects controlled waters eg sewage outfalls or the escape of polluting matter from factories and other land based sources which end up in controlled waters.

One of the principal concerns identified by Lord Donaldson in his report relates to the highly undesirable consequences of invoking the sanctions of the criminal law in the context of salvage operations. The outcome of any major salvage operation is necessarily uncertain and involves many risks. Decisions have to be taken at short notice and very often in the most difficult of circumstances. In the context of tanker salvage operations, it is not unusual for those involved in the operation to be faced with a situation where the best way of salvaging the ship and her cargo and avoiding potentially far greater pollution is to press up damaged oil tanks in order to refloat the vessel, in the knowledge that this action will, in the short term, cause additional pollution. One of the serious problems created by the precedent of using the Water Resources Act in a maritime context is that pollution caused by salvors acting in this way constitutes a criminal offence under section

⁵ The report of Lord Donaldson's Review of Salvage and Intervention and their Command and Control.

85. There is no responder immunity from prosecution as things stand at present.

Lord Donaldson's report goes on to point out that if the Secretary of State's representative (SOSREP as he is now known) were to order this course of action then he could be prosecuted and so could the salvor if he complied with the order. On the other hand if the salvor declined to comply with the order, he would then be exposed to the risk of being prosecuted by SOSREP under the Merchant Shipping Acts for refusing to obey his orders - catch 22!

As a result of Lord Donaldson's recommendations, the Government has undertaken to review the legislation and this process is now underway.

Marine Accident Investigation Branch

A further problem created by the use of criminal sanctions in such cases is that the threat of prosecution immediately puts people on their guard and inevitably results in them being less forthcoming and less cooperative when asked to assist in an investigation by the Marine Accident Investigation Branch. The purpose of an MAIB investigation is not to allocate or apportion blame or liability for a maritime accident. The fundamental purpose of an MAIB investigation into an accident is "to determine its circumstances and the causes with the aim of improving the safety of life at sea and the avoidance of accidents in the future". The MAIB clearly have a valuable role to play in this regard but it is one which will undoubtedly be made more difficult as long as the threat of criminal prosecution lingers over those involved in an accident.

The powers under which the MAIB operate have recently been revised.⁶ One of the fears which has been expressed about the amended rules is that they may make it easier for owners, mariners and others to be prosecuted by the Maritime and Coastguard Agency after they have given evidence to an MAIB Inspector. Whilst the new regulations stress the independence of the MAIB from the Maritime and Coastguard Agency, it remains to be seen how these agencies and SOSREP will interact with each other in future cases.

The International Management Code for the Safe Operation of Ships and for Pollution Prevention

The ISM Code was adopted by the IMO in 1993 and incorporated as part of the SOLAS

⁶ The Merchant Shipping (Accident Reporting and Investigation) Regulations 1999.

Convention. In the UK it became mandatory for passenger ships, high speed vessels, tankers, bulk carriers and gas carriers of more than 500 tons gross from 1st July 1998 and will be extended to all cargo ships from 1st July 2002. The Code lays down an international standard for the safe management and operation of ships and for pollution prevention. Essentially it requires shipowners to describe what their safety management systems consist of, to implement those systems and, finally, be able to produce documents to verify implementation of the systems. The Code also introduces the requirement that a "Designated Person" be appointed with responsibility for monitoring the safety and pollution prevention aspects of the operation of each ship.

The advent of the Code, in combination with a number of other actual and proposed developments in English criminal law, is likely to have an important impact in widening the potential criminal law liabilities of shipping companies and individuals within those companies. The Code must already now be regarded as the benchmark against which the conduct of all shipping companies will come to be judged whenever managerial standards and faults have to be examined by the Courts. The requirement, created by the Code, of identifying a designated person with specific responsibility for safety may also increase the likelihood of a Court either equating the acts (or omissions) of that person with the company, or finding that such person assumed a personal responsibility for safety. This will increase the vulnerability of both to a criminal prosecution in certain circumstances.

Article 3.2 of the Code requires the owners/managers to:

"define and document the responsibility, authority and interrelation of all personnel who manage, perform and verify work relating to and affecting safety and pollution prevention."

Clearly any individuals who are identified under this provision of the Code may also find that they are treated as having assumed a personal responsibility for safety and thus be equally vulnerable to prosecution in appropriate cases.

Port Marine Safety Code

The "SEA EMPRESS" oil spill also prompted the Department of the Environment Transport and the Regions to conduct a thorough review of the arrangements for harbour pilotage in the UK and this review has led in turn to the development of a Port Marine Safety Code which was published in March 2000 and covers all port safety functions. It is intended to serve as a national standard for all aspects of marine safety.

The Code for ports closely resembles the formula for more transparent management arrangements which was adopted in the ISM Code and it does so by adopting the principle that ports must describe what their safety management systems consist of, they must implement those systems and they must be able to produce documents to verify implementation of the systems.

The Port Marine Safety Code comes complete with its own warning which states that:-

“Harbour Authorities **must** apply these principles if they are to discharge their legal duties and statutory powers to the national standard that the Code establishes.”

It goes on to say that:-

“the Code is not optional.”

The final consultation draft of the Code went further by saying that “Non-compliant authorities can expect to be held to account” and although those words did not appear in the final document, the message is nevertheless clear - Port Authorities ignore the Code at their peril.

As with the ISM Code, individuals who are identified under the Port Marine Safety Code as having particular responsibilities in relation to safety and pollution prevention eg Harbour Masters, may find that they are treated as having assumed a personal responsibility for safety which could render them vulnerable to a prosecution in certain circumstances.

Conclusions

There is certainly a growing public perception that protection and preservation of the environment is an issue which is of crucial importance to the future of mankind. As a result of this, international organisations, governments and other public bodies are pushing through legislation designed to achieve the objective of protecting the environment and generally adopting the principle that “the polluter pays” for the environmental damage for which he is responsible. There is a widely held belief that the introduction of strict liability offences is necessary to achieve that objective. However, strict liability offences are not always appropriate and the “SEA EMPRESS” prosecution has certainly highlighted a number of undesirable consequences of invoking the sanctions of the criminal law in the context of a maritime accident involving salvage operations.

A spokesman for the Environment Agency which brought the prosecution stated at a

The "Sea Empress" Prosecution

recent conference that the Agency regards its role as "not merely as a custodian of the environment; it is not merely a regulator. Its enforcement and investigative powers make the Environment Agency the environment's principal policeman". It must at least be questionable whether the wider public interest can properly be safeguarded by granting such extensive powers to a single agency.



UBERRIMAE FIDEI UNDER CHINESE LAW

*S M Chen**

Introduction

Insurance contracts are said to be *uberrimae fidei* (of the utmost good faith). The doctrine is defined in Section 17 of Marine Insurance Act 1906 (“MIA”) under English law, where the doctrine of it applies to non-marine insurance contracts as well. The issue of utmost good faith has been subject to widespread criticism over a long period of time for its absurdly wide range of application by the courts as well as by the insurance industry. The recent decisions seemed to have changed the law of it, however, there still exist a lot of defects in this area under English law. In contrast, China’s laws seemed less to cover this area until the promulgation of the Maritime Code of the People’s Republic of China (“CMC”) in 1992 where the law of marine insurance is codified therein. The Law of Insurance of the People’s Republic of China (“CIL”) followed and came into effect on October 1, 1995. Before the promulgation of CMC and CIL, the General Principles of Civil Law of the People’s Republic of China (“CCL”) and the Law of Economic Contract of the People’s Republic of China (“ECL” and now replaced by Contract Law of PRC) regulating the basic rules of civil activity when concluding a contract applied to all insurance disputes. Those rules still apply when there are no corresponding stipulations in the CMC and CIL in relation to the insurance disputes. Case precedent is not part of Chinese legal system, however, relevant regulations promulgated by the People’s Supreme Court which deal with the particular issues arising from particular disputes in the insurance contracts will prevail to apply.

The doctrine of *uberrimae fidei* is defined both in CMC and CIL. However, Chinese maritime courts experience few trials in relation to disputes over this doctrine. Interpretation of this doctrine has not been reported and hence ambiguities remain therein. This article is also attempted to briefly examine the basic principle of *uberrimae fidei* and the latest developments under English law. In the meantime, commenting on how to apply this doctrine under Chinese law:-

How the Doctrine of *Uberrimae Fidei* Applies Under Chinese Law

A basic rule in Chinese law is to require either party to conduct in good faith in all civil

* Chen San Ming & Solicitors. Tel: +86-591-367-2261; Fax: +86-591-363-4926.

activity including when coming to conclude a contract. A general term of good faith codified in Article 4 of CCL, states that 'all civil activity should be pursuant to ... and in good faith'. Similarly, a corresponding definition can be found in the recently promulgated insurance law.¹ It is submitted that the duty of good faith exists among either party at the moment they begin to negotiate the contractual terms. Unless a fraudulent act of either party have led the other party to make a decision contrary to his willingness, the other party is not entitled to repudiate the contract; fraud conducted by either party makes the contract void *ab initio*. Breach of such duty is merely arising from a fraudulent act of either party. Corresponding provisions are also provided in the Article 7.2 of ECL and Article 58 (2) of CCL. This is a basic duty when concluding a contract under Chinese law and it should be distinguishable from the doctrine of utmost of good faith which is widely adopted in the law of insurance. 'Utmost good faith' is not worded in Chinese laws including CMC. It seems that Article 7.2 of ECL and Article 58(2) of CCL are more appropriate to deal with fraud rather than breach of duty of good faith in an ordinary contract which depends upon fraud by either party whether it has led to the other party making a decision contrary to his willingness. The law should have put stress on forbidding the fraudulent acts. The legal effect of breach of good faith and of a fraud is the same. Chinese law, however, is still ambiguous as to what a degree of an intentional act may constitute a fraud. It is to be noted that the doctrine of good faith is not broadly tested in courts. Conversely, Chinese courts tend to examine fraud in tort rather than taking into account breach of the duty of good faith.

Unlike English law, the law of marine insurance in China is mainly codified into CMC, i.e. Chapter XII - Contract of Marine Insurance. Though the utmost good faith is not worded therein, it appears that Article 222 of CMC should be construed as a definition of disclosure and representation of the assured and the wording is almost similar to that in Marine Insurance Act 1906: 'Before the contract is concluded, the insured shall truthfully inform the insurer of the material circumstances which the insured has knowledge of or ought to have knowledge of in his ordinary business practice and which may have a bearing on the insurer in deciding the premium or whether he agrees to insure or not...'² It appears from Article 222 of CMC the duty of disclosure arises before the contract is concluded and the test of materiality lies on whether the circumstances undisclosed may have an impact on the insurer in fixing the premium and deciding whether to take the risk. The definition of materiality has not been interpreted in court. Similarly, a number of issues in this respect shall likely be debated in courts. Under English law, what a

¹ Article 4, CIL.

² Article 222, CMC.

circumstance is material is a question of fact and has been subject to a lot of interpretation in courts. The words 'truthfully inform' denote a meaning of disclosure as well as representation according to Article 222 of CMC. No separate definition of representation is codified therein. If breach of utmost of good faith depends on non-disclosure and misrepresentation, then the insured would never have a duty of utmost good faith under Chinese law. This is a significant difference from English law. Under English law, duty of utmost good faith is imposed on the assured as well as the insurer. 'If the utmost good faith is not observed by either party, the contract may be avoided by the other party.'³ Furthermore, the duty of utmost good faith may exist throughout the contract under English law.⁴ Thus, as can be inferred from the provision of CMC that the insured never has a duty of disclosure before a contract is concluded.

In contrast to English law the legal effect of that duty is almost different. Under Article 223 of CMC, the legal effect of that duty is classified depending on whether the insured's intentional act is observed. 'Upon failure of the insured to truthfully inform the insurer of the material circumstances set out in Article 222 of this Code due to his intentional act, the insurer has the right to terminate the contract without refunding the premium. The insurer shall not be liable for any loss arising from the perils insured against before the contract is terminated. If, not due to an intentional act, the assured did not truthfully inform the insurer of the material circumstances set out in Article 222 of this Code, the insurer has the right to terminate the contract or to demand a corresponding increase in the premium. In case the contract is terminated by the insurer, the insurer shall be liable for the loss arising from the perils insured against which occurred prior to the termination of the contract, except where the material circumstances uninformed or wrongly informed have an impact on the occurrence of such perils.'⁵ CIL has the same definition of that effect.⁶ It seems very odd that the insurer is entitled to avoid the contract, but, at the same time, he should still be liable for the losses occurring prior to the termination of contract in the event of undisclosed of material fact by the assured on the ground of negligence or innocence unless where the undisclosed fact has an impact on the occurrence of perils. The effect of that is that the insurer could merely cancel the contract. He may affirm the policy on an additional premium if he wishes. Yet he is not entitled to deny the liability prior to the termination of contract. This is completely different from the English law. In practice, breach of utmost good faith arises when the losses occurring, where the insurer seeks to deny the liability. Assuming the insurer do not avoid the contract no matter what

³ Section 17, Marine Insurance Act 1906.

⁴ *The Litsion Pride* [1985] 1 Lloyd's Rep. 437.

⁵ Article 223, CMC.

⁶ Article 16, CIL.

facts the assured undisclosed, the commercial effect is the same, as he is, in any event, liable for the loss under the cover of policy unless he could prove that the undisclosed fact has an impact on the occurrence of such perils.

The duty of disclosure, as defined by the Code, requires, on one hand, the assured to truthfully inform the material circumstance which may have an impact on the insurer in fixing the premium or deciding whether he would take the risk and, on the other hand, it is material to the occurrence of perils. It should have nothing to do with the occurrence of perils? There is no causal link to the non-disclosure under English law. How could an undisclosed fact link to the occurrence of perils? It is more appropriate to say that the undisclosed facts have an impact on the insurer's mind of processing in deciding whether he would take the risk or not and breach of that would render the policy void. It is ambiguous whether breach of utmost good faith lies in the materiality of undisclosed facts or the undisclosed facts which are material to the occurrence of perils. Alternatively, the materiality would be decided on whether the undisclosed fact is material to the occurrence of perils. Accordingly, a material circumstance which is not disclosed on ground of negligence or innocence of the assured is of no practical effect to the assured under Article 223 of CMC unless the undisclosed fact has a material impact on the happening of perils. In other word, the law is not so much considering about the legal effect of innocent or negligent non-disclosure made by the assured. In the event of fraud, a fraudulent act conducted by the assured who intends to deceive the insurer would render the contract void under CCL and ECL. Whatever a statutory purpose is in the law of marine insurance that requires the assured to truthfully disclose the material circumstance before the contract is concluded, whereas non-disclosure on ground of innocence or negligence simply entitles the insurer to avoid the contract but he is still liable for the losses occurred prior to such avoidance unless the undisclosed fact is material to the happening of perils. The law may impose a huge duty on the insurer and thus protect the assured's interest. In fact, this complies with the provision in CIL which states that the construction of insurance contract by courts should be made favourably to the assured when the disputes arise.⁷ Thus, the law may deprive us of the real doctrine of utmost good faith. Question may arise whether there is a duty of utmost good faith under Chinese law.

In addition the law is silent as to the duty of disclosure and representation made by the broker or the agent of the assured. What is the legal effect if the agent does not disclose the material fact on ground of negligence or innocence? Should he disclose all the facts which he knows or ought to know in the ordinary course of business or simply disclose

⁷ Article 30, CIL.

what have been told? Could a non-disclosure made intentionally by the agent discharge the obligation of the duty of disclosure by the assured under CMC? Chinese laws deem the legal effect of an agent's act the same as that of the assured's, except where the agent effects the policy without the prior authority of the assured. This confers that the fact which is known to the agent or the broker but is not known to the assured in the ordinary course of business need not to be disclosed by the agent or broker. The legal effect under Chinese law would be the same if the policy is made by an agent or made by the assured. That would be a little bit different to the English law. The assured, however, could make a claim against the agent based upon his faults.

In a recent case involving a breach of utmost good faith in China, *the Fuda*,⁸ the High People's Court, in the absence of discussion of material circumstances undisclosed, awarded the assured on the basis that breach of duty of utmost good faith should depend on whether non-disclosure by the assured damaged the interests of the insurer. The appellant, as the assured, concluded a hull insurance contract with the respondent insurer in his own name, where, actually, the subject matter insured was not owned by the appellant, but registered in the fleet of his name and the appellant took charge of the operation of the vessel under an agreement of cooperation between the shipowner and the appellant. Afterwards, the M/V Fuda grounded in port of QuanZhou due to negligence of crew and finally went sunk there. The insurer contended that there is a non-disclosure of material fact of the real shipowner and therefore denied the liability for the total loss of the vessel. Tinjin Maritime Court awarded the insurer on the ground that the assured breached the duty of utmost good faith for non-disclosure of a material fact. When the case was appealed to the higher court, the appeal court revised the decision. Unfortunately, the appeal court did not interpret the definition of utmost good faith and what constituted a material fact. It is very ambiguous whether the appeal court merely deemed breach of utmost good faith on the basis that the interests of the insurer have been damaged by the conduct of the assured. No legal basis could be cited from the reported case.

The breach of utmost good faith is mostly brought by the insurer who intends to deny the liability when the subject matter has become a total loss. How would the doctrine of utmost good faith apply under Chinese law? At the very least, the test of materiality should be considered. Before bringing a pleading of breach of utmost good faith, the insurer should, first of all, establish the circumstance undisclosed is a material fact. Whether a circumstance is material is a question of fact. It is hard to elaborate under

⁸ The People's Court News, 07/12/1996.

Chinese law in this regard and no authority can be cited from the reported cases. The difficulties may arise as to how the undisclosed fact has an impact on the occurrence of perils if there is an innocent non-disclosure. Only had the insurer proved so, then he could deny the liability if a loss has occurred. However, proof of materiality that the fact undisclosed has an impact in fixing the premium or deciding whether to take the risk or not is not enough. Whether an intentional act has the same meaning of a fraudulent act is ambiguous. It seems an intentional non-disclosure is the one fraudulently made by the assured who tries to deceive the insurer to take the risk or reduce the premium. The meaning of an intentional act is not mentioned in common law. It is suggested that an intentional act should be fraudulent in the law of insurance. It is the duty of the assured to disclose the material circumstance and only when a non-disclosure is observed by the insurer, could he establish a breach of utmost good faith. Fraud makes the contract void from the beginning under Chinese law. After all, the doctrine of utmost good faith may apply only when the assured fails to disclose all the material circumstances which he know or he is deemed to know in the ordinary course of business if not due to his intentional act. It should not be applicable when there is a fraudulent non-disclosure.

Conclusion

In conclusion the law of *uberrimae fidei* is not well established under Chinese law and still, there are a number of issues which need to be decided in courts. The law of *uberrimae fidei* in China seeks to protect the interests of the assured and imposes a huge burden upon the insurer to examine the material circumstances. The duty of utmost good faith seems to be uneasy to be breached as the insurer need to prove the materiality of fact and in the meantime prove the causal link of the undisclosed fact to the occurrence of perils as well. It seems unfair to the insurer and this would inevitably depart from the real doctrine of utmost good faith adopted in the law of insurance. Furthermore, the wording in relation to the duty of utmost good faith appears to be simple and therefore ambiguous. ■