WaveLength

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Congratulatory Remarks Delivered by Mr. Takao Kusakari Celebratory Event of the Japan Association of Arbitrators

To celebrate the approval from the Minister of Justice on December 5, 2005 for the establishment of the Japan Association of Arbitrators as an autonomous juridical person under the Japanese Civil Code, a Celebratory Event and Party was held at the Bar Association Building on March 1, 2006.

The Event was honored by the presence and remarks of the Minister of Justice, Seiken Sugiura as a guest, as well as to receive congratulatory remarks from the Vice Chairman of the Nippon Keidanren, Takao Kusakari. Mr. Richard A. Eastman, representing the Chartered Institute of Arbitrators, delivered the commemoration lecture entitled "Current Conditions and Future Outlook for the Training of Arbitrators in the United Kingdom – Learning from the History and Experience of the Chartered Institute of Arbitrators".

The text of the congratulatory remarks delivered by Takao Kusakari, who is also Chairman of NYK Line, follows.

My name is Takao Kusakari, Vice Chairman of the Nippon Keidaren. I serve as the chairman of a shipping company called Nippon Yusen Kabushiki Kaisha (NYK Line). I am honored to be given the opportunity to deliver congratulatory remarks at the Celebratory Event and Party commemorating the establishment of the Japan Association of Arbitrators as an autonomous juridical person under the Japanese Civil Code and of "The Day of Arbitration".

I would first like to express my sincere congratulations on the establishment of the Japan Association of Arbitrators as an autonomous juridical person under the Japanese Civil Code. In light of the current trend toward the rationalization and review of public corporations, the Minister of Justice's approval of autonomous juridical person status speaks not only to the importance placed on the training of arbitrators and the research of arbitration law in Japan, but also to the hard work of the Ministry of Justice and the Members of the Association.

Because the shipping industry in which I work has involved competition with the shipping companies from all over the world through the ages, it has become common practice to use contracts containing arbitral clauses and to settle conflicts through the use

of arbitration. Japan's oldest arbitration organization, The Japan Shipping Exchange has been engaged in arbitration for 80 years, but use of arbitration has not become common practice in most industries.

Generally speaking, although I believe that there will be times when there is no choice but to hold an arbitration in a jurisdiction other than the primary jurisdiction of the parties involved, I still believe that the top management of companies must recognize that place of arbitration is an important term of a contract, just as price and delivery dates are important terms. Also, even in today's world, some persons in management may not fully understand the arbitration process and think that arbitration involves the "summing of both parties' claims and dividing by 2", causing them to believe that the company's important issues should be resolved in a court rather than through arbitration. Because it is not easy to enforce court rulings overseas but it is possible to enforce arbitral awards in many countries, I believe that resolution of conflicts through arbitration is ideal, particular in light of the recent expansion into China of Japanese business. On the occasion of the establishment of the Japan Association of Arbitrators as an autonomous juridical person, my sincere hope is both for an increase in arbitrators and the development of arbitration in Japan, through the efforts of the Association to promote arbitration.

I also commend the designation of March 1 of each year as "The Day of Arbitration", reflecting the March 1, 2004 effective date of the Arbitration Law of Japan.

Freight Forwarders – Can it be a Shipper?

*Yosuke Tanaka**

1. Introduction

Freight forwarders are indispensable entities in the modern international carriage of goods. However, their legal status has not been sufficiently discussed nor explained clearly. In some arrangement of the transportation of goods, they act as a shipper's agent, but in other aspects of trades, they act as a carrier and issue their B/Ls. In some combined transportations, they act as a combined transport operator who negotiates a single contract for multimodal transport, including carriage by rail, road and sea[1].

Recently, a Japanese court held, with respect to the legal status of a freight forwarder, that it can be regarded as a shipper itself who should pay for the freight under the B/Ls, in which other corporation was described as a "shipper"[2].

This judgment showed some important understanding by the Japanese court about freight forwarders and suggested some relevant issues relating to their functions, therefore, this report is intended to introduce it to foreigners who are involved in the international transportation.

In the next chapter, the factual background in this case is roughly summarized, and the main reasons held by the judge are also described after the next, for all of which some comments are made in the last chapter.

2. Factual background

(1) The Claimant is one of the biggest Japanese owners of ocean-going vessels, which is described in this case as a company which has operated the liner service between the area of the Far East, including Japan, and Santos in Brazil. The Defendant is also a representative freight forwarder in Japan, which is described as a NVOCC (Non Vessel Operating Common Carrier), which undertakes the carriage of goods from cargo owners, and packs the goods into containers, and asks the carriage to ship-owning companies. The Defendant is also described to have an international network of business in the world.

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1 Wilson, J, *Carriage of Goods by Sea* (4th ed.), 2001, p241

2 Judgment held by Tokyo District Court on 9th April 2004 (cited in "Hanreijiho" No. 1869, p102)

(2) In around May in 1997, the Claimant and the Defendant agreed the freight for the carriage by the liner service from Japan or other countries in the Far East toward Santos in Brazil. They agreed that the Defendant or its subsidiaries or local agents in each country would ask to the Claimant the carriage from each country to Brazil. When the Defendant, its subsidiaries or local agents undertook the carriage from the cargo owners, they issued their B/Ls, which are called in the judgment as "House B/Ls". When the Defendant, subsidiaries or agents requested the carriage to the Claimant, it also issued its B/Ls, which are called as "Master B/Ls". They further agreed that the Claimant should deliver the cargo against the "Master B/Ls" which certified the full payment of the freight.

(3) In some "Master B/Ls" in question, the subsidiaries or local agents of the Defendant were described as a "shipper", and as to the payment of the freight, the remark as "FREIGHT COLLECT" was descried. The payment of freight under those B/Ls was not made but the cargo was released from the custom in Santos, Brazil, to which the Claimant had delivered the cargo.

After the negotiation about the payment of the freight, the Claimant submitted its case to the court in Tokyo, claiming for the freight against the Defendant.

(4) The Defendant argued in the procedure that a "shipper", which is a party to the contract of carriage and owes the liability to pay for the freight, should be identified according to the description on the B/Ls, when the B/Ls were issued for such contract, and that in this case, the "shipper" should be recognized as the subsidiaries or agents, not the Defendant itself, therefore, the claim against the Defendant should be denied.

However, the court regarded the Defendant as the "shipper" in the relationship between the Claimant and upheld its claim according to the reasons as shown in the next chapter.

3. Reasons taken by the court

(1) As the first reason for the Claimant, the court paid its attention to the situation about the freight in the arrangement of carriage which had been conducted by the parties from May in 1997.

The court found as a matter of fact that regarding all of the freight, including for the carriage which the subsidiaries and local agents requested to the Claimant, had been negotiated between the Claimant and the Defendant itself, and such freight had been paid for by the Defendant to the Claimant.

(2) As the second reason, the court held the legal principle about the meaning of the "shipper" in the B/Ls and in the contract of carriage.

The court held that the "shipper" as described in the B/Ls does not always mean the party to the contract who owes the liability to pay for the freight, but means widely the "cargo owner" who sent its cargo to the destination.

Therefore, the court told for this case that the description of the subsidiaries or local agents as the "shipper" in the B/Ls does not prevent the judges from recognizing the Defendant as the parties to the contract of carriage.

(3) As the third reason, the court emphasized the position of the Defendant against its subsidiaries or local agents.

The Defendant argued that the Defendant had not been paid for any fees from its subsidiaries or local agents for the carriage of goods which was requested by subsidiaries or agents, therefore, the Defendant acted only as the agent on behalf of the subsidiaries and local agents when the Defendant negotiated the freight between the Claimant.

However, the court recognized that as the perception of facts, it is not a natural construction to understand that the Defendant which has the international network of business in the world had acted only as the agent for the subsidiaries or local agents.

On the other hand, the court found that it was the employees in the Defendant who actually negotiated the matters with the Claimant when they found the non-payment of the freight for the B/Ls in question.

(4) According to the main reasons as described above, the court held that the Defendant should be regarded as the "shipper" in the contract of carriage and should pay for the freight for the carriage for which the B/Ls in question were issued.

4. Comments

(1) Firstly, it should be noted that the judgment clearly held the status of the freight forwarder as a "shipper" which owes the liability to pay for the freight.

This recognition of the status is important because it shows one aspect of freight forwarders in the situation in Japan where such status has not been sufficiently discussed for a long time as stated in the above chapter.

(2) Secondly, it should be considered whether the reason taken by the court about the meaning of a "shipper" shall be the general rule or not.

In the traditional understanding, the meaning of the description in the B/Ls should be construed according to the matters as stated in the B/Ls, and the matters outside of the B/

Ls should not be taken into account.

On the other hand, the judgment took the manner in which some matters outside of the B/Ls, including the situation of negotiation for the freight and the position of the Defendant against the subsidiaries, can be considered when the meaning of the description of the "shipper" is construed.

In this case, the B/Ls were issued as the straight B/Ls, in which the receivers were identified, and such B/Ls are unlikely transferred to the bona fide third parties. Therefore, the decision by the court seems to be affected from such nature of the B/Ls in question.

(3) In addition, the court took the view that the "shipper" as described in the B/Ls and those as the party to the contract of carriage can be different.

In the traditional understanding, when the B/Ls were issued for certain contract of carriage, such B/Ls represent the contract, therefore, as the natural construction the "shipper" described in the B/Ls should be the same as those to the contract for which the B/Ls were issued.

The lawyer on behalf of the Claimant argued that the meaning of the representation of the contract by the B/Ls lies in the construction about who has the right for delivery of the cargo, not about who owes the liability to pay for the freight.

In the judgment, this argument is not clearly examined, but the judges took the wide meaning of the shipper in the B/Ls as the person who sent the cargo.

The view by the judges about the meaning of the shipper seems to weaken the legal effect of the description in the B/Ls.

(4) Fourthly, it should be noted that some issues are still remaining after this judgment, namely, the legal meaning of the aspects of the status of freight forwarders other than as a "shipper".

Especially, when they act as a carrier against cargo owners, it is the difficult problem whether we should put the traditional responsibility as a carrier onto NVOCC or not, and how we should establish the rule for the responsibility of a carrier who arranges the multimodal transportation.

Arbitration Award in Dispute Arising under the Voyage Charter Party for the M.V. "ABC"

Consignee refused to accept the hardened cement cargo · · · Costs incurred in removing cargo · · · Freight and demurrage

Claimant: XXX (Korea)
Respondent: YYY (Japan)

AWARD

In connection with this charterparty dispute, it is awarded by this Arbitration Panel as follows:

1. The Respondent shall pay to the Claimant the sum of US$373,328.43 plus interest at 6% per annum from November 7, 2002 up to the date of the payment.

2. All of remaining claims of the Claimant be dismissed.

3. Arbitration costs shall be born by the respective parties as paid by the respective parties with ¥1,624,978 by the Claimant (including the costs for another case between ZZZ and the Claimant) and ¥1,489,478 by the Respondent.

REASONING OF THE AWARD

I. Arguments raised by the Respective Parties

[A] Claimant's Arguments - Complaint

Gist of Claim

The Claimant seeks an award that:

1. The Respondent shall pay to the Claimant US$857,164.50 and interest thereon at the rate of 6% per annum accrued from 10 November 2001 up to completion of the payment.
2. The Respondent shall bear all arbitration costs.

Causes of the Claim

[The followings are arguments presented by ZZZ, the Claimant of another Arbitration Case between ZZZ and XXX (Claimant in this case). The Claimant XXX quotes ZZZ's Causes of the Claim as its own Causes of the Claim.]

1. The Claimant is a Korean corporation in the shipping business. The Respondent is a Japanese corporation in the trade business.
2. ZZZ chartered the M.V. ABC (Indian flag bulk carrier, hereinafter referred to as the "Vessel") to the Claimant under terms and conditions of the Charter Party (hereinafter referred to as the C/P B).

By a voyage charter party dated June 21, 2001 (hereinafter referred to as the "C/P A"), the Claimant voyage chartered the Vessel to the Respondent for a carriage of cement in bulk from Sri Racha, Thailand to Long Beach, U.S.A on the back-to-back basis.

3. The C/P A (and C/P B) includes, *inter alia*, the following provisions:

"Clause 5. Loading, Discharging Costs:

(a) - deleted -

(b) FIO and free spout trimmed:
The cargo shall be brought into the hold loaded stowed and/or trimmed and taken from the holds and discharged by the Charterers or their Agents, free of any risk, liability and expense whatsoever to the Owners.

The Owners shall provide winches, motive power and the Charterers shall provide and pay for winchmen from shore and/or cranes, if any. (This provision shall not apply if vessel is gearless and stated as such in Box 15).

Goods shall be loaded from through a hold made in the center area of each hatch cover. Size of the hole can be round or square, and shall be with a minimum diameter or each length/each width of 55 cm to maximum 85 cm.

De-dusting unit for collecting dust from Goods loaded into holds will be installed for each hold. It can be connected to the escape manhole of the hold in case the size of the escape manhole have a minimum area of 3,600 cm^2 and clearance around the manhole should be 100 cm minimum in all directions or the holes meeting the same specifications for loading.

The Owner shall advise Charterers upon vessel nomination if the nominated vessel has cement holes and the escape manholes or any alternative opening such as holes on hatch covers in addition to cement loading hole for de-dusting unit on each hold. The Owner shall also advise the size and location of such holes or alternative opening. The Owner guarantee the accuracy of such information as the part of vessel particulars.

Charterers/Shipper have an option to load cement and collect cement dust through holes opened in the vessel's hatch covers. In case the vessel does not have such hold suitable for Shipper's loading, Charterers/Shipper have an option to cut holes at Charterers/Shippers cost and account. Charterers/Shipper shall recover such holes such holds by welder to Master's satisfaction at Charterers/Shipper's cost. Owners allow 9 hours after completion of loading for such recovery work by Charterers/ Shipper. Any hours used in excess of such 6 hours shall be added to Laytime used for loading.

Clause 21. Cargo to be loaded, stowed, trimmed and discharged by Charterers with free of expense to the vessel."

Clause 56. Arbitration

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

4. After loading approximately 38,500 metric tons of Ordinary Gray Portland Cement in bulk, the Vessel sailed from Sri Racha, Thailand bound for Long Beach, U.S.A. on October 14, 2001. The Vessel arrived at Long Beach on November 10, 2001. Then it was revealed that a certain portion (approximately 2,500 metric tons) of the cargo had hardened by way of contamination with fresh water. The consignee, PPP Cement, eventually rejected that hardened cargo on the ground that the cargo did not meet their commercial purpose. As a result of the consignee's refusal to accept the cargo, the Claimant had no alternative but to remove the rejected cargo from the Vessel's holds at its own cost.

5. The Claimant has claims against the Respondent under the C/P A, at least, as follows:

(a)	Costs incurred at Long Beach in removing cargo:	US$549,507.09
(b)	Costs incurred at Vancouver in removing cargo:	US$172,741.72
(c)	Balance freight and demurrage incurred at Long Beach:	US$93,062.69
(d)	Time lost at Vancouver:	US$41,853.00
		Total: US$857,164.50

6. By clause 56 of the C/P A, it was mutually agreed that any dispute arising out of the C/P shall be submitted to TOMAC arbitration.

7. Based upon the above, the Claimant seeks an arbitration award that the Respondent shall pay to the Claimant US$857,164.50 and interest thereon at six percent per annum, which is the rate provided for in Section 514 of the Commercial Code of Japan, accrued from November 10, 2001 up to completion of the payment.

[B] Respondent's Arguments - Answer

The Respondent seeks an award in answer to the Claimant's demand.

1. Dismiss the Claimant's demand.

2. The costs of the arbitration be born by the Claimant.

Answer to Causes of the Claim

1. The Respondent admits the facts set out in paragraphs 1, 2 and 3 of the "Causes of the Claim" of the Claimant (except for facts relating to C/P B concluded between ZZZ and XXX).

2. The Respondent answers to the facts set out in 4 of the "Causes of the Claim" denying that the cargo had hardened by way of contamination with fresh water as follows.

The vessel was alongside Long Beach Berth #208, made all fast at 13:00 hours on 10 November 2001 and commenced discharging the cargo of cement at 18:00 hours on the same day.

Prior to discharge, all cargo holds were physically inspected. Traces of water entry into the holds and coagulated lumps of hardened cement were found in Cargo Holds 1, 2 and 5. The damage appeared to be at random places on the port and starboard sides of

each hold. Evidence of water traces were clearly noted on the hatch coamings and closing edges of the hatch covers in all cargo holds.

The Vessel's hatch covers were inspected. All gaskets and tightening bars were found to be generally intact, but upon close inspection, it was noted that gaskets of Holds 1 and 2 were in a concave condition, which undermines the integrity of watertightness. Upon arrival, all cargo hatch covers were observed with Ram-Neck tape applied.

Samples of the hardened chunks of cement were removed from the holds and sent to a laboratory for analysis. Laboratory analysis showed that the cement became hardened into chunks as a result of it coming into contact with fresh and salt water.

Cargo was discharged from all the cargo holds. The terminal made an attempt to discharge the damaged cargo. The Kovako nozzle was installed with an extra screen (having a 1" x 2" opening) throughout discharge, in order to minimize any damage to the unloading equipment, which affected the discharging rate.

The Vessel experienced delay in discharging the cargo due to the presence of damaged cargo in Holds 1, 2 and 5.

Throughout the discharging operations, the terminal experienced problems of the discharge operation being interrupted a number of times owing to the presence of heavy hardened chunks of cement, until ultimately the terminal was unable to continue discharge of the cargo. On the 21 November 2001 the vessel was shifted by the owners to an inner anchorage to make another attempt to remove all the hardened chunks of cement (of about 745 M/T) from Holds 1, 2 and 5.

On 23 November 2001, the vessel was shifted alongside to make a further attempt to discharge the cargo. Upon discharging 1,446.570 metric tons, by draft survey, the terminal placed the vessel under notice of inability to discharge any additional cargo from Holds 1, 2 and 5 due to hard cement chunks remaining in the cargo.

The Master of the Vessel was notified in writing in the afternoon of 23 November 2001 by PPP Terminal that the cargo remaining in Holds 1, 2 and 5 would be abandoned due to the presence of hard chunks of cement.

The Vessel completed discharging on 23 November 2001 at 16:30 hours; it shifted out at 06:03 hours, 24 November 2001, to Long Beach inner anchorage.

Visual estimated cargo remaining in the holds:

Hold No. 1 =	1,157.00 M/T
Hold No. 2 =	300.00 M/T
Hold No. 5 =	250.00 M/T
	1,707.00 M/T

The total damaged cargo unable to be discharged was approximately 2,452 M/T (1,707 M/T + 745 M/T).

The consignee, PPP Cement, eventually rejected the hardened cargo not only because the hardened cargo did not meet its commercial purpose but also because the hardened cargo would cause damage to the unloading equipment and because the hardened cargo would contaminate the sound cement which had already been discharged in the warehouse, which would result in serious secondary damage.

3. The Respondent denies occurrence of losses alleged in 5 of Causes of the Claim

As to the losses allegedly incurred by the Claimant, the Respondent totally denies the facts set out in 5 of the "Causes of the Claim". The Respondent raised various questions on details of the alleged losses referring to the brief dated April 30, 2004.

4. Further Arguments by the Respondent

(1) Result of chemical analysis of the hardened cement in Cargo Holds 1, 2 and 5

Samples of hardened cement as well as sound cement were taken and sent to PPP' Cement's Cushenberry Plant located in California for chemical analysis.

The result of the analysis was known on 21 November 2001 to indicate that the hardened cement in Hold No. 1 was largely affected by sea water and probably by fresh water as well and that the hardened cement in Holds No.2 and 5 was largely affected by fresh water and partially by sea water as well.

(2) Deck Log Book covering the voyage in question

At the request of Mr. TT of PPP Cement, photocopies of the Deck Log Book of the Vessel covering the entire voyage in question from Siam Sea Port to Long Beach were provided to Mr. TT by the Master on 11 November 2001.

(3) Analysis of the Deck Log Book

An analysis of the relevant entries in the Deck Log Book may be summarized as follows:

1) The Crew made efforts to seal hatch covers with marine tape during the period from 15 October 2001 to 18 October 2001.

2) The Vessel experienced drizzling rain on 15, 16 and 30 October 2001 and 1 and 4 November 2001.

3) The Vessel experienced rain on 17 October 2001.

4) The Vessel experienced passing-showers on 18 and 19 October 2001.

5) The Vessel experienced shipping sprays on deck for a total of 18 days out of the total 29 days underway to various extents under wind forces ranging from 3 to 8 and swells ranging from 2 meters to 7 meters.

(4) Clause 2 of the Charter Party

The last sentence of Clause 2 of C/P reads as follows:

> **The Owner shall seal all hatch covers, doors, lid or any access to holds of vessel with marine tape for the purpose of attaining the extra seaworthiness of holds, upon completion of loading at Owner's risk and account.**

An analysis of the Deck Log Book reveals that the Owner failed, *in violation of above term in Clause 2*, to seal hatch covers, doors, lid or any access to holds of the Vessel with marine tape upon completion of loading.

That is to say, the crew did not complete such work until 18 October 2001, and by 18 October, the Vessel had experienced drizzling rain on the 15th and 16th, rain on the 17th, passing showers on the 18th and shipping sprays over forecastle deck up to Hatch No. 1 on 17th and shipping sprays over forecastle deck up to Hatch No. 2 on the 18th.

(5) Clause 48 of the Charter Party

Clause 48 of C/P reads as follows:

> **Owners to warrant all hatches are watertight. Any damage caused by water leakage to be for Owners' account.**

Based upon the entries on the Deck Log Book, the Report of Survey of QQQ and the Result of Chemical Analysis contained in Mr. MN's 5-page Fax Transmittal dated 21 November 2002, the Respondent asserts that saltwater and fresh water entered Cargo Holds 1, 2 and 5 through interstices of hatch covers where watertightness (or weathertightness) was lost or defective. Stated differently, the lack or insufficiency of watertightness (or weathertightness) allowed water (both seawater and freshwater) to enter the cargo holds, resulting in part of the cargo of cement in bulk stowed therein hardening into chunks.

It is evident that by virtue of Clause 48 the Owner is responsible for any damage caused by water leakage.

[C] Evidence Submitted by Respective Parties

Documentary Evidence submitted by the Claimant

Exhibit No.1 to No.3, Exhibit No. 1 and quoted ZZZ Exhibit No.1 to No.33 as its own evidence.

Documentary Evidence submitted by the Respondent

YYY Exhibit No. 1 to No.99.

Summoned Witness Examined

Mr. KK, Chief Officer of the Vessel

Mr. TT, Director of PPP.

(Witness positions as of November 10, 2001)

II. Controversial Issues

[A] Whether the charterers have a duty to take delivery of the cargo even if the cargo became a total loss

It is sometimes said that the cargo receiver has no duty to take delivery of the cargo where the cargo lost its full value during the period of the transportation or where the costs to take delivery of the cargo would exceed the remaining value of the cargo, for example, when the vessel went aground. These issues in this case have, of course, to be studied and decided under Japanese Law. We have no direct articles to determine this issue in our Maritime Law contained in Japan COGSA (Hague-Visby Rules) and the Commercial Code of Japan. We can find only a few articles which give some hints to interpret this issue in our Commercial Code as follows:

> **Article 760**
>
> **The carriage contract shall be automatically terminated in case of sinking of the ship or CTL of the ship. In such case, the charterer shall pay the ocean freight to the owner according to the rate of the performance of the contract but the charterer's liability shall not exceed the value of the cargo.**
>
> **Article 812**
>
> **In case of involuntary salvage of the vessel, the cargo owner shall pay for the salvage costs to the extent of the salved cargo value.**

It could be interpreted that the above articles would suggest that the cargo owner has no liability for the costs or expenses to remove the cargo from the ship unless the cargo keeps value which exceeds the removal costs.

From the foregoing, the Panel thinks that the cargo receiver's responsibility is a limited liability in respect of taking delivery of the cargo, that is, the duty can only exist as long as the remaining value of the cargo exceeds the costs for taking delivery of the cargo, that is, the cargo receiver has no duty to assume reimbursement for the costs of the removal of the cargo on board the Vessel beyond the remaining value of the cargo. This cargo value rule should be applied to the cargo receiver who is the final B/L holder but not the direct party to the voyage charter concluded with the carrier, the shipowner (including disponent shipowner).

In this case, the Respondent is being claimed to reimburse the removal and disposal costs of the cargo and other related losses not as the B/L holder but as the charterer of the voyage charterparty concluded with the Claimant, the "disponent owner" of the Vessel. That is, the issue is whether the charterer has a duty to discharge the cargo on board the vessel even if the cargo lost its value due to the damage. This matter should be decided by a general rule of good faith and trust (SHINGI SEIJITSU NO GENSOKU, Art. 1 of Civil Code of Japan), i.e., depending upon how the cargo damage arose, who was able to control occurrence or prevention of the cargo damage, in whose control the circumstances leading to the occurrence of the cargo damage arose. If the causes of the occurrence of the cargo damage are found to have links to such situation as being controlled by the shipowner, then the shipowner shall assume the responsibility of discharge and disposal of the damaged cargo. If the causes of the cargo damage are found to exist in the situation controlled by the charterer, then the charterer should have a duty to take delivery of the cargo even if the cargo became a total loss.

[B] Burden of Proof

Then, what about the conclusion if it is unclear whether in whose control of the situation the causes of the cargo damage occurred. In this respect, the Respondent argues that the above burden of proof that the cargo damage was caused by the condition of the cargo before loading lies on the shipowner because of the shipowner's warranty as to the water-tightness of the hatch cover (Clause 48 of C/P). The Panel thinks that to make the hatch cover warranty clause applicable in connection with the above burden of proof, the charterer should establish that the shipowner breached this warranty clause.

The Claimant argued that the charterer owes the burden of proof that the cargo was in a sound condition at the time of the loading because of FIO clause.

The cement cargo is a very vulnerable cargo to contact with water. Therefore, the charterer imposed heavy duty on the shipowner to prepare dry and water-tight vessel to the charterer. In this particular case, there are a very few things for the master to supervise the loading of the cargo. The cement cargo was loaded under the high pressure of the two bar (kg/cm^2) produced by the blower of the cement bulk truck (YYY Exhibit No. 20). The cargo was pushed by the pressure produced by the blower of the truck through rubber hoses connected between the truck and the ship's cement hole. The ship's cement hole was closed with "Inlet" (manifold) through which three hoses were penetrated before the commencement of the loading operation. The surveyors instructed by the shipper inspected all of the holds and during their inspection of the holds, hose

tests to ascertain water tightness of the hatch cover were also conducted under the supervision of the cargo surveyor (YYY Exhibit No.1). The loading operation of the cargo was being conducted completely in the closed condition through the cement bulk truck into the cargo hold of the ship. The loading operation was controlled by the shipper. The ship's role was just to receive the cargo loaded into the closed holds by the high pressure produced by the truck's blower.

Considering these loading procedures, the burden of proof that the cargo was in a sound condition before loading should rest with the charterer. Therefore, if the charterer can not establish that the cargo damages occurred after the loading of the cargo, that is, during the period of the transportation, it must be presumed that the cargo was not in a sound condition at the time of the loading.

[C] Sampling Test Results

The Respondent argues that samples of No.1 and No.2 Holds in the ZZZ Exhibit No.9 of chemical analysis are the sound samples since the figures of LOI (950°) are less than 3% below which the cargo is deemed to be sound. The Panel upholds the Respondent's arguments on this point. However, YYY Exhibit No.9, the sampling analysis conducted at the instructions of PPP shows that No.1 Hold sample was contaminated with seawater but two samples of No.2 Hold and No.5 Hold were contaminated with fresh water and all three samples LOI far went up from 3% to 12 or 20%, which means that they were all wet damaged.

The Respondent argues that it is likely that samples of damaged cargo of No.2 Hold and No.5 Hold were also contaminated with seawater in conjunction with fresh water. In view of no substantial increase of Cl and Na 20 of these samples, the Panel has a great doubt about this.

In view of the above, the Panel concludes that hardened cargo found in No.1 Hold was contaminated with seawater and the hardened cargo in No.2 Hold and No.5 Hold were contaminated with fresh water only.

[D] Damaged Cargo in No. 1 Hold

As to the damaged cargo of No.1 Hold, the Claimant argues that the damaged cargo by seawater was confined to the cargo found and later removed from the surface and that the hardened cargoes found in the middle and bottom layers were contaminated not with

seawater but with fresh water. However, as mentioned above, it is suspicious about the sampling results of No.1 Hold in ZZZ Exhibited No.9. There were no other evidence to show that the damaged cargoes in No.1 Hold were contaminated with fresh water. There are some photographs which might support the Claimant's arguments. For example, YYY Exhibit No.10 Fitter's survey report, page 29 of 30 and ZZZ Exhibit No.24 -118 seem to show that the cargo left on board the Vessel at forward starboard section in No.1 Hold was contaminated with fresh water since no white traces of the seawater ingress were found and no oval shape blocks attached to the shell plating were found. However, it is evident that considerable amount of seawater entered the No.1 Hold through the hatch coaming of both sides of starboard and port.

The seawater ingress trace was shown in many photos such as ZZZ Exhibit No.24 (11) to (23) and YYY Exhibit No. 10, pages 9 and 10. It is almost impossible to ascertain how much amount of the seawater entered No.1 Hold. Further, it is also impossible to ascertain how far the seawater travelled from the surface to the bottom.

As mentioned above, the shipowner undertook to maintain water tightness of the hatch over during the period of the entire voyage. But, this warranty was breached. Therefore, the shipowner should bear the burden of proof that the damage to the cargo was not caused by ingress of the seawater. It means that in this case, the shipowner should establish that the contamination of No.1 Hold cargo was caused by contact with fresh water. However, as mentioned above, the sampling report submitted by the Claimant is lack of reliance since it is highly likely that the sample of No.1 Hold was not the damaged one but the sound one. The Panel has to conclude that the Claimant has failed to establish that damage to the cargo in No.1 Hold was caused by another reason other than the contamination with seawater.

[E] Damage to No.2 Cargo Hold

As to the damage to No.2 cargo hold, a number of photographs taken by surveyor Mr. FF, ZZZ Exhibit No. 24, photos (3) to (6) show that seawater entered No.2 cargo hold. However, these photos also show that the volume of ingress of the seawater was minor and the seawater did not reach to the surface of the cargo. Further, the seawater ingress was found only in the middle section of the starboard side. No sign of water ingress on port side was found.

Further, as mentioned above, the sample analysis by the Respondent shows that contamination of the cargo in No.2 Hold was caused by contact with fresh water.

[F] Cargo in No. 3 and No. 4 Holds

As to the cargoes stowed in No.3 and No.4 Hold, no hardened cargoes were found and all of the cargoes were discharged and accepted by the receiver, PPP as the sound cargo.

However, surveyor Capt. HH instructed by YYY stated in his report that there was evidence of "any water traces" even through the hatch coamings of No.3 and No.4 Holds. This statement seems inaccurate. Therefore, descriptions as to water traces through the hatch coamings by surveyor Capt. HH should be carefully examined.

[G] Rain Water Ingress

As mentioned above in the Respondent's answer, the Vessel encountered drizzling rain and showers for several days in the voyage as shown in the log book. It could be ascertained that some amount of seawater entered the No.1 cargo hold as mentioned above. However, it is doubtful that any seawater entered No.2 Hold to such volume as contacted with the inside cargo.

The Respondent argues that rain water entered the No.2 cargo hold through the hatch coaming. The Panel understands how the seawater entered No.1 cargo hold and slightly No.2 hold. If the vessel encounters rough weather, high wave or swell, then the seawater washes the ship on deck, particularly when the ship's bow goes down by pitching. In such case, more seawater washes No.1 cargo Hold than any other afterwards cargo holds.

However, in case of rainfalls, this kind of thing does not happen since rainfalls come down from the sky.

There was no evidence that the hatch covers of all holds including No.2 hold had any defects to allow rain water to come into the holds. Only possibility that rainwater got into the inside of the hold was through the hatch coaming.

In this respect, there was very few evidence presented to the Panel by the Respondent. There is only one photo taken by surveyor Capt. HH, ZZZ No.10, page 18. This photo says that noted gaskets of holds 1 and 2 in a concave condition which undermine the integrity water tightness. However, no photos were taken to show clearly the concave condition of the gaskets of No.2 hold. If there was clear defect found by surveyor Capt. HH in respect of the gasket of No.2 cargo hold or even No.1 cargo hold, then he would have made remarks in his survey report.

Therefore, the Panel concludes that no proof was presented by the Respondent in respect of the clear defects of the hatch coaming of Holds No.2 and No. 5.

[H] Reason for Hardening of Cement

Then, why was the cargo in No.2 hold contaminated with fresh water? There are a number of possibilities on this point. When the loading operation of the cargo was conducted at the loading port of Sri Racha, Thailand, at least twice, taking samples from the trucks were suspended for two hours on October 12 and three hours on October 13, 2001 even as per PPP arguments. The Respondent admitted that the amount of the rain was 8.2mm on October 12 and 7.1mm on October 13. That was not heavy rain but not so slight rain too. Humidity was presumed to be nearly 100%.

The Respondent submitted the survey report, another cement contamination case of Western Viking (YYY Exhibit No.63). In this case, it was reported that during the loading period, the weather was partly cloudy, overcast and dry. Ingress of seawater into No.1 and No. 2 holds were observed. About a half of 40,000 metric tons of the cargo were rejected by the consignee. The cargo receiver surveyor concluded that "the apparent quantity and reported dispersement of clinkers throughout the cargo would indicate their existence is the result of a preloading condition". In this case as mentioned above, no rainfall was reported during the period of the loading operation. However, the surveyor instructed by the cargo interests concluded that the reason for the contamination may be the result of the preloading condition of the cargo.

Professor BB, (YYY Exhibit No. 96) admits a possibility of the cement cargo's exacerbation by the presence of rain in the air inlet saying as follows:

> **It is feasible that damage could have been exacerbated by the presence of liquid water (in the form of rain drops) in the air inlet to the blower, but there has been no actual evidence of any condensation arising from supposed very humid air being pressurised. Thus, it could equally be the case that the lumps found on discharge of the Vessel, cement cargo were caused by the direct ingress of water droplets during the voyage through faults on the hatch covers (page 22).**

The Panel concludes that there is little possibility that rain waters came into No.2 Hold as mentioned above.

Bearing the above circumstances in mind, the Panel comes to the conclusion that it is the charterer who has burden of proof that the cargo was in a sound condition at the time of loading. If the charterer fails to fulfil this burden of proof, then it should be presumed that the cargo was not in a sound condition before being loaded on board the vessel. The Panel, further, concludes that the Respondent fails to satisfy this burden of proof.

Therefore, as far as the cargoes of Holds No. 2 and No.5 are concerned, solidification of the cargo shall be presumed to have been caused by the cargo's poor condition before the loading.

III. Conclusion on Liability

As mentioned above, it should be concluded that as for the removal and disposal costs in respect of the cargo of No.1 Hold should be paid by the shipowner, the Claimant. Those costs of the cargo No.2 and No.5 Holds should be paid by the charterer, the Respondent.

IV. Amount of the Damaged Cargo

According to the time sheet at Long Beach singed by PPP Terminal and the master of the Vessel for receipt only (ZZZ Exhibit No. 7 and YYY Exhibit No.10), the following cargoes of No. 1, No. 2 and No. 5 were discharged and accepted by the cargo receiver;

	Discharged (A)	B/L (B)	Balance (A) – (B)
No. 1:	6,415	7,500	△ 1,085
No.2:	6,680	7,700	△ 1,020
No.5 :	7,174	7,400	△ 226
		Total:	△ 2,331

YYY Exhibit No. 10 (Confirmation of the amount of the damaged cargo) says that "the amount of the cargo discharged by draft survey was 36,047.74 M/T and the total damaged cargo unable to be discharged from the vessel was 2,452.26 M/T (744.54 M/T was discharge into the barge at the anchorage).

This confirmation was signed by the master and the cargo's surveyor. Difference between 2,331 M/T and 2,452.26 M/T is only 121.26 tons. However, according to the

Time Sheet (Bulk Exhibit No.7), the cargo of No. 3 and No. 4 Holds were overdischarged by 763 tons more than BL figures. It is thought that as to the exact weight of this type of bulk cargo especially when part of the cargo was damaged by the contact with water, it would be very difficult to compute the exact weight.

In view of the above, the Panel considers that the amount of the damaged cargo was though to be as follows:

No.1 Hold:	about 1,100 tons
No.2 Hold:	about 1,000 tons
No. 5 Hold:	about 200 tons
	Total about 2,300 M/T

V. Claims by the Claimant

[A] Losses incurred at Long Beach

It is admitted that Barge DD was employed to accept the damaged cement removed from the Vessel and Barge GG was used to transport necessary equipments for the shifting operation (wheel loaders, light stand, manlifts and etc.) (ZZZ Exhibit No. 21).

Further, it was acknowledged that no further barges were available although the Claimant's port agents tried to hire more barges because of large port construction projects were in progress by the ports of Los Angels and Long Beach. The capacity of the Barge DD was 2,000 tons.

The damaged cargoes were removed from Holds No.1, No.2 and No.5 at the anchoring position on November 21 and 22. The amount of the damaged cargo so removed was about 745 m/t. The unloading operation of the cargo at Long Beach was finished on November 23. Thereafter, as the consignees rejected taking delivery of the remaining cargo, the shipowner removed the remaining cargo of No.1 Hold and No.5 Hold of the total amount of about 567 tons into the barge of DD in addition to the above 745 m/t.

On November 26, 2001, discharge of the abandoned cement from No.1 and No.5 Holds to barge was completed and the Vessel sailed from Long Beach for Vancouver with damaged cement in Hold No.2 remained on board the Vessel.

The Claimant could not find any contractors to undertake disposal of the damaged cement on board the barge until January 3, 2002 when UU undertook disposal of the damaged cement at the cost of US$105.00 per ton. The removal operation of the cement from the barge to the truck was commenced on January 10, 2002 and finished at the first week of March, 2002. Thereafter, the barge returned to the base on March 15, 2002.

During the above mentioned operation, the barge motors, electronic system, generator and other machines were damaged with wet cement. Barge rental including the repair costs, labour costs, tug rental, cargo removal costs from barge to truck, agency fees, water tank rental, line handling, pilotage fees and etc. are admitted as claimed.

However, as to the surveyor attendance coordination for US$11,517.00 be denied by 50% since the survey was conducted as part of defence to preserve evidence for the Claimant (ZZZ Exhibit No.22 and 23).

The Claimant claims the balance of freight and demurrage incurred at Long Beach in the sum of US$93,062.69. The Claimant XXX is seeking indemnification from the Respondent, YYY in respect of the claims lodged against them by ZZZ. From the ZZZ points of view, the rate for loss of detention is not US$9,000 per day but US$7,000 per day. Therefore, this rate should be applied to the Claimant, XXX claims, too, as there is no reason that the Claimant, XXX can obtain a "windfall" for this unhappy events.

It is presumed that the vessel would have been able to finish discharge of all cargoes within the period of laytime allowed of 7.7 days in view of the daily discharging rate of the cargo at about 6,000 tons to the total cargo volumes of 38,500 on B/L figure. However, the vessel had to stay at Long Beach for 17 days from November 10 to 26 due to disposal of the hardened cargo of cement.

Therefore, the demurrage claim is admitted to the extent of the pure demurrage amount of US$58,245.81 same as the claim by ZZZ.

[B] Losses incurred at Vancouver

It is further admitted that the Vessel arrived at Vancouver on November 30. During the period from November 30 to December 11, cleaning operation of Holds No.1 and No.5 were carried out. Further, removal of the damaged cargo in Hold No.2 which was unable to be removed at Long Beach was carried out (ZZZ Exhibit No. 22).

Berthing charges, cleaning costs and removal costs of No.2 Hold cargo should be accepted.

However, carrying charges due to accepting after cancelling date in the sum of US$69,932.28 should be denied. This payment was made by the Claimant to the next charterers as part of special compensation in return for the next charterers not exercising the cancelling right of the charter as the Vessel was delayed beyond the cancelling date. This claim is too remote.

The Claimant claims loss by detention and demurrage in the sum of US$41,853.00 for the period from November 30 to December 11, 2001. This is admissible.

In addition to this normal loss of detention, the shipowner can not claim more in respect of the special compensation to continue the next charter since that loss is beyond foreseeability under Japanese Law (Article 412 of the Civil Code of Japan).

[C] Total Sum of Losses

The amount acceptable by the Panel in respect of the removal and disposal of the damaged cement and related losses is the sum of US$746,656.75 (Detail omitted).

VI. Final Conclusion

For the reasons mentioned above, the Claimant shall be responsible for the above mentioned costs in respect of the cargo of No.1 Hold and the Respondent shall be responsible for the cargo removal and disposal costs in respect of the cargoes of No.2 Hold and No.5 Hold.

In Vancouver, only the cargo of No.2 Hold was removed. However, part of the damaged cargo of No.2 Hold was also removed in Long Beach. The reason why No.2 Hold cargo was unable to have been removed was lack of the available barges at the Port of Long Beach.

Therefore, the Panel thinks that the removal and disposal costs of the cargoes incurred at Long Beach and Vancouver are not distinguishable and so, should be shared among the responsible parties as a kind of the package costs and charges for removal and disposal of the hardened cements.

The volume of the damaged cargo of Hold No.1 (1,100 M/T) is almost the same as the volume of the damaged cargo of No. 2 Hold and No. 5 Hold (1,200 M/T). Therefore, the Panel concludes that these costs should be born equally by the shipowner and the charterer respectively.

It means that the Respondent shall pay to the Claimant a half of the sum of US$746,656.84, the total sum of losses incurred in connection with the removal and disposal of the hardened cement cargoes in No. 1 Hold, No. 2 Hold and No. 5 Hold.

In view of the above, the Panel hands down its award that the Claimant is entitled to recover from the Respondent the sum of US$373,328.42, that is, 50% of the proved losses sustained by the Claimant.

It is further awarded that the Claimant is entitled to claim interest on the above sum at 6% per annum from the filing date of the Arbitration by ZZZ, November 7, 2002 to the date of payment as per Article 514 of the Commercial Code of Japan.

As to the arbitration costs, they should be born by the respective parties as already paid to JSE with no liability each other for further adjustment.

Date: August 26th, 2005
At Tokyo, Japan

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

_____
Arbitrator Mitsuhiro Toda

_____
Arbitrator Haruo Shigeta

_____
Arbitrator Ryoji Miyawaki

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