WaveLength

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Arbitral Award of Dispute arising under Shipbuilding Contract

The Claimant: Buyer (Liberia)
The Respondent: Shipbuilder (Japan)

Award

1. The Claimant's claim shall be dismissed.
2. The arbitration costs shall be born by the respective parties as paid by them with Yen1,730,000 by the Claimant and Yen1,711,500 by the Respondent.
3. Attorneys' fees and other procedural costs shall be born by the respective parties.

Gist of Claim made by the Claimant

1. The Respondent shall pay to the Claimant the sum of ¥203,208,076 and interest thereon at the rate of 6% per annum calculated from the date when the Statement of Claim was served the Respondent until completion of payment.
2. The Respondent shall bear all arbitration costs.
3. The Respondent shall bear the Claimant's attorneys' fees and other procedural costs.

Answer to the Gist of Claim

1. The Claimant's claim shall be dismissed.
2. The Claimant shall bear all arbitration costs.
3. The Claimant shall bear the Respondent's attorneys' fees and other procedural costs.

Grounds of Claim

The Claimant stated as follows:

1. On 29 October 2003, the Respondent entered into a shipbuilding contract with a Panamanian company ABC (not the party to this Arbitration) for construction of 55,000tdw bulk carrier ("Vessel"), and concurrently, ABC entered into a sale and purchase contract with the Claimant whereby the Claimant will undertake to purchase the Vessel on her completion, and the two contracts were effectively characterised as back-to-back contracts.
2. The Vessel was delivered by the Respondent on 30 January 2007 to ABC and subsequently delivered by ABC to the Claimant. On 19 July 2007, the Vessel departed from Pohang, Korea for Alaska, the next loading port, after completing her cargo discharge.
3. Due to high latitude of the loading port, the Vessel started to prepare for heavy ballast

draft to suit the high latitude voyage from 22 July morning by ballasting the No.3 cargo hold. The crew interrupted the operation when the cargo hold was approximately 60% ballasted, and commenced discharging of the No.3 ballast tanks (port and starboard) in order to reduce the hull stresses. When the ballast tank discharge was about 50% complete, this operation was interrupted and ballasting of No.3 cargo hold was restarted. When the cargo hold ballasting was complete, discharge from No.3 ballast tanks (port and starboard) were restarted, and around 22:35 hours, the hatch cover, hatch coaming, and surrounding deck plates of the No.3 cargo hold collapsed and the Vessel sustained a great damage. After the accident, the Vessel was directed to a Japanese repair shipyard to get the damage repaired.

4. After the accident, the position indicator of No.3 cargo hold hydraulic pump remote control handle etc. were checked under the attendance of the Claimant and the Respondent, to find that the actual degree of opening of the No.3 cargo hold valve was different from the position indicated by the indicator. Namely, the indicator position showed that the valve must be shut but the valve was actually open by one fourth. Because of this, the seawater ballast in No.3 cargo hold was shifted into No.3 ballast tank when No.3 ballast tanks discharge was restarted and created a large vacuum pressure which resulted in the collapse of the No.3 cargo hold hatch cover, hatch coaming and surrounding deck plates.
5. Due to the accident, the Claimant suffered damages for repairing the hatch cover, hatch coaming and the surrounding deck plates, including painting costs and other costs amounting to ¥208,292,826 in total. The actual amount of damage is reduced to ¥203,208,076 after deducting the revenue from selling the scrapped materials which came to ¥5,084,750.
6. On 2 July 2008, the rights of recovering damage compensation vested in ABC under the shipbuilding contract was assigned to the Claimant by way of entering into an Agreement on Assignment, and on 3 July, 2008, ABC notified the Respondent of the assignment by serving Notice of Assignment. The payment of compensation by ABC to the Claimant does not constitute a condition precedent for the Claimant to make compensation claim to the Respondent (in reference to Tokyo High Court Judgment of 24 August, 2006).
7. Shipbuilding contracts are contracts to build the ship and to transfer the rights to the buyer, and has the characteristics of both the contract for performing the work and the contract for sales, thereby the shipbuilding contract will be subjected to the provisions regarding sales contract (Articles 559 and 570) as well as the warranty on contract for work (Article 634) of the Japanese Civil Code. For the sales contract, the Japanese Civil Code Article 570 provides for absolute liability for latent defects and court cases so far judged that for those items which are traded with no specificity, claims for

compensation can be made on grounds of imperfect performance, unless the buyer admits the trade to go forward acknowledging that the defect exists (Supreme Court Judgment 15 December, 1961). The valve system in question from this aspect can be considered as items traded with no specificity, while the Claimant has not allowed the existence of such an defect in the performance of the work. The supply of the subject indicator is thus considered to be imperfect performance, and the Respondent, under the provisions of Civil Code Article 415 is responsible for compensating damages, which are considered to have appropriate causal link with such imperfect performance. The shipbuilder is also responsible under the characteristics of this contract as a contract for performing the work as well. The scope of damage compensation according to the court cases so far covers all damages generated from the defect and considered as absolute liability (according to the common opinion and judgments). The Vessel is a new building ship, and the crew of the Vessel trusted the indication on the indicator when engaging in the discharge operation of the No.3 ballast tank, and therefore it is considered that there is no fault on part of the crew. The fact, however, was that the valve was not completely shut. If the valve was not shut completely, an ordinary person can naturally perceive that the seawater in the No.3 cargo hold will flow into No.3 ballast tank creating negative pressure in No.3 cargo hold and cause the collapse of the hatch cover, hatch coaming and the surrounding deck plates, and therefore the damage is what can be appropriately considered to be natural upon the defect of the valve.

8. The No.3 cargo hold de-ballasting line of the Vessel has a larger pipe diameter than that of the Respondent's standard ship design, and the oil quantity for the line's butterfly valve actuator required 395cc. In order for the indicator pointer to be adjustable to move within the angle of about 345 degrees, it is either necessary to use a pump with larger discharge volume, or change the pipe gear to reduce the rotating angle per one rotation to become smaller. However, the manufacturer of the valve system ("Manufacturer") was only manufacturing pumps having discharge volume of 18cc at the time when the open-shut indicator of the remote valve operation of the Vessel was fitted, it prevented them from providing a larger discharge volume pump, and thus it was necessary to change the internal gear. If the Respondent made suitable indicator adjustment, it was possible to detect the defective indication of the indicator. It is a gross negligence on part of the Respondent to have overlooked this defect and delivered the Vessel.
9. The shipbuilding contract provides in its Clause 18, Paragraph 1 for the Respondent's liability for warranty of defects and that the scope of this liability is to repair the defects to a perfect state, while Paragraph 2 provides for the Respondent to carry out the repair of the inherent defects without delay. In this case, the Vessel sustained hull

damage. Therefore, unless the damage to the hull is repaired, it does not fulfil the requirement to "repair to a perfect state". The intent of the above clause is to eliminate the responsibility to compensate damages beyond what is required for making repairs such as loss of earning and other damages, and does not exclude the repairs to the damages sustained by the Vessel. The damage sustained by the Vessel is a direct damage, and such direct damage is not excluded in the aforesaid Clause 18 of the shipbuilding contract. Furthermore, the aforesaid Clause 18 is a clause that deals with absolute liability and the interpretation for such liability does not exclude the responsibility of default in performance of the contract (as will arise in conjunction with either the act of sale or the act of performing the work). This interpretation is further backed by the fact that there is no clear exclusion of such default of performance of the contract in Clause 18 of the shipbuilding contract.

10. The Respondent states that the accident occurred because the deck crew of the Vessel did not make any judgment as to whether the rotational force of the valve open-shut handle has changed or not and went on to operate the valve towards open position despite the indication shown on the indicator, whereas to operate the valve towards close position, they stopped the handle operation in accordance with the indication shown on the indicator, and further, the Respondent states that the de-ballasting operation of the No. 3 ballast tank is normally expected to be complete in 2 hours time, but in this case it took 3.5 hours and such abnormality must have been recognised. However, it took 20 or more times extra rotating of the handle to complete shutting or opening of the valve, whereas, it would normally require rotating the handle 6 times before the indication on the indicator moves from "open" indication to "shut" indication. Prior to delivery of the Vessel, the inspectors of the Respondent must have carried out the valve operation using their judgment on the change in the valve rotational force, but the inspectors themselves could not detect that it required handle rotation of 20 times to feel that the rotational force had changed. There is no description in the operating manual, that the open-shut operation of the valve is done in accordance with the change of the rotational force, and neither were there any explanations to this effect made by the Respondent at the time of delivery. It is therefore not appropriate to blame the crew on account that they did not follow the open-shut operation of the valve by judging the rotational force which could not be done properly even by the Respondent's inspectors. De-ballasting of the Vessel was done by the crew in a suitable manner and there is no fault on their part. Furthermore, the Respondent states that the damage was caused due to the crew closing the cover of the ventilator situated near the No.3 hatch cover before the seawater ballast was discharged. Claimant does not intend to dispute on whether the cover of the ventilator was closed by the crew or not, but there is no fault on their part

because they just followed the instruction on the caution plate near the ventilator saying "Close at the time of Heavy Ballast Condition" (which is assumed to be put there to restrict the movement of the ballast water in the tank).

11. Claimant submitted evidences numbered Claimant Evidence No.1 to No.21, and applied for its witness to make testimony.

Respondent's Defence

The Respondent stated as follows:

1. Respondent admits that there was an defect on the indicator and that repair work was done on that indicator.
2. The shipbuilding contract between ABC and the Respondent and the shipbuilding and sales contract between ABC and the Claimant both contain clauses with substantially the same provisions for the warranty for defects (both being Clause 18). These provisions state that the liability for repairing and making good of the defects applies only to those defects which were notified within one year after the delivery of the Vessel, and that the liability is limited only to repair and making good of the defects. The Respondent has admitted its responsibility for the defects of the indicator and has carried out the repair and making good of such indicator and therefore the Respondent's liability has been fulfilled in compliance with Clause 18 of the shipbuilding contract.
3. It is a fact that there was a disorder of the open-shut indicator in this case, the way the deck crew of the Vessel took action during operation should be considered as extremely problematic. The accidents started from the fact that the closing of the valve for ballasting and de-ballasting was not complete, but the resultant abnormality was caused incidentally due to the deck crew employing the operation routine without making judgment on the handle force change; namely for the valve opening operation, the handle was rotated far beyond the indication shown on the indicator, while for the valve closing operation, the handle operation was stopped in accordance with the indication shown on the indicator, and there was no room for occurrence of such an accident if the abnormal operation routine, neither depending on operating force or the indication shown on the indicator, was avoided.
4. It took three and half hours from the commencement of discharging No.3 ballast tank to the time directly before the occurrence of the accident (which in normal circumstances is expected to be complete in 2 hours). If the crew paid appropriate attention of the water level sounding during the process, they would have perceived the abnormality in the slow progress of the discharging and would have naturally reacted to stop the operation. However, the actual fact was that the abnormality was overlooked and carelessly left as it was, thereby losing the opportunity of giving way

to avoid the damage, and finally invited the serious accident to happen.

5. According to the Explanatory Notes annexed to the Shipbuilding Contract Form established by the Documentary Committee of The Japan Shipping Exchange, Inc. (JSE) in 1972, the comments on Clause 22 says that out of the rights vested in the buyer under contract such as the right to demand compensation for damages, or the right of rescission of the contract, this Clause functions to limit the rights only to the right to demand repair of the defects and to exclude any other rights, the reason being that;
   (1) There is a customary practice exercised world wide not to impose liability to the shipyard beyond repair of the defects,
   (2) Remarkable advancement of shipbuilding technology causes the shipyards to introduce new technology not experienced before to build the ships and it will be too harsh to let the shipyard assume absolute responsibility, and
   (3) If all such aforesaid rights of the buyer (shipowner) are admitted, shipyards are forced to add on the cost of the predicted damage for self-insurance purpose, which will result in the shipowner in ordering ships that will be profitless.

   The 1969 version Shipbuilding Contract Form also had provisions to limit the shipyard liability for repairs only in its clause related to warranty of defects, but the commentary note on this point says that claims from the shipowner based on shipyard's wilful act or negligence was not included in the provisions since the understanding was that this will depend on negotiation between the parties.

   Summarising the above points, the demand for compensation based on negligence of the shipyard is reasonably covered by the points raised in the Explanatory Note of the 1972 version Shipbuilding Contract Form (under numbering (1) and (3)) and corresponds well with the actual situation of the shipbuilding industry, and can be considered as an appropriate interpretation of the shipbuilding contract for the Vessel.

   The Claimant claims that the repair includes the repair of the damaged hull, but according to the commentary note of the 1972 version of the shipbuilding contract form, the requirement to repair to a complete state in no way means to make the Vessel complete, and such expression was adopted just to ensure that the repair itself is completely done.

6. The damages in way of the hatch cover, in this case is an abnormal damage, and it cannot be expected that this kind of damage will normally happen in connection with the disorder of the indicator. The definitive cause of the aggravated damage is the abnormal doing of both the deck crew who operated the indicator and the deck crew who was in charge of the sounding of water level. The Japanese Civil Code provides for in its Article 416, the so-called the rule of appropriate causal link, but the damage in this case corresponds to special damage as defined in Paragraph 2 of the same

Article, where it is not predictable damage and therefore the shipyard (Respondent) is relieved from its liability. This predictability is not based on that of an "ordinary person" but of a "professional person" within the related business transaction. In this case, from the perspective of the Respondent as a "professional person", the damage belongs to those which are not predictable. That is to say, the predictability is on premises of prevailing recognition that the Vessel delivered from the shipyard will be operated under normal seamanship, but this case relates to the point that there were actions deviating from normal handling. To sum up, if the Vessel was operated under seamanship of normal skills and prudence, the disorder of the indicator would have remained only as a disorder, and it would have been extremely unlikely to have developed into an astonishing degree of aggravation of the damage such as the breakdown of the hatch cover, and therefore, it should be groundless to judge that the shipyard is liable for the damage either from the applicability of contractual terms as well as the legal principles of appropriate causal link. Furthermore, from the universally accepted idea in the shipbuilding industry, once a ship is delivered from the shipyard, the ship will be operated under varying environment which cannot possibly be controlled by the shipyard, and the ship is built and delivered on premises that she is operated under appropriate seamanship, and therefore the risk of occurrence of damage due to lack of seamanship after delivery should be borne by the shipowner or the insurers and shipyards have nothing to do with this aspect.

7. On the other hand, in order for the Claimant's right to claim for damages assigned from ABC to be valid, there is a need for ABC to actually sustain corresponding damage and the judgment of Tokyo High Court referred to by the Claimant is content-wise a different case.
8. Respondent submitted evidences numbered Respondent Evidence No.1 to No.6, and applied for its witness to make testimony.

Reason

It is found that on 29 October 2003, ABC and the Respondent entered into a shipbuilding contract ("Contract") of the Vessel, and on the same day, ABC and the Claimant entered into a shipbuilding and sales contract, and further, both on Clause 26 of the aforesaid two contracts, it is provided for that "the contract is construed in accordance with and governed by Japanese Law" and further in Clause 27, it is provided for that "if any dispute arises in connection with this contract, each party shall submit to arbitration of The Japan Shipping Exchange (Tokyo)".

Furthermore, on 2 July 2008, the Claimant has acquired assignment of the rights to claim damage compensation from the Respondent vested in ABC under the contract, and ABC has notified such assignment to the Respondent on 3 July 2008. The Claimant has applied

for arbitration based on the rights so assigned to them. The arbitrators decided as follows:

1. The relationship between warranty for defects and the liability for imperfect performance

   The Claimant sought liability of the Respondent for imperfect performance of the contract, and stated that the subject indicator supply represents imperfect performance thereby the Respondent is liable for compensating the damages of the indicator and all related damages having appropriate causal link to the disorder of the indicator, in accordance with the provisions of Article 416 the Japanese Civil Code. In general, the responsibility of the contractor can accrue from causes attributable to him, in which case, he assumes the liability for imperfect performance. If so, the question arises on the relationship between imperfect performance and the contractor’s warranty for defects provided for in Article 634 onwards of the Japanese Civil Code. In Japanese Civil Code, there are no provisions permitting the person who has ordered the work to make damage compensation claims caused by defects of the work undertaken attributable to the contractor (there is such provision in German Civil Code). The Common opinion and the court judgments have shown the following way of background thinking to deal with this matter so far:

   Contractor’s warranty is absolute liability where there is no need for the defects to be latent ones. To impose such a heavy and absolute liability to the contractor and furthermore to impose liability for non-performance is too cruel for the contractor, and in the spirit of the general principles of law to keep fairness, if the contractor has assumed warranty for defects, liability for non-performance is excluded (Osaka District Court Judgment 4 April, 1967, Tokyo District Court Judgment 15 April 1969, Tokyo High Court Judgment 29 May, 1972).

   Reviewing the Tokyo High Court Judgment, the following statement is included:

   “Civil Code provides the contractor’s warranty on defects on contracts for work in its Article 634 and onwards. Such provisions are not only a special rule against the Civil Code Article 561 onwards on the seller’s warranty but also functions to exclude the application of the general rule for imperfect performance”.

   The disorder of the indicator in this case is an issue on the warranty for defects, and it is appropriate to exclude the principle of imperfect performance.

2. On the Claimant’s claim that the valve system in this case is a supply of items of no specificity

   Claimant states that the case, from the aspect of valve system supply (sales), is a sale of items of no specificity and therefore claims that the supply of subject indicator is an imperfect performance of the contract. The general interpretation of distinction between items of specificity and no specificity is whether the parties to the contract

has notably focused on the characteristics of the item when making the deal, or just focused on the kind of the item without questioning the characteristics. This means that the distinction depends on the subjectivity of the parties to the contract. The subject of the contract is to build a specific ship. In order to build such a specific ship, the parties to the contract will discuss from the stage of designing, and incorporate requirements of the party ordering the work and agree on various specifications of the ship to proceed with the actual construction work. Therefore, it is evident that the ship to be so built, belongs to a deal for items of specificity. The valve system (made by the Manufacturer) including the indicator was adopted by the parties to the contract and installed on the premises that such system will fulfil its function in harmony with the whole ship, and therefore together with the ship, which is an item of specificity, constitutes a part of the whole structural unit. Therefore, it should be natural to consider that the valve system is an item of specificity. To separate the valve system from the whole ship and consider this part only as an item of no specificity is an odd view. The valve system constitutes a part of the ship similar to other parts of the ship, and constructed to be delivered altogether to the Claimant. Therefore, it is not possible to support the Claimant's demand for compensation owing to imperfect performance which needs to be based on the premises that the item of no specificity was traded. In other words, the disorder of the indicator system belonging as a part of the subject ship which is an item of specificity should be dealt with in accordance with the warranty for defects and application of the legal principles of imperfect performance should be dismissed.

3. Special agreement for warranty for defects

The both contracts referred to in this case contain a special agreement on warranty for defects in Clause 18. The Civil Code Article 640 provides for on such special agreements as follows:

> "Even if the contractor has made a special agreement not to assume liability under the provisions of Article 634 or 635, the contractor shall not be relieved from its liability for facts knowingly not notified."

This means that the Civil Code Article 640 validates adjustment of the extent or relief of warranty for defects, but if the contractor did not knowingly notify the party ordering the work of any defects, such adjustment or relief is not valid. In this case, the Respondent was not aware of the disorder of the indicator (testimony of Respondent's witness) and therefore this provision does not apply. Furthermore, after taking into consideration of testimonies of the witnesses of the Claimant and the Respondent, there is no sign of gross negligence on either of the parties. Therefore the special agreement to exclude liability cannot be considered invalid on account of gross negligence.

4. Interpretation on warranty for defects provided for in Clause 18 of the subject contract

The following provisions are contained in Clause 18 of the subject contract:

"1. The Builder assumes warranty for defects on the Vessel delivered to the party ordering the work. The period for such liability is one year from delivery to receive notification of the defects, and the scope of liability is limited to repair and making good.

2. In the event that the Purchaser found an defect and notified the Builder within the time specified in the preceding paragraph, the Builder shall make repairs without delay to make it complete."

The contract form is the one established by the Documentary Committee of JSE, prepared for Government Supported Shipbuilding Scheme in 1969, and the Explanatory Notes thereof say that "on the damage compensation claims from the shipping companies arising from intentional wrongdoing or negligence on part of the shipbuilder was not expressly covered in this clause on the understanding that such would be discussed among the parties." In other words, they have refrained from making any comments other than those related to warranty for defects on part of the shipbuilder. However, in the Explanatory Notes annexed to the Shipbuilding Contract Form promulgated in 1972, more detailed comments were included though the wording on warranty remained identical to the form established in 1969. These comments are as follows:

(1) This article corresponds to the provisions related to "work under guarantee", but in order to avoid useless disputes the concept of warranty for defects, which has a clear legal definition, was introduced.

(2) Defects mean breakdown or defect of hull, machinery appurtenances and spares etc. due to poor material, design or workmanship excluding natural tear and wear. Negligence of the shipyard is not a requisite.

(3) This includes the case of renewal of parts, not only repairing.

(4) The meaning of repairing it and making it complete as provided for in paragraph 2, is not to make the ship complete, but for the action of repairing and making good to be complete.

(5) If the ship has an defect, normally the shipowner will have the right to (a) set up an appropriate period of time within which they will seek the repair to be carried out, but if the defect is not serious, and if it costs too much to make such repairs, there is only the right to seek compensation of the damages (Civil Code Article 634), (b) Demand for compensation of damages can also be made together with the demand for repairs or in lieu of repairs (Civil Code Article 634) and, (c) If the defect is serious preventing the fulfilment of the purpose of

the contract, the contract can be cancelled (Civil Code Article 635).

(6) The rights of the shipowner in the above paragraph (5) can be excluded or made less severe, if the parties to the contract make a special agreement on reduction of the warranty (Civil Code Article 640). This Clause 18 of the contract only permits the shipowners' rights stated in above (a), which is the right to seek repairs of defects and have excluded other rights. The reasoning for this is as follows:

(i) There is a customary practice exercised world wide not to impose liability to the shipyard beyond repair of the inherent defects.

(ii) Remarkable advancement of shipbuilding technology causes the shipyards to introduce new technology not experienced before to build the ships and it will be too harsh to let the shipyard assume absolute liability,

(iii) If all such aforesaid rights of the shipowner are admitted, shipyards are forced to add on the cost of the predicted damage for self-insurance purpose which will result in the shipowner in ordering ships that will be profitless.

The above are the comments of the Documentary Committee of JSE, and these comments are considered to be rational for the following reasons:

1) The special agreement in the provisions of paragraph 1 of Clause 18 stating that the scope of liability is limited to repairs and making good is legally valid, and as aforesaid, the warranty for damages and the liability for imperfect performance cannot logically be compatible for co-existence, meaning that if the warranty for defects is established, the liability for imperfect performance needs to be excluded, and therefore the special agreement to exclude other rights than the warranty is legally well founded. And on the question of cancellation of contract, the shipbuilding contract normally contains provisions to this effect in detail so that such provisions will naturally have priority.

2) JSE has established shipbuilding contract forms by discussing among its members from the shipping industry, shipbuilding industry and other related industries. The form was established as a result of harmonising the interests of the related parties and these forms do contain provisions of the same tenor.

3) The limitation of the shipyards' responsibility to repair the defected parts is currently a generally accepted international common practice, and the shipping companies entering into shipbuilding contracts are well aware of this situation.

4) Shipyards assume absolute liability for repairing the defected parts, and it will be unfair to impose liability for performance further than such liability, and will adversely affect the development of well-balanced shipbuilding programmes.
5) If the shipyard is forced to assume responsibility of imperfect performance other than the warranty for defects, the shipyard, in order to protect their interest, will seek for insurance coverage of a vast amount, or avoid such risk by way of self-insurance, and the building cost will naturally rise, to result in shipowners paying much more higher shipbuilding prices.
6) Such clauses to relieve responsibilities is not only seen in shipbuilding business but also normally seen in other businesses. For instance, the pilot clauses for pilots that guide the ships, or the maritime transport business by shipping companies. These clauses are generally considered valid unless there is a wilful misconduct or gross negligence on part of the contractor.

As it follows from the above, demands based on imperfect performance cannot be justified and since the exemption agreement on the warranty for defects in this case is valid, the Claimant's demand cannot be accepted.

5. On the valve operation in this case

As stated in the previous sections, the claim of the Claimant cannot be accepted, but for the sake of good order, the No.3 cargo hold valve operation and the defect of the indicator of the Vessel is examined.

(1) According to the Claimant, the cause of the damage due to collapse of the hatch cover, hatch coaming and surrounding deck plates, is because of the negative pressure created in the cargo hold and the cause of such negative pressure is the leakage of the seawater ballast in the No.3 cargo hold into the No.3 ballast tank. After the delivery of the Vessel until the occurrence of the accident, the Vessel's crew have been conducting various operations, but the Claimant claims that hydraulic pump remote control handle open-shut indicator which was used to operate the ballasting-deballasting valve for the cargo hold used in the operation was showing a different position than the actual degree of opening, and therefore the indicator did have an inherent defect to cause the accident. On the other hand, the Respondent admits that there was an defect of the indicator, but states that such defect and the damage claimed by the Claimant has no appropriate causal link, which is the point of examination.

(2) There is no dispute between the Claimant and the Respondent on the relative facts that caused the accident in this case, and deducting from such premises, the following three points need to be satisfied in order for the negative pressure to be created in the No. 3 cargo hold to eventually cause the collapse of the

structural members:

① The air ventilator was kept closed preventing the air to enter.

② Outside air flowing into the cargo hold had the velocity of more than 20 metres/second to cause the air vent pipe to maintain a closed position.

③ Ballast tank discharge operation was continued so that the negative pressure kept on rising to about 7 tonnes/square metre which is the allowable limit for the structural members to collapse.

These three points were caused through the ballasting operation of the crew, and while the defect of the indicator may have helped to spoil the judgment, the essential cause of the accident in this case existed on the side of the Vessel's crew, as stated in the paragraph (3) below.

(3) Though they did not have actual experience, the Vessel's crew were aware that the structural members would collapse if the negative pressure in the cargo hold reaches a certain level, but the Claimant's witness during the hearing of the witness on 18 December 2008, made it clear that the crew did not expect such an accident to occur. Due to such situation, the Vessel's crew did not make appropriate response to the following:

1) The Vessel's crew kept the air ventilator closed until the cargo hold became full during the ballasting operation, and this is what is normally done, as it can also be generally seen from the fact that the shipyard is giving instructions to this effect, such as placing caution plates. However, when discharging the ballast water from the cargo hold, it is an iron rule to open the air ventilator, since it can be easily expected that negative pressure will be created if something wrong happens, caused directly or indirectly when discharge operation is done after the hold is full of water, and the crews should notice the necessity of opening the air ventilator from general caution or prudence. At the beginning there could be cases that the necessity may not be recognised, but for this case, considerable time elapsed until the accident occurred, and in the meantime, the abnormality was found in respect of decline in ballast tank discharge efficiency and the increase of water level, and therefore it should not be difficult for the crew to realise this as an emergency measure. As Claimant's witness made in his statement that after the accident occurred, the forward ventilators are ordered to be opened, the worst case must have been avoided if the air ventilators were closed only when it was necessary.

2) Opinions of the Claimant and the Respondent crossed in respect of the open-shut operation of the ballasting/de-ballasting valve but after all, the Vessel's crews depended upon the open-shut indication of the indicator,

and while they became aware of the ballast discharge abnormality, they seemed to be short of carefulness in recognising the situation that complete shutting of the valve is an important point in the operation. In the Claimant's evidence presenting the operation manual of the valve, the safety valve function is explained to be causing the operating handle to become heavy, which is an explanation based on the premises that the operator is naturally aware of the basic functions of the valve, and as shown in the Respondent's evidence, the manual is included in the finished plans, and this underlines the point that it should not require any special knowledge to think of the measure to recheck the state of valve closure. If the tank water level is continuingly measured during the ballast discharge and if any water level increase is found, there is even a risk of damage of the hull. If all possibilities were taken into consideration in dealing with the situation, it would have stopped the reckless action of forcing the discharge to continue by switching over to ejector discharge mode.

3) Ballast tank discharge was restarted at 18:00 hours on the day of the accident and continued for 4 and a half hours until 22:35 hours when the accident occurred, and the Respondent's evidence states that the air pipe head was in closed condition. From the cargo hold capacity and the assuming that air remained to the height of the hatch coaming when the ballasting was complete, it is roughly calculated to take more than three hours to reach the negative pressure of 7 tonnes/square metre, on the premises that 240 cubic metres per hour discharge had continued to create velocity of the air inflow into the hold sufficient enough to cause the air pipe head closure. Since collapsing of the structural members cannot occur in the meantime because of the characteristics of the steel material, it is also logically justified that there was sufficient time to take appropriate action from the time of discovery of abnormality or from the time of completion of the normally expected of ballast tank operation of 2 hours.

Summarising the above points, even if there was a defect of the valve open-shut indicator, the phenomenon brought about by such disorder does not immediately link to an accident, and there was sufficient time to make judgment as to whether such phenomenon will cause serious accidents and take accordant action, but there was lack of sense of crisis and continuation of the ballast operation purposelessly lead to the occurrence of the accident. If the Vessel's crew was thorough enough to accomplish the duty of care that a normal ship crew is

required to perform during the operation, this accident could have been easily prevented from occurring. Particularly, it was less than one year from the delivery of the Vessel, within the so-called warranty period, and the Vessel's crew could have expected that some equipment of the Vessel may have some disorder, and on the other hand, the crew was not yet accustomed to the handling of the equipment which suggest the Vessel's crew should have been careful with the ballast operation. If that was the case, it would have been possible to discover that ballast water was not at the expected level, and was easy to take appropriate action. From this aspect, the reaction of the Vessel's crew is clearly inferior to those of the normally required level of knowledge and skills. The accident is therefore due to breach of duty of care, and it is not possible to admit any appropriate causal link between the occurrence of the accident and the defect of the indicator.

Conclusion

Under the circumstances, the Tribunal held as stated the above Award

14 July, 2009 in Tokyo

Tokyo Maritime Arbitration Commission of
The Japan Shipping Exchange, Inc.
Arbitrators:
Hiroshi Iwamoto, Takeo Kubota and Takao Mine

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Civil Code

(Damages due to Default)

Article 415 If an obligor fails to perform consistent with the purpose of its obligation, the obligee shall be entitled to demand damages arising from such failure. The same shall apply in cases it has become impossible to perform due to reasons attributable to the obligor.

(Scope of Damages)

Article 416 The purpose of the demand for the damages for failure to perform an obligation shall be to demand the compensation for damages which would ordinarily arise from such failure.

(2) The obligee may also demand the compensation for damages which arise from any special circumstances if the party did foresee, or should have foreseen, such circumstances.

(Mutatis Mutandis Application to Contracts for Value)

Article 559 The provisions of this Section shall apply mutatis mutandis to contracts for value other than contracts for sale; provided, however that this shall not apply when it is not permitted by the nature of the contract for value.

(Seller's Warranty when Selling Rights of Others)
Article 561 In the cases set forth in the preceding Article, if the seller cannot acquire and transfer to the buyer the rights the seller has sold, the buyer may cancel the contract. In such cases, if the buyer knew, at the time of the contract, that the rights did not belong to the seller, the buyer may not demand compensation for damages.

(Seller's Warranty against Defects)
Article 570 If there is any latent defect in the subject matter of a sale, the provisions of Article 566 shall apply mutatis mutandis; provided, however, that this shall not apply in cases of compulsory auction.

(Contractor's Warranty)
Article 634 If there is any defect in the subject matter of work performed, the party ordering the work may demand that the contractor repair the defect, specifying a reasonable period; provided, however, that this shall not apply if the defect is not significant and excessive costs would be required for the repair.
(2) The party ordering the work may demand compensation for damages in lieu of, or in addition to, the repair of the defect. In such cases, the provisions of Article 533 shall apply mutatis mutandis.

Article 635 If there is any defect in the subject matter of work performed and the purpose of the contract cannot be achieved because of the defect, the party ordering the work may cancel the contract; provided, however, that this shall not apply to a building or other structure on land.

(Special Agreement of No Warranty)
Article 640 Even if the contractor agrees to a special agreement to the effect that the contractor will not be liable for the warranty provided in Article 634 or Article 635, the contractor may not be released from the contractor's liability with respect to facts the contractor knew and did not disclose.

Amendment of Arbitration Rules

TOMAC amended its Arbitration Rules aiming to quicken proceedings. These Rules will come into force on 1st April, 2010.

Under the former Rules TOMAC had no power to consolidate arbitral proceedings, if any party to the arbitration had objection, but now such power is given to TOMAC. We have seen cases in the past where proceedings took a long time before final awards were given owing to one party refusing to consolidate the proceeding without reasonable grounds. Our view is that the principle of party autonomy is hardly affected by this amendment, while we recognize the inevitable need to consolidate arbitral proceedings in well-known transactions where the vessels were sub-contracted on back-to-back terms of the original contract (Article 27).
We have also looked into the cases where either party may go bankrupt during arbitral proceedings, and have incorporated new provisions to cope with such situation (Article 40).

Further, some provisions were amended incorporating betterments from users' viewpoint.

THE RULES OF ARBITRATION OF TOKYO MARITIME ARBITRATION COMMISSION (TOMAC) OF THE JAPAN SHIPPING EXCHANGE, INC.

[ORDINARY RULES]

Made 13th September, 1962
Last amended 10th February, 2010
In force 1st April, 2010

Article 1. [Purpose of these Rules]
These Rules apply to arbitrations to be held at The Japan Shipping Exchange, Inc. (hereinafter referred to as "JSE").
Article 2. [Arbitral Tribunal]
(1) Arbitration described in the preceding Article shall be performed by the Arbitral Tribunal (including the case of a sole arbitrator, hereinafter referred to as "the Tribunal") to be constituted by arbitrators appointed in accordance with Articles 15 to 17 and 27 hereof.

(2) The Tribunal shall perform arbitration independently of JSE and the Tokyo Maritime Arbitration Commission (hereinafter referred to as "TOMAC").

(3) The Tribunal may continue the arbitral proceedings notwithstanding the assertion by a party of the invalidity or non-existence of the arbitration agreement. In such a case, the Tribunal may determine prior to the arbitral award that the arbitration agreement is valid.

Article 3. [Relation between an Arbitration Agreement and these Rules]

Where the parties to a dispute have stipulated, by an arbitration agreement entered into between them or by an arbitration clause contained in any other contract between them that any dispute shall be referred to arbitration of JSE or arbitration in accordance with its rules, these Rules (or such version of these Rules in force at the time the application for arbitration is referred) shall be deemed to constitute part of such arbitration agreement or arbitration clause.

Article 4. [Secretariat of Arbitration]

The Secretariat of JSE shall assume and conduct for TOMAC or the Tribunal all administrative matters provided for in these Rules or directed by TOMAC or the Tribunal.

Article 5. [Documents to be Filed for Application for Arbitration]

(1) Any party desirous to apply for arbitration (hereinafter referred to as "the Claimant") shall file with the Secretariat the following documents:
   1. The Statement of Claim;
   2. Documents evidencing the agreement that any disputes shall be referred to arbitration of JSE or arbitration in accordance with its rules;
   3. Documentary evidence in support of the claim, if any;
   4. Where the Claimant is a body corporate, a document evidencing the capacity of its representative;
   5. Where an agent or attorney is nominated by the Claimant, a document empowering that person to act on behalf of the Claimant.

(2) The documents under the preceding paragraph shall be submitted in the number of copies as instructed by the Secretariat.

Article 6. [Particulars to be Specified in Statement of Claim]

The following items must be included in the Statement of Claim:
1. The names and addresses of the parties (in case of a body corporate, the address of its head office or main place of business, its legal name, the name of its representative and such representative's capacity);
2. The relief or remedy sought and grounds thereof.

Article 7. [Acceptance of Application for Arbitration]

(1) Where the Secretariat has acknowledged that the application for arbitration conforms with the requirements of the preceding two Articles, the Secretariat shall accept it,

however where special circumstances are acknowledged, the Secretariat may accept the application for arbitration on condition that the documents required in items 3, 4, or 5 of Article 5 (1) shall be filed later.

(2) Where an application for arbitration is accepted under the preceding paragraph, a claim made in arbitral proceedings shall give rise to an interruption of limitation (protection of time bar) as of the day on which such application has arrived at the office of JSE. This shall however not apply where the arbitral proceedings have been terminated for a reason other than the arbitral award.

(3) Where a statement of claim cannot be filed with the Secretariat because of out of office hours at night, on holidays and so on, it may be submitted by e-mail or facsimile. However, the original copy thereof shall be filed together with other documents without delay, in which case the date of sending of the e-mail or facsimile shall be deemed to be the arrival date of the statement of claim to the Secretariat, if sending of e-mail or facsimile has been confirmed by the Secretariat to have taken place on that sending date.

Article 8. [Attempt of Conciliation]

(1) The Secretariat may, after accepting an application for arbitration, recommend the parties to first conciliate the dispute which is the subject of arbitration in the interest of a simple, speedy and amicable resolution of the parties' dispute.

(2) Where the parties agree to conciliate their dispute in accordance with the preceding paragraph, TOMAC shall suspend the arbitral proceedings until the termination of conciliation proceedings.

(3) The conciliation shall be conducted by one conciliator, who shall be appointed by Chairman of TOMAC, in principle within 60 days from the date of the agreement referred to in the preceding paragraph.

(4) The conciliation proceedings shall be in accordance with the Conciliation Rules of JSE (hereinafter referred to as the "Conciliation Rules") unless otherwise provided for in this Article.

(5) If the dispute is resolved by conciliation, the Filing Fee for arbitration shall be appropriated as part of the preliminary investigation fee and conciliation fee under the Conciliation Rules.

(6) The conciliator may become an arbitrator in the arbitral proceedings subsequent to the failure of the conciliation attempt only if the parties so agree.

(7) The Arbitration Fee for the arbitral proceedings resumed after failure of the conciliation attempt shall be the sum in accordance with the Tariff of Fees for Arbitration, minus any conciliation fee paid to and retained by JSE.

Article 9. [Instruction for Filing of Defense and Supplementary Statements]

(1) Where the Secretariat has accepted the application for arbitration, it shall forward to

the other party (hereinafter referred to as “the Respondent”) a copy of the Statement of Claim together with copies of the documentary evidence submitted, and shall instruct the Respondent to send to the Secretariat and the Claimant respectively the Defense and documents in support of the Defense, if any, within 21 days from the day of receipt of such instruction, provided that an allowance of a reasonable longer period will be granted to the Respondent in cases where its address, its head office or main place of business is located in a foreign country, or otherwise where special circumstances are acknowledged. Where the Respondent is a body corporate, a document evidencing the capacity of its representative shall be sent to the Secretariat attached to the Defense.

(2) Where the Respondent nominates an agent or attorney, it shall file, on filing of the Defense, a document empowering the agent or attorney to act on its behalf.

(3) When the Claimant has received the Defense, and documentary evidence if any, the Claimant shall, if it has any objection to the Defense, send its Supplementary Statement, and further documentary evidence if any, to the Secretariat and to the Respondent, respectively, so that such Supplementary Statement, and further documentary evidence if any, are received by the Secretariat and the Respondent respectively within 14 days from the day of receipt by the Claimant of the Defense, and documentary evidence if any.

(4) In the event of any further Supplementary Statement(s) and documentary evidence being filed, the procedures provided in the preceding paragraph shall be repeated, provided the Tribunal may direct the parties not to send such Supplementary Statement(s) and/or documentary evidence.

(5) The Defense, Supplementary Statements and documentary evidence may be submitted via e-mail, facsimile or other similar methods, provided that the sending party shall bear the burden of proving that the original documents are truly established and existed at the time of submission and that the documents have in fact been submitted to the other party.

(6) The documents under this Article shall be submitted in the number of copies as instructed by the Secretariat.

Article 10. [Service of Documents]

(1) Service of Documents by Secretariat shall be effected to the address, habitual residence, place of business or office of the party or to the address of its agent or attorney indicated in the Statement of Claim or the Defense, or the place where the party designated, unless handed in person to the party or its agent or attorney in exchange for receipt.

(2) The service under the preceding paragraph may be effected via e-mail, facsimile, etc. to the address/number designated by the parties.

Article 11. [Counterclaim by the Respondent]

(1) If the Respondent wishes to apply for arbitration of a counterclaim arising out of the same cause or matter, in principle, he must do so within the period stipulated in Article 9(1).

(2) Counterclaim applications made within the period specified in the preceding paragraph shall, in principle, be heard concurrently with the arbitration applied for by the Claimant.

Article 12. [Amendment of the Claim]

Amendment or addition of the claim, if any, must be made prior to appointment of the arbitrators, however, such amendment may be made even after the arbitrators are appointed if the Tribunal approves it.

Article 13. [Place of Arbitration]

(1) The place of arbitration shall be Tokyo or Kobe.

(2) Where no place of arbitration is designated in the arbitration agreement or the arbitration clause, Tokyo shall be the place of arbitration.

(3) Where it is not clear whether the arbitration agreement or the arbitration clause designates Tokyo or Kobe as the place of arbitration, and no mutual consent of the parties is obtained, the place of arbitration shall be Tokyo.

Article 14. [Qualification of Arbitrators]

The arbitrator(s) shall be appointed from the persons listed on the Panel of TOMAC Arbitrators and who have no connection with either of the parties or with the matter in dispute. However, TOMAC may appoint a person or persons not on the Panel if TOMAC deems such appointment necessary.

Article 15. [Appointment of Arbitrators in Two Parties' Case]

(1) Each party shall nominate an arbitrator from the persons satisfying the requirement under the preceding Article and the two arbitrators thus nominated shall, in principle, nominate a third arbitrator who also satisfies such requirement. However, the two nominees may by agreement nominate a person who is not listed on the Panel of TOMAC Arbitrators.

(2) The Claimant, within 15 days from the date of its application for arbitration, and the Respondent, within 15 days from the receipt of the application for arbitration, shall each nominate an arbitrator. Each party shall notify the other party and the Secretariat of the name of the nominee. The two nominees shall nominate the third arbitrator within 30 days of their nomination and notify each party and the Secretariat of the name of the nominee of the third arbitrator.

(3) TOMAC shall appoint the persons nominated pursuant to preceding paragraph (1) as arbitrators. When the parties have nominated the same person and have no objection to a sole arbitrator, such person shall be a sole arbitrator.

(4) Where a party does not make the nomination in accordance with the preceding paragraphs (1) and (2), or where the arbitrators nominated do not nominate the third arbitrator, or where the parties entrust TOMAC the appointment of arbitrators or the third arbitrator, TOMAC shall make such appointments taking into account the parties' intention.

(5) The appointment of arbitrators by TOMAC shall be made by consultations of the Chairman and Vice-Chairmen thereof.

Article 16. [Appointment of Arbitrators in Multi-parties Case]

Unless otherwise agreed by the parties, where there are more than two parties to an arbitration, TOMAC shall appoint an arbitrator or arbitrators taking into account all parties' intention.

Article 17. [Appointment of Substitute Arbitrators]

Where a vacancy occurs amongst the arbitrators due to death, resignation or other reasons, a substitute arbitrator shall be appointed in accordance with the provisions of the preceding two Articles.

Article 18. [Obligations and Punitive Provisions for Arbitrators]

(1) Arbitrators shall carry out their duties fairly and justly, treating the parties equally.

(2) Arbitrators shall not privately associate with the parties, their agent, attorney or other related persons in regard to the matter in question.

(3) Arbitrators shall not reveal to third parties the contents of the arbitration, the names of the parties or anything else related to the matter in question.

(4) An arbitrator in violation of any of the preceding three paragraphs shall resign immediately.

(5) TOMAC may remove the arbitrator in the preceding paragraph from the Panel of Arbitrators.

Article 19. [Disclosure by Arbitrators]

(1) Arbitrators appointed in accordance with Articles 15 to 17 and 27, shall, within 7 days of being appointed, provide to the Secretariat a document indicating any circumstances which may give rise to doubts concerning their impartiality or independence, and the Secretariat shall forward copies of same to the parties.

(2) An arbitrator, if any circumstances stipulated in the preceding paragraph arise during the course of the arbitration proceedings, shall without delay submit a document describing such circumstances to the Secretariat, who shall distribute such document to all parties and other members of the Tribunal.

(3) The disclosure in the preceding two paragraphs shall include whether the arbitrator has any close personal, commercial or other relationship with the following:

1. Parties to the arbitration
2. Subsidiary companies or other companies related to the parties

3. Parties' agents
4. Other appointed arbitrators

(4) When a party does not file a motion to challenge the arbitrator within 7 days from the day of receipt of the disclosure document referred to in the preceding paragraph (1) or (2), it shall be deemed that the party has no objection to the contents disclosed in accordance with the preceding paragraph (1) or (2).

Article 20. [Challenge of an Arbitrator]

(1) Where a party desires to challenge an arbitrator, it must do so by making a motion of challenge to TOMAC in writing showing the name of the arbitrator to be challenged and the grounds for challenge.

(2) Where the motion of the preceding paragraph is made, the arbitral proceedings shall be suspended until the advice provided in paragraph (5) is given. TOMAC shall constitute an Arbitrator Challenge Review Committee (hereinafter referred to as "the Committee") to decide whether the challenge to the arbitrator shall be accepted or dismissed, consisting of three persons whom TOMAC shall, by consultations of Chairman and Vice-Chairmen, appoint from those on the Panel of TOMAC.

(3) The Committee shall resolve whether or not to approve the challenge, in principle, within 30 days of the establishment of the Committee.

(4) Where the Committee decides that the grounds for challenge exist in respect of the arbitrator in question, a substitute arbitrator shall be appointed in accordance with the provisions of Article 17.

(5) Where a substitute arbitrator is appointed in accordance with the preceding paragraph or where the Committee concludes that the challenge of the arbitrator is not approved, the Secretariat shall so advise the parties.

(6) Where a challenge has been filed, the arbitrator may voluntarily resign from its office. However, such resignation shall not be deemed to be any admittance that there exists any ground for challenge.

Article 21. [Parties' Obligations]

(1) The parties must follow the instructions the Tribunal gives for the purpose of facilitating the arbitral proceedings.

(2) Where a party, whether willfully or in gross negligence, fails to submit its statements or documentary evidence within a reasonable period or delays in applying for the hearing of a witness or expert witness such that the Tribunal deems it will unreasonably delay the conclusion of the proceedings, the Tribunal may dismiss such submission or application.

(3) The arbitral proceedings and record are not open to the public and the parties, their agents or attorneys or any other persons concerned shall not reveal to third parties the contents of the arbitration, the names of the parties or anything else related to the

ongoing matter in question.

Article 22. [Issue to be Determined and Schedule of Proceedings]

(1) The Tribunal shall at an early stage of the proceedings, discuss and confirm the issue(s) to be determined, evidence to be filed, timetable, etc. with the parties or their attorneys.

(2) The Tribunal and parties shall, in principle, attempt to facilitate the arbitral proceedings in accordance with the terms confirmed in the preceding paragraph.

Article 23. [Oral Hearings]

(1) The Tribunal shall conduct oral hearings, at which the parties shall have an opportunity to attend. Notwithstanding the foregoing the Tribunal may examine only documents submitted without any oral hearing if the Tribunal considers it appropriate.

(2) The Tribunal shall fix the date and time (hereinafter referred to as "the fixed date") and the place for the oral hearing, if decided to be conducted, and give notice thereof to the parties at least 14 days prior to the fixed date, unless prevented by special circumstances.

Article 24. [Appearance of Parties, Witnesses, etc.]

(1) The parties (in case of a body corporate, representative thereof) or their agents or attorneys shall appear in person before the Tribunal at the fixed date, in order to gain hearing.

(2) Any party may have the person in charge of the matter in dispute appear at the hearing and testify orally, in which case the Tribunal is permitted to clarify the identity of such person.

(3) The parties shall communicate to the other party and the Secretariat not later than seven (7) days before the fixed date, the names and titles, etc. of the persons who are expected to appear.

(4) Where any party, its person in charge of the matter in dispute, its agent or attorney does not appear before the Tribunal, at the fixed date, without any justifiable reason preventing the Tribunal to conduct the hearing, the Tribunal may make its award on the basis of the documentary evidence or other documents filed by the parties.

(5) The Tribunal may, when it deems appropriate, and after taking into consideration the views of the parties, hold a hearing of the absentee(s) to the hearing in such a manner as to enable the absentee and all the attendees to the hearing to communicate with each other through two-way telecommunications technology. In this case, the person who has undergone the hearing through such telecommunications shall be deemed to have attended the hearing.

Article 25. [Hearings of Witnesses or Appraisers by the Tribunal]

(1) Each party to the arbitration may apply to the Tribunal for oral hearings of witnesses or appraisers by giving a clear description of the contents of testimonies or appraisal

by such witnesses or appraisers.

(2) When the Tribunal accepts the application under the preceding paragraph, the Secretariat shall notify all of the parties of the contents of such hearing, in principle, not later than 30 days before such hearing takes place.

(3) The Tribunal may, irrespective of there being any request by either party, request from the witnesses their voluntary appearance, or appoint expert witnesses, and examine them by hearing.

Article 26. [Participation in Proceedings]

(1) Any person who is not a party to the arbitration, upon the consent of all parties, may request to the Tribunal to participate in such arbitral proceedings as a party.

(2) Each party to the arbitration may, upon the consent of other parties and a person who is not a party to such arbitration, request to the Tribunal to make the said person to participate as a party in such arbitral proceedings.

(3) If said person who is not a party asserts a claim for its own independent relief or remedy, the Tribunal shall consider such claim as a new arbitral application and consolidate and examine this claim concurrently with the arbitration in progress.

(4) When a third person comes to participate in the arbitral proceedings pursuant to the provisions of the foregoing paragraphs, as a result of transfer of the rights or duties of the object of arbitration, a party or parties may, upon the consent of all other parties inclusive of the said third person, withdraw from the arbitral proceedings.

Article 27. [Consolidation of Proceedings]

(1) When multiple arbitral proceedings are commenced such as those regarding disputes arising from the multiple contracts involving the same ship of charter party, shipbuilding contract, ship sale and purchase agreement and etc. or the issues of law or fact are mutually related to each other, TOMAC may decide to consolidate such multiple proceedings into one proceedings at the application of any party or at its discretion.

(2) In case of the preceding paragraph, TOMAC shall appoint arbitrators pursuant to Article 16.

(3) Even in case that the multiple arbitral proceedings are not consolidated into one proceedings in accordance with the paragraph (1), TOMAC may decide to make the multiple proceedings to be progressed simultaneously. In such case, when oral hearings are held, all arbitrators and all parties of the relevant multiple proceedings shall attend it. However such oral hearings shall be held without a party or parties who are absent with no justifiable reason.

(4) TOMAC may separate the consolidated arbitral proceedings if it deems appropriate after considering a party’s application or under its own discretion.

(5) Decisions to be conferred at TOMAC meeting in this Article may be substituted by

decisions made by at the meeting of Chairman and Vice-Chairmen of TOMAC.

Article 28. [Pronouncement of Conclusion of Hearings]

The Tribunal shall, if it deems appropriate, declare the hearings closed. Provided that the Tribunal has not given an award, the Tribunal may, if it deems it necessary, re-open the hearing at any time.

Article 29. [Immunity of TOMAC and the Arbitrators]

TOMAC, the Arbitrators and the Secretariat have complete civil immunity from liability regarding the arbitral proceedings and the arbitration award.

Article 30. [Language]

The language employed in the Statement of Claim, the Defense, the Supplementary Statements, the hearings and the arbitral award in domestic arbitrations shall be the Japanese language, and that in international arbitrations shall, in principle, be the English language. However, except where the Tribunal has specified otherwise, it is not necessary to translate documentary evidence.

Article 31. [Interpreting]

The parties who will need interpreters at the oral hearings may, at their own expense, arrange for interpreters to be present at the hearings.

Article 32. [Settlement]

(1) The parties shall be allowed to settle the dispute amicably during the course of the arbitral proceedings.

(2) The Tribunal may, at any stage of the arbitral proceedings, attempt to settle the whole or a part of the dispute, where consent in writing to this effect between the parties is not a prerequisite.

(3) In case settlement conducted in accordance with the preceding paragraph fails, the Tribunal shall resume the arbitral proceedings, provided however that it must not issue an award which relates its judgment on any of the information it gained in conjunction with the move to promote the settlement proceedings.

Article 33. [Dismissal of Application for Arbitration or Other Decisions]

In any of the following cases the Tribunal may, without examining the merits of the dispute, dismiss the application for arbitration or make such other decisions as it deems appropriate:

1. Where it is found that the arbitration agreement is not validly made or is void, or the arbitration agreement has been rescinded by mutual agreement;
2. Where it is found that either of the parties is not lawfully represented or its agent or attorney has no authority to act on its behalf;
3. Where both parties fail to appear without cause at the fixed date for oral hearing;
4. Where both parties fail to comply with such directions or requirement of the Tribunal as it deems necessary for a proper performance of the arbitral proceedings;

5. Where the Tribunal finds that the Claimant has wrongfully delayed the prompt prosecution of the arbitral proceedings (where the Respondent has filed a counterclaim the same applies to the Respondent's counterclaim).

Article 34. [Withdrawal of Claims]

(1) The Claimant may withdraw its application for arbitration with the approval of the Respondent before formation of the Tribunal.

(2) When the Claimant submits that it will withdraw its application for arbitration after formation of the Tribunal, the Tribunal may permit such withdrawal if it confirms that the Respondent has no objection thereto. Where such withdrawal has been permitted, the Tribunal shall also decide on the closure of the arbitral proceedings.

Article 35. [Assessment of Damages]

Where it is recognized that a loss was incurred, but it is extremely difficult to prove the amount of the loss due to the nature of such loss, the Tribunal may assess a reasonable amount on the basis of the results of examination.

Article 36. [When Award Given]

Where the Tribunal has pronounced the conclusion of hearings in accordance with Article 28, it shall, in principle, make the arbitral award within 30 days thereof.

Article 37. [How Award, etc. to be Determined]

The award and other decisions by multiple arbitrators must be made by a majority vote of the arbitrators.

Article 38. [Written Award]

(1) When the Tribunal decides its award, it shall make the award in writing which shall include the following items. The award shall be signed by all arbitrators. However, where for an unavoidable reason an arbitrator cannot sign the award, the fact of omission of the signature of that arbitrator is required to be written into the award to be complete.
   1. The names and addresses of the parties (in case of a body corporate, the address of its head office or main place of business, its name, the name and the capacity of the representative), and in case an agent or attorney is nominated, its name;
   2. The decision made;
   3. The summary of the facts and points at issue;
   4. The reason for the decision;
   5. The date on which the written award is prepared and place of arbitration;
   6. The costs of arbitration and proportion thereof to be borne by respective parties;

(2) The Tribunal may omit item 4 of the preceding paragraph, if a specific agreement exists between the parties.

Article 39. [Amicable Settlement of Dispute]

Where the parties have settled amicably the whole or part of the dispute by themselves

during the arbitral proceedings, the Tribunal may, if requested by the parties, describe the contents of such settlement in the text of the award.

Article 40. [Procedures in case of a Party's Bankruptcy]

(1) When there occurs an application of bankruptcy, civil rehabilitation, or company rehabilitation procedures in respect of one party after an arbitration application was accepted, the arbitral proceedings shall be suspended and resumed by succession as per the Procedural Articles of Bankruptcy Law, Civil Rehabilitation Law, and Company Rehabilitation Law (whereby "litigation procedures" referred to in these laws should read as "arbitral proceedings"). Where the similar procedures are commenced in a foreign state, one of the above laws presenting the most similarity in the procedural articles to those of the foreign procedures shall apply.

(2) When the arbitral proceedings were suspended as per the preceding paragraph, the Tribunal may require the opinions in writing from the parties of the arbitral proceedings as to the progress of the arbitral proceedings. If a right of management of the assets of the party is transferred to a receiver or others appointed by a court, the above inquiry shall be made to such the asset management right holder. When any objection is lodged against a claim which is the subject of the arbitral proceedings and submitted to the court to deny the claim as accepted in the bankruptcy or civil rehabilitation and/or company rehabilitation procedures, the Tribunal should make the said inquiry to the person who lodged such objection.

(3) The Tribunal shall progress the arbitral proceedings promptly when all parties (the asset management right holder in the above mentioned case) of the arbitral proceedings agree to do so. When any objection is lodged against the claim which is the subject of the arbitral proceedings and submitted to the court, the Tribunal may also obtain the consent from the person(s) who submitted the said objection in respect of the progress of the arbitral proceedings. The Tribunal may progress the arbitral proceedings when it considers it appropriate in view of all prevalent circumstances, even if the Tribunal cannot obtain consents from all parties including persons who raised the above objections.

Article 41. [Service of Award]

The Secretariat shall such number of copies of the award signed by the arbitrators equal to the number of parties plus one. The Secretariat shall send a copy thereof to each party by registered certified postal mail or private courier by which the delivery receipt can be obtained, and keep one copy in its office.

Article 42. [Correction of Award]

If any miscalculation, mistyping, miswriting or any other apparent error is discovered on the face of the written award within 30 days after its service, the Tribunal may correct it.

Article 43. [Publication of Award]

The award given by the Tribunal may be published unless any party to the arbitration communicate its objections before the arbitral award is sent to the parties. Notwithstanding the foregoing, when an arbitration report is published by TOMAC, information on all arbitral awards may be included regardless of parties' intention, provided that identity of the parties and all related proper nouns are not disclosed.

Article 44. [Documents not Returnable]

Documents filed by the parties shall, in principle, not be returned. Where any document is desired to be returned, marking must be made by the submitting party to that effect at the time of its filing, and a copy thereof must be attached thereto.

Article 45. [Costs of Arbitration]

(1) The Claimant shall pay a Filing Fee of One Hundred Thousand Japanese Yen (¥100,000) to the Secretariat on its application for arbitration. This provision shall also apply where an application for counterclaim is filed.

(2) Each party shall, within 7 days of the receipt of notice from the Secretariat, pay to the Secretariat as part of the expenses of the arbitration a fee (hereinafter referred to as "the Arbitration Fee") which the Tribunal shall determine in accordance with the Tariff of Fees for Arbitration.

When no amount of claim has been stated at the time of application, the Tribunal shall determine the Provisional Arbitration Fee taking into consideration the contents of the claim, subject to further adjustment to arrive at a Final Arbitration Fee in accordance with the Tariff of Fees for Arbitration as soon as an amount can be determined.

In case the amount of claim cannot be finally determined, the Provisional Arbitration Fee as provided in the foregoing paragraph shall be deemed the final one.

(3) Where the sum claimed is in a foreign currency, such sum shall, for the purpose of calculating the prescribed Arbitration Fee of the preceding paragraph, be converted into Japanese currency by calculation at the mean rate on the Tokyo Foreign Exchange Market at 5.00p.m. on the date the application is filed.

(4) Where the Respondent files its application for arbitration of a counterclaim and the Tribunal decides that such arbitration is performed concurrently with the Claimant's application, the amounts claimed and counterclaimed respectively shall be aggregated and the aggregate sum shall be taken as the amount of claim in the Tariff of Fees for Arbitration.

(5) The Tribunal may direct the Claimant to advance the Arbitration Fee due from the Respondent on its behalf.

(6) Where the number of oral hearings held exceeds four, beginning with the fifth hearing, each party must pay a fee of Fifty Thousand Japanese Yen (¥50,000) per additional hearing to the Secretariat. Regardless, however, of the number of oral hearings held on one day, hearings held on one calendar day shall be counted

cumulatively as one hearing only.

(7) The expenses incurred by the particular nature of the subject of dispute and the expenses incurred on account of calling for witnesses or expert by requirement of the Tribunal shall be additionally paid by the parties.

(8) The Filing Fee shall not be returned after the application for arbitration is accepted. The Tribunal may, upon its determination, return a part of the Arbitration Fee, on the ground that the application for arbitration was abandoned or the dispute was amicably settled.

(9) Each party shall pay any consumption tax imposed on the amount of the each fee as provided in the preceding paragraphs (1) through (7).

(10) Where arbitral proceedings are consolidated under Article 27, the Tribunal may reduce the Arbitration Fee to be paid by a party or parties.

Article 46. [Apportionment of Costs of Arbitration and Attorney's Fee]

(1) The costs of arbitration shall be appropriated from the Filing Fee and Arbitration Fee paid to the Secretariat under the preceding Article and the cost sharing ratio by the parties shall be decided by the Tribunal.

(2) Upon application for recovery which shall be filed before the conclusion of hearings by a party from the other party of attorneys' fees, costs of witnesses or appraisers and other procedural costs of the arbitration, the Tribunal may in the arbitral award or by a separate order permit, to a reasonable extent and in consideration of the contents of the arbitral award, such recovery.

Article 47. [Remunerations for Arbitrators]

The remunerations for arbitrators shall be paid out of the Arbitration Fee of Article 45. The amount of the said remunerations shall be determined by consultations of Chairman and Vice-Chairmen of TOMAC considering the degree of difficulty of the case and other circumstances.

Article 48. [TOMAC]

Any matter relating to TOMAC shall be governed by the Rules of the Tokyo Maritime Arbitration Commission.

Article 49. [Interpretation of these Rules]

The Tribunal shall determine the interpretation of these Rules and the procedural matters not provided for in these Rules.

Article 50. [Amendment of these Rules]

Any amendment of these Rules shall be made by TOMAC at the initiative of Chairman of TOMAC.

Article 51. [Bylaws]

Bylaws shall be made where it is considered necessary to enforce these Rules in practice.

Supplementary Provisions (10 February, 2010)

Section 1. These Rules shall be put into force as from 1st April, 2010.

Section 2. The former Rules shall apply to the cases for which application for arbitration is filed prior to the enforcement of these Rules.

The Tariff of Fees for Ordinary Arbitration

The amount of the Arbitration Fee to be paid by each party shall be as follows:

When the amount of claim is ¥20,000,000 or less, the fee is ¥450,000;

When the amount of claim exceeds ¥20,000,000 but is ¥120,000,000 or less, the fee is the fee to be paid for ¥20,000,000 plus ¥10,000 for each additional ¥1,000,000 in excess of ¥20,000,000 up to ¥120,000,000;

When the amount of claim exceeds ¥120,000,000, the fee is the fee to be paid for ¥120,000,000 plus ¥20,000 for each additional ¥10,000,000 in excess of ¥120,000,000.

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