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Resolution of Oil Pollution Cases in Japan under the International Compensation System

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1. Introduction

It comes as a surprise to Japanese lawyers that a large number of cases[1] are decided by the courts in the United States with respect to the Oil Pollution Act of 1990 ("OPA").[2] On the other hand, Japanese courts have made very few judgments related to the Oil Pollution Damage Compensation Act of 1975 ("OPDCA"),[3] even though Japan is an island nation surrounded by the Pacific Ocean and the Sea of Japan, and thus oil spills are likely to occur. Just one judgment related to compensation sought for oil pollution damage under OPDCA rendered by the Nagasaki District Court in 2000 has been found, meaning there were no other judgments in those twenty five years.[4] This fact indicates a low level of litigiousness for oil pollution cases in Japan.

One reason for this lack of judgments is the parties' inclination to resolve cases by settlements.[5] Rather than file a suit with the court and seek a judgment for which parties would have to argue for a long time, they choose settlements in terms of cost-and-time saving. In addition, it should be noted that Japan has established a system to compensate victims for oil pollution damage not only by enacting OPDCA but also by ratifying the

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1 *See* ROBERT FORCE, MARINE POLLUTION VOLUME I INTRODUCTION, STATUES AND CASES and VOLUME II CASES (Cont.) (2005).

2 33 U.S.C. §§ 2701-2762. The United States has not ratified CLC and FUND. Instead, OPA created its own liability and compensation scheme including the Oil Spill Liability Trust Fund, which aims to provide up to one billion dollars per incident. 26 U.S.C. § 9509 (c)(2)(A)(i). This "meant that the United States was separate from the international compensation scheme such as CLC and FUND." TOMOTAKA FUJITA, MARINE ENVIRONMENTAL POLLUTION, KAIHO TAIKEI [THE MARITIME LAW SYSTEM], at 103 (Seiichi Ochiai & Kenjiro Egashira et al. eds., 2003).

3 Law No. 95 of December 27, 1975 (the last amendment: Law No. 37 of April 21, 2004). Its current name is Ship Oil Pollution Damage Compensation Act. Its English translation is available at http://www.cas.go.jp/jp/seisaku/hourei/data/ALOPD.pdf provided by Cabinet Secretariat of Japan ("CSJ").

4 One decision (not a judgment) by the court was also found. 811 HANREI TAIMUZU 229 (D. Tokyo, Dec. 15, 1992). In that case, the issue was whether Japanese law is a governing law regarding accrual and validity of the vessel lien. The case is not one in which compensation for oil pollution damage pursuant to OPDCA was sought, and therefore it is irrelevant to the research. A judgment or judgments not listed on the court reports with respect to compensation for oil pollution damage under OPDCA, if any, is excluded from the search.

5 *See* FUJITA, *supra* note 2, at 97.

two international conventions (i.e., the International Convention on Civil Liability for Oil Pollution Damage ("CLC") and the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage ("FUND")). By virtue of these conventions as well as domestic legislation, Japanese parties may settle oil pollution cases in or out of the court proceedings and, as a result, oil pollution cases have been amicably resolved.

Through an overview of CLC, FUND and OPDCA and references to two cases, this Article will illustrate the ways in which oil pollution cases in Japan have been resolved.

2. Overview of CLC and FUND

After a historically significant oil pollution case called the Torrey Canyon case in 1967 in which approximately sixty thousand tons of crude oil spilled from a tanker called Torrey Canyon onto the coasts of the U.K. and France, the two countries called for establishment of an international compensation system for oil pollution damage.[6] As a result, 1969 CLC and 1971 FUND was adopted. Japan ratified both conventions in 1976. "Through amendments, 1992 CLC and 1992 FUND are currently the legal basis" of the international compensation system for oil pollution damage.[7] "Japan has consistently continued to support the system since its foundation and, as the biggest donor country to the international oil pollution compensation fund (the "IOPC Fund")[8], has made considerable contributions to maintain and operate it."[9] The author thinks that this fact also increases the Japanese parties' inclinations to resolve oil pollution cases by settlements as mentioned below.

(1) CLC

CLC was adopted in 1969, replaced by its 1992 protocol and amended in 2000. It aims to ensure that adequate compensation is available to persons who suffer damage caused by pollution resulting from the escape or discharge of oil from ships and to adopt uniform international rules and procedures for determining questions of liability. Under CLC, the shipowner[10] is strictly liable for pollution damage[11] while a few defenses are provided thereunder.[12] The shipowner shall be entitled to limit his/her liability to an amount

6 For more on the Torrey Canyon case, *see* Hisashi Tanikawa, *With Respect to Compensation System for Oil Pollution Damage*, 59(2) Damage Insurance Research 271, at 272-4 (1997). Due to space limitations, the overview does not cover all aspects of the liability regime under CLC and FUND.

7 Seiichi Ochiai, *New Development of the International Oil Pollution Compensation System*, 1253 JURISTO, at 163 (2003).

8 *See* the IOPC Fund, *Annual Report 2010*, at 20 *available at* http://www.iopcfund.org/npdf/AR2010_e.pdf.

9 Ochiai *supra* note 7, at 163.

10 *See* 1992 CLC Article 1, Paragraph 1 and 3. CLC premises oil pollution caused by a tanker.

11 *See* 1992 CLC Article 1, Paragraph 6.

12 *See* CLC Article 3, Paragraph 2 and 3.

calculated based on the tonnage of the ship.[13] For a ship not exceeding 5,000 units of tonnage, the limit is 4.51 million Special Drawing Rights ("SDR")[14]; for a ship with a tonnage in excess thereof, the limit is 631 SDR for each additional unit of tonnage in addition to 4.51 million SDR; provided that the limit shall not exceed 89.77 million SDR (approximately JP¥10.8 billion as of Dec. 9, 2011).[15] The shipowner shall not be entitled to limit his/her liability, however, if it is proved that the pollution damage resulted from his/her personal act or omission, committed with the intent to cause pollution damage, or recklessly and with knowledge that such damage would probably result.[16] The owner of a ship carrying more than 2,000 tons of oil in bulk as cargo shall be required to maintain insurance or other financial security.[17]

(2) FUND

FUND was adopted in 1971, replaced by its 1992 protocol and amended in 2000. Its main purpose is to establish an international fund to provide victims of oil pollution damage with additional compensation supplementary to CLC. The aggregate amount of compensation payable by the IOPC Fund per incident in certain events (including the amount payable under 1992 CLC) shall not exceed 203 million SDR (approximately JP¥24.5 billion as of Dec. 9, 2011) under 1992 FUND as a general rule.[18] In addition, its 2003 protocol established a supplementary fund for additional compensation for pollution damage in contracting states to the protocol.[19] The total amount of compensation payable per incident is 750 million SDR (approximately JP¥90.7 billion as of Dec. 9, 2011) including the amount payable under 1992 CLC and 1992 FUND.[20] It is comparable to the maximum amount of compensation payable by the Oil Spill Liability Trust Fund under OPA (US$1 billion per incident[21]).

(3) The Claims Manual

Most importantly, the IOPC Fund has adopted a claims manual (the "Claims Manual")

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13 1992 CLC Article 5, Paragraph 1.

14 Replacing liability limit calculated on a franc basis provided by 1969 CLC, the 1976 protocol provided for a new unit of account called the Special Drawing Right. The exchange rate is available at the International Monetary Fund's website. As of Dec. 9, 2011, one SDR is converted into JP¥121.

15 1992 CLC Article 5, Paragraph 1. *See* the IOPC Fund, *Claims Manual*, at 10 (Dec. 2008 ed.).

16 1992 CLC Article 5, Paragraph 2.

17 1992 CLC Article 7, Paragraph 1.

18 1992 FUND Article 4, Paragraph 4 (a)(b). *See* 1992 FUND Article 4, Paragraph 1 (a)(b)(c) for events in which compensation shall be made by the fund, and 1992 FUND Article 4, Paragraph 2 (a)(b) for events in which the fund shall incur no obligation for compensation.

19 2003 Protocol Article 2 and 3. *See* the IOPC Fund, *supra* note 15, at 10.

20 2003 Protocol Article 4. *See* the IOPC Fund, *supra* note 15, at 11.

21 26 U.S.C. § 9509 (c)(2)(A)(i).

setting forth (1) a summary of the compensation regime, (2) submission and assessment of claims, and (3) guidelines on the submission of different types of claim.[22] As this allows oil pollution cases to be treated uniformly in accordance with the Claims Manual, parties are able to settle such cases relying thereon. Such treatment pursuant to the Claims Manual can be perceived as the basis to resolve the case by settlement outside the court unless the statute of limitations (time limit)[23] applies.

3. Overview of the Oil Pollution Damage Compensation Act in Japan

The compensation system under OPDCA is based on CLC and FUND. OPDCA was enacted as domestic legislation required for ratification of these conventions.[24] The following briefs the underlying framework of the liability regime under OPDCA.[25]

(1) Strict Liability[26]

OPDCA divides liability into two types: one for damage caused by oil spill from a tanker (tanker oil pollution damage)[27] and one for damage caused by oil spill from a general ship (i.e., a non-tanker vessel) (general ship oil pollution damage)[28]. Under OPDCA, the owner of a tanker and the owner, etc of a general ship are strictly liable for tanker oil pollution damage and general ship oil pollution damage, respectively.[29] In other

22 The IOPC Fund, *supra* note 15, *available at* http://www.iopcfund.org/npdf/2008%20claims%20manual_e. pdf.

23 *See* 1992 CLC Article 8 and OPDCA Article 10. *See* DICTIONARY OF ANGLO-AMERICAN LAW, at 809 (Hideo Tanaka et al. eds., 1991).

24 YASUSHI TOKIOKA ET AL., COMMENTARY ON LIMITATION OF LIABILITY ACT AND OIL POLLUTION DAMAGE COMPENSATION ACT, at 308 (1979) (Hisashi Tanikawa).

25 Due to space limitations, the brief does not cover all aspects of the liability regime under OPDCA.

26 Strict Liability means liability regardless of negligence. *See* DICTIONARY OF ANGLO-AMERICAN LAW, *supra* note 23, at 816.

27 Tanker oil pollution damage means (a) damage caused within the territory (including territorial sea) of a contracting state of CLC or within the exclusive economic zone, etc. by the pollution (which is limited to pollution caused by oil loaded as cargo or by bunker oil) resulting from the escape or discharge of oil from a tanker and/or (b) cost required for reasonable measures taken to prevent or alleviate the damage after an event causing the damage prescribed under (a) above occurred and the damage resulting from those measures. OPDCA Article 2, Item 6. For a more detailed English translation, *see* CSJ, *supra* note 3.

28 General ship oil pollution damage means (a) damage caused by the pollution resulting from the escape or discharge of bunker oil from a general ship within the Japanese territory or exclusive economic zone and/or (b) cost required for reasonable measures taken to prevent or alleviate the damage after an event causing the damage prescribed under (a) above occurred and the damage resulting from those measures. OPDCA Article 2, Item 7-2. *See* CSJ, *supra* note 3.

29 OPDCA Article 3 and 39-2. The right to claim for tanker oil pollution damage is subject to statute of limitations if no judicial claim is made within three years from the date of occurrence of tanker oil pollution damage or within six years from the date of occurrence of the first fact which caused tanker oil pollution damage. OPDCA Article 10. It is unclear whether Article 10 is applicable to general ship oil pollution damage.

words, regardless of whether the owner or its employee is negligent or not, the owner shall be liable for oil pollution damage as a general rule.[30]

The owner, etc. of a general ship means the shipowner of a general ship and the shiplessee thereof.[31] A general ship means a type of ship for the carriage by sea of freight and other articles except passengers and oil in bulk (excluding ships operated by oars or primarily operated by oars).[32]

(2) Joint and Several Liability

In cases in which (a) oil loaded in two or more tankers has caused tanker oil pollution damage and (b) it cannot be identified which oil loaded in the tankers has caused the damage, each owner shall be jointly and severally liable therefor unless either of the defenses explained below applies.[33] As for general ship oil pollution damage, the owner, etc. of a general ship which loaded bunker oil for the said damage are jointly and severally liable therefor unless either of the defenses explained below applies.[34] As is the case in strict liability mentioned earlier, joint and several liability provides a plaintiff with statutory tools to pursue responsible parties' liability. Obviously, OPDCA is not a less litigious statute, given its strict joint and several liability.

(3) Defenses to Liability

Neither the owner of an oil tanker nor the owner, etc. of a general ship is liable for oil pollution damage where the damage was caused by: (1) war, civil war or insurrection; (2) an extraordinary natural disaster; (3) solely an intentional act of the person other than the owner, etc. or his/her employees; or (4) solely a defect in the management of the aids to navigation or the signal facilities for traffic control by the state or a public entity.[35] The owner must prove that oil pollution damage was caused by whichever of the four elements above for application of his/her defense.[36] OPDCA clearly provides a defendant with statutory tools to rebut a plaintiff's argument for his/her defense.

(4) Limitation of Liability

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[30] Hisashi Tanikawa, *With Respect to Oil Pollution Damage Compensation Act*, 607 JURISTO 106, at 108 (1976).

[31] OPDCA Article 2, Item 5-2.

[32] OPDCA Article 2, Item 4-2. *See* CSJ, *supra* note 3.

[33] OPDCA Article 3, Paragraph 2.

[34] OPDCA Article 39-2, Paragraph 1. OPDCA Article 3, Paragraph 2 shall apply mutatis mutandis to the compensation for general ship oil pollution damage. OPDCA Article 39-2, Paragraph 2. *See* CSJ, *supra* note 3.

[35] OPDCA Article 3, Paragraph 1, Item 1 through 4 and Article 39-2, Paragraph 1, Item 1 through 4. *See* CSJ, *supra* note 3.

[36] Tanikawa, *supra* note 30, at 108.

The owner of a tanker may limit his/her liability for tanker oil pollution damage unless the damage is caused by his/her willfulness or reckless misconduct with recognition that the damage is likely to be caused.[37] OPDCA sets forth formulas to calculate the amount of limited liability depending on the weight in tons of a tanker, which is identical to the formulas under 1992 CLC mentioned earlier.[38] On the other hand, as for liability of the owner, etc. of a general ship for general ship oil pollution damage, it shall be pursuant to the Japanese Limitation of Shipowner's Liability Act.[39]

(5) Compensation by the IOPC Fund

A victim of tanker oil pollution damage may seek compensation from the IOPC Fund under 1992 FUND and from the supplementary fund under the 2003 protocol for the amount of uncompensated oil pollution damage.[40] No compensation may be provided by the IOPC Fund for general oil pollution damage.

(6) In sum, OPDCA provides a victim of oil pollution damage with the legal measures to seek compensation for the damage. In other words, a plaintiff suffering damage can litigate to seek compensation for damage and costs under OPDCA.

4. Japan v. the IOPC Fund[41]

(1) The Facts

"On April 3, 1997, around 9:00 pm, the South Korean registered tanker Osung No. 3 (786 gross tons) was stranded at sea about 10 kilometers south of Geoje Island on the southern coast of South Korea and sank around 11:25 pm. The tanker was carrying C fuel oil, and an estimated 186 kiloliters spilled. The spilled oil drifted from territorial sea of South Korea into high seas on April 7th and about 20-30 kilometers offshore Tsushima Island on April 8th, and the part of it washed ashore on the west coast of Tsushima Island on April 9th. Japan (the Ground Self-Defense Force, the Maritime Self-Defense Force, and the Air Self-Defense Force) took measures from April 7th through 14th to prevent or mitigate damages caused by the oil spill and, as a result, incurred expenses totaling

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37 OPDCA Article 5.

38 OPDCA Article 6, Item 1 and 2. The amount of compulsory insurance incurred by the owner of a tanker carrying more than 2,000 tons of oil in bulk pursuant to OPDCA Article 13, Paragraph 1 shall not be less than the amount of limited liability. OPDCA Article Article 14, Paragraph 3.

39 OPDCA Article 39-3. Article 39-4 and 39-5 require a general ship with gross tonnage of not less than 100 tons to maintain insurance or other financial security. For an English explanation of P&I Insurance, *see* Takeya Yamamoto, *Requirement for Entry to Japanese Ports "Compulsory P&I Insurance" –Comparison with Bunker Oil Pollution Convention 2001–*, 52 Wave Length 9, at 10-12 (2007).

40 OPDCA Article 22 and 30-2.

41 1101 HANREI TAIMUZU 228 (D. Nagasaki, Dec. 6, 2000).

JP¥50,755,568." [42]

"The owner of Osung No. 3, Osung Shipping Company Limited, was indigent and did not assume the duty under 1969 CLC Article 7. Consequently, Japan, a plaintiff, could not obtain sufficient and adequate compensation for the accident from the owner."[43] Japan filed a suit with the Nagasaki District Court against the IOPC Fund, a defendant.

(2) The Plaintiff's Claim and Issue

The plaintiff claimed to the defendant the above expenses incurred by taking measures to prevent or mitigate damages caused by the oil spill. The defendant accepted the claim except for the following specific costs: (1) (a) a portion of the personnel cost (JP¥7,200), a portion of the fuel cost for air fleet (JP¥120,563) and (b) half of the cost of photo processing and materials (JP¥19,950) incurred by the Ground Self-Defense Force; and (2) the fuel costs (JP¥2,577,939) of the naval ships incurred on April 12 by the Maritime Self-Defense Force.[44] The IOPC Fund contended that the above costs were not reasonable as expenses of preventing or mitigating oil pollution damage.[45]

Therefore, the issue was whether all the costs incurred by the plaintiff should be compensated.

(3) The Court Decision

The court rejected the argument by the defendant as follows. As to measures taken by the Ground Self-Defense Force, "the use of air fleet for air reconnaissance was considered appropriate for quick and efficient oil recovery to minimize the escalation of oil pollution damage in a race against time."[46] Furthermore, "the use of photography was appropriate as a means of conveying simple and accurate information."[47] As to measures taken by the Maritime Self-Defense Force, "the search by the naval ships carried out in a multilayered manner with the air reconnaissance by the Japan Coast Guard obviously facilitated the quick and efficient confinement and recovery of oil."[48]

(4) Analysis

The plaintiff needed to file the suit with the court to prevent application of the three-year statute of limitations.[49] The court decided that the claim by the plaintiff was

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[42] *Id*., at 230.
[43] *Id*.
[44] *Id*., at 230-31.
[45] *Id*.
[46] *Id*., at 231.
[47] *Id*.
[48] *Id*., at 232.
[49] *See Id*., at 230.

reasonable.

The amount rejected by the IOPC Fund (JP¥2,725,652 in total) is much lower than the amount argued in the NAKHODKA case discussed below. In other words, the IOPC Fund accepted more than ninety percent of the total costs incurred by the plaintiff amounting to approximately JP¥50 million. Therefore, despite the court's judgment, the degree of dispute in this litigation is quite minimal in terms of the amount. It could be assumed that the case was exceptionally brought to a judgment as a result that the IOPC Fund treated it in accordance with the criteria set forth under the Claims Manual and did not compromise. In other words, Japan v. the IOPC Fund is a rare case in which the court rendered its judgment since most oil pollution cases in Japan have been resolved by settlement due to, among other things, uniform treatment pursuant to the Claims Manual.[50] The following NAKHODKA case offers further proof.

5. NAKHODKA Oil Tanker Pollution Case

Unlike Japan v. the IOPC Fund in which the court rendered its judgment as mentioned above, the NAKHODKA case was resolved by the settlement in the court proceedings in 2002.

(1) The Facts[51]

"On January 2, 1997, around 2:50 am, the NAKHODKA, a tanker registered in Russia (13,157 gross tons), sent an urgent rescue message to the regional coast guard headquarters of the 8th region of the Japan Coast Guard. Thirty-one crewmembers were subsequently rescued but the body of the captain was washed ashore at Fukui Prefecture on January 26. The tanker was carrying about 19,000 kiloliters of C fuel oil[52] from Shanghai to Kamchatka (Petropavlovsk). The tanker's bow broke and its rear sank in the Sea of Japan (about 106 kilometers the north-northeast of Oki Islands in Shimane Prefecture), and the bow carrying about 2,800 kiloliters of C fuel oil approached the coast of Honshu. It was estimated that approximately 6,240 kiloliters of the fuel oil spilled from a tank located in the broken section."[53] "The pollution caused by the oil spill extended over nine prefectures from Shimane to Niigata."[54] It required collection and cleanup of oil at sea and on shore and caused massive damage including, but not limited to, economic losses upon the fisheries and other industries. It is said that the NAKHODKA case is the largest oil pollution case in Japan.[55]

[50] The numbers of oil pollution cases settled in or out of the proceedings are unable to be identified.

[51] Hisashi Tanikawa, *NAKHODKA Tanker Oil Spill Case and Legal Issues*, 1117 JURISTO 185 (1997).

[52] C fuel oil falls under "fuel oil" stipulated in CLC Article 1, Paragraph 5.

[53] Tanikawa, *supra* note 51, at 185.

[54] *Id*.

[55] Yoichi Ogawa, *Oil Pollution Damage Case of NAKHODKA*, 517 Sea and Safety, at 27 (2003).

(2) The Procedure

Among various suits filed regarding the case,[56] victims such as fisheries, tourism businesses, electric power companies and local municipalities filed lawsuits with the Fukui District Court against the owner of the NAKHODKA (the "Owner"), the P&I Insurer (UK P&I Club) (the "Insurer") and the IOPC Fund in November and December, 1999.[57] In addition, Japan and the Maritime Disaster Prevention Center filed a lawsuit with the Tokyo District Court against the Owner and the Insurer in December, 1999.[58] "The main issue at the Fukui District Court was whether the Owner was liable for oil pollution damage. The IOPC Fund contended that the strength of the NAKHODKA was considerably diminished due to severe wear and tear of structural member (i.e., unseaworthiness) and the Owner was negligent in failing to maintain seaworthiness of the NAKHODKA."[59] This aimed to prevent the Owner from limiting his liability.

As a result of negotiations with victims by the IOPC Fund and the Insurer, and an agreement executed between the IOPC Fund and the Insurer in May, 2002 to end all suits,[60] the case filed with the Tokyo District Court was settled in the proceedings on August 30, 2002.[61] The other cases filed with the Fukui District Court were withdrawn by December 9, 2002 because all claims were settled.[62] Compensation for oil pollution damage incurred by the plaintiffs was agreed to be paid in the total amount of approximately twenty six billion and one hundred million yen (JP¥26,100,000,000)[63] (the ratio of the amount: approximately eleven billion yen (JP¥11,000,000,000) (42%) borne by the Owner/Insurer; approximately fifteen billion and one hundred million yen (JP¥15,100,000,000) (58%) borne by the IOPC Fund).[64]

(3) Analysis

In the NAKHODKA case, victims needed to file the suits with the courts to avoid the statute of limitations[65] given that it was quite difficult for them to be compensated within

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[56] For more on details of those suits filed, *see Id*., at 30-31.

[57] *Id*., at 30. Ministry of Land, Infrastructure and Transport ("MLIT"), *With Respect to the Settlement of NAKHODKA Tanker Oil Spill Case* (Aug. 30, 2002), *available at* http://www.mlit.go.jp/kisha/kisha02/10/100830_.html.

[58] MLIT, *supra* note 57.

[59] Ogawa, *supra* note 55, at 31.

[60] *See Id*.

[61] *Id*. MLIT, *supra* note 57.

[62] Ogawa, *supra* note 55, at 31.

[63] MLIT, *supra* note 57. The table indicating damage and costs for compensation to victims is available on the website.

[64] Ichiro Kawabata, *Transition of the Oil Pollution Compensation System in This Ten Years and Future Issues*, 532 Sea and Safety, at 26 (2007). It is pointed out that the amount of compensation exceeded limits of liability and compensation at that time (before amendment in 2000). *Id*., at 26.

three years.[66] Despite setting aside the issues relating to damage and costs, the parties agreed to settle the cases in the court proceedings. Because it took approximately three years to reach the settlement from the time the suit was filed, it can be readily assumed that the parties argued considerably during that period. The parties, however, eventually opted for the settlement as the way to resolve the cases. As background to the settlement of the case, there were efforts made by the IOPC Fund and the Insures for settlement. If Japan had not ratified the international conventions, the plaintiffs may not have agreed to settle the case. Therefore, examining the NAKHODKA case, the existence of the international compensation system based on CLC and FUND significantly contributes to the parties' inclination to choose settlements in oil pollution cases in Japan. The fact that even the NAKHODKA case, the largest oil pollution case in Japan, was settled is proof of the amicable resolution of oil pollution cases in Japan.

6. Conclusion

As examined above, OPDCA provides parties to oil pollution cases with various means to argue in the proceedings. However, even though OPDCA was enacted in 1975, Japan v. the IOPC Fund, the first-ever judgment regarding OPDCA,[67] was filed in 2000. It can be inferred that oil pollution cases arisen in the waters in Japan are much less litigious than those in other countries. One reason is that Japanese parties in oil pollution cases would prefer to resolve the cases by settlement. However, the reasons are not limited to the inclination of Japanese parties but multiple. In 2003,[68] 159,032 civil and administrative cases in total were ended at the district courts as the first-instance courts across Japan.[69] Among those cases, the courts rendered the judgments for 77,669 cases (approximately 48.8%). 53,131 cases were resolved by settlement (approximately 33.4%).

These figures themselves do not look unbalanced. We apparently have a number of judgments as well as settled cases. In addition, the figures for the judgments are greater than those for settlements in 2003. Nevertheless, as far as oil pollution cases in which compensation was sought under OPDCA are concerned, there has only been one known judgment made in Japan the author found. The background is that Japan has established a system to compensate victims of oil pollution for damage and costs not only by enacting OPDCA but also by ratifying the international conventions (i.e., CLC and FUND) and

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65 *See* OPDCA Article 10.

66 *See* Ogawa, *supra* note 55, at 30.

67 1101 HANREI TAIMUZU, at 230.

68 The author chose 2003 as the year close to 2002 when the NAKHODKA case was settled.

69 SUPREME COURT OF JAPAN, JUDICIAL STATISTICS (2003), at 35, *available at* http://www.courts.go.jp/sihotokei/nenpo/pdf/B69CD6B1EB53CF2549256EDD0006DC11.pdf.

consistently supported the system based thereon. That is why oil pollution cases are uniformly treated in accordance with the international criteria set forth in the Claims Manual provided by the IOPC Fund, and thus Japanese parties are likely to resolve oil pollution cases by settlement. The resolution by settlement is advantageous for both parties in terms of, among other things, prompt resolution and voluntary fulfillment of payment. Accordingly, given the lack of judgments regarding OPDCA, it can be interpreted that oil pollution cases have been amicably resolved. In that sense, the author appreciates the ways in which oil pollution cases in Japan are being resolved based on the international compensation system.[70]

As to oil pollution caused by a general ship other than a tanker, uniform treatment pursuant to the Claims Manual does not directly apply because the international system based on CLC and FUND applies to oil pollution caused by tankers.[71] It seems, however, that such treatment in effect contributes to the legal practices for general ship oil pollution since the practices for oil pollution damage are in common and, as a result, settlements have been made as is the case in tanker oil pollution. The issue is that OPDCA employs no compensation fund scheme for general ship oil pollution damage.[72] Therefore, there remains some concern whether adequate compensation to victims of general ship pollution damage can be attained (especially if the aggregate amount of damage exceeds the amount of limited liability determined by the Limitation of Shipowner's Liability Act). The way to handle such cases will be a future issue for Japan.

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[70] It does not necessarily mean, however, that the international compensation system is a perfect scheme. For instance, the fund is financed by annual contributions incurred by certain oil receivers. 1992 FUND Article 10 and 2003 Protocol Article 10. It should be noted that the financial burden is imposed on them (especially by 2003 Protocol) and a fair share of burden between shipowners and oil receivers is an issue to be examined. *See* Ochiai, *supra* note 7, at 169. As to STOPIA 2006 and TOPIA 2006 to handle such an issue, *see* Kawabata, *supra* note 64, at 27-29. Three issues of the international compensation system are also being pointed out. *See Id*., at 28-29.

[71] *See* 1992 CLC Article 1, Paragraph 1; FUJITA, *supra* note 2, at 100.

[72] Unlike FUND, International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001 does not have a compensation fund scheme. *See* FUJITA, *supra* note 2, at 101. Regarding comparative analysis between Bunker Convention and OPDCA, *see* Hiroshi Kobayashi, *Entry into Force of Bunker Convention and Compensation System for Oil Pollution Damage Caused by A General Ship*, 202 Maritime Law Review (KAIJIHO KENKYU KAISHI) 26, at 31-35 (2009). This Article added and modified it.

Higashi Nihon Great Earthquake, Massive Tsunami and Shipping Industry

Isamu Takahashi *

On March 11, 2011 a seminar on "Important and Developing Issues in the United States Maritime Law" was held in Tokyo by the Japan Shipping Exchange, Inc. Lecturers were Mr. John D. Kimball, Mr. Richard V. Singleton II and Mr. Corner T. Warde from Messrs. Blank Rome LLP in New York. Approx. 80 numbers of attorneys, representatives of the non-life insurance companies and scholars attended the seminar.

At 14:46 hours, in the midst of the seminar, the ground was violently shaken by a severe and powerful earthquake of magnitude 9.0, which continued for about 5 minutes as three consecutive earthquakes occurred at short intervals. Though aftershocks have frequently shaken ground of Tokyo, the lecture was resumed soon and successfully finished at about 5 p.m. All the public transportations such as trains, subways and bus and taxi had ceased services after the outbreak of earthquakes, roads were crowded with the cars and massive people, who were walking back home from their offices.

My colleagues and I walked back to the office, which was in a mess with scattered books and files. We learned by nation-wide broadcast on TV that the mega-earthquake of magnitude 9.0 triggered massive Tsunami, which swept and devastated the Japan's northeastern coastal communities, particularly Miyagi, Fukushima and Iwate prefectures. TV made us gasp with shocking and horrible films of the aftermath of Tsunami, e.g. big fire on the sea surface of Kesenuma City in Miyagi Prefecture, the largest fishing port in the Tohoku area broke out as the Fuel Oil Tanks for fishing boats fell down and large quantity of gas oil leaked out. House debris on the sea surface appears to have worked as a role of candlewick. We also learned that the epicenter of the earthquake was located at about 80 nautical miles east from Sendai at a depth of 32 kilometers and 230 nautical miles north east from Tokyo, where 5+ seismic intensity scale was recorded by Japan Meteorological Agency. It was reported that the earth's rotational axis shifted by 10 centimeters and shortened day's time by one-millionth of a second as the result of mega-earthquake. Japan's Honshu Island is said to have sifted 2.4 meters to the east.

Approximate 500,000 people were said to have left home to evacuation center such as school gymnasium. Thousands of human's lives were reportedly confirmed lost or missing. The majority of the fatalities came not from the earthquake itself but from the 10 meters or more high Tsunami waves, which reportedly swept even 10 kilometers inland from the coast line and flattened almost every home and vegetable greenhouses and rice

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fields in its path at Sendai area. Infrastructure damages were widespread throughout the affected area that is sea ports, roads, airport, railways, bridge, liquefaction of land and landslides, which destroyed the distribution networks in the affected regions.

The tsunami caused substantial damage to ports of the northeast coastline, namely, Hachinohe, Kesenuma, Ofunato, Kamaishi, Sendai, Ishinomaki, Onahama and Kashima ports.

As the mega-earthquake broke out in cold winter time, it was snowing in Tohoku and northern Kanto regions. Thus, supply of fuel for car and heating system in severely affected area was a matter of the utmost urgency.

Japan Federation of Coastal Shipping Association set up a headquarter to cope with emergency transport by sea of the necessities of daily life at 22:00 hours of 11th March 2011. On the following day, 12th March 2011, The Ministry of Land Infrastructure, Transport and Tourism (MLIT) officially requested the Federation to cooperate for the emergency transportation of fuel oil and relief materials to the disaster area.

The Japan Federation of Costal Shipping Association, after having discussed with affiliate five associations, that is Japan Coastal shipping Association, General Federation of Coastal Shipping Association, Japan Coastal Tanker Association, Japan Coastal Ship Operators Association and Japan Association of Main Coastal Ship Owners, submitted a list of reportedly 10 coastal shipping companies and 19 coastal ships on 13th March 2011. Configuration of those ships was Tankers, RoRo ships, Container Ships, Crane Ships etc.

On 14th March the first coastal tanker laden with 1,900 K/L of gasoline, 1,000 K/L of Gas Oil and 1,000 K/L of kerosene arrived at Niigata port of the Japan Sea coast where less affected by the earthquake. The fuel oils were immediately transported by Tank Lorries of 20 K/L capacity to Miyagi Prefecture by land. Thereafter within 5 day till 18th March, the coastal tanker fleet reportedly transported 185,000 K/L of fuel and propane to Akita, Sakata, Noshiro and Aomori ports. After 18th March, coastal tankers reportedly transported 1,162,000 K/L of fuel, 45,000 K/L of crude oil and 15,000 K/L of propane to the ports located along the west coast of Honshu.

At the same time for those ports located along the east side coast such as Shiogama, Hachinohe, Kashima, Hitachi and Onahama, coastal tankers transported 784,000 K/L of fuel and 4,800 tons propane by April 28, 2011.

As of July 1st, 2011, 586 aggregated numbers of costal tankers transported reportedly 2,108,000 K/L of fuel, 64,000 K/L of crude oil and 25,000 tons of propane. On the east coast side, 778 costal tankers in total transported 218,000 K/L of fuel, 34,000 K/L of crude oil and 8,600 tons of propane. The figure indicates that relatively large tankers were deployed in the Japan Sea route and smaller size tankers were deployed in the east coast route daily.

Foods, water, necessities for daily life, heavy construction machines and JSDF rescue

corps /vehicles were transported by RoRo Ferry ships.

On 23rd March, First RoRo ships from Tokyo arrived at Hachinohe and Sendai. Owners of RoRo Ferry ships reportedly rendered the transport services of the necessities for daily life with free of freight. In Tokyo, the owns/manages of RoRo and ferry terminal, also offered the facilities for trans-shipment of the necessities for daily life gathered from all over the country at free of charge.

Livestock and companion animals are also the victims of the earthquake and tsunami. Hundreds of thousands of livestock are reported to have died by tsunami. Further, innumerable livestock animals that survived the initial disaster starved to death. Many livestock and pet animals died in despair of hunger and thirst as their owners had to abandon them because people were forced to evacuate their residential area of 20 km radius of the nuclear electric power plant and nobody was taking care of them.

Receiving terminals and mixing plants of imported grains for livestock feed are located in the vicinity of the ports of Hachinohe, Kamaishi, Ishinomaki and Kashima, which fact caused disruptions to livestock feed supplies in Tohoku and Kanto regions. Japan imports 90% of the grain to be used for livestock feed. As a result, animal feed supplies were halted in some area and another tragedy occurred as a large numbr of cows, pigs and chickens died of starvation when lifeline of supplies was cut off. Those ports sustained severe damage by Tsunami, but recovered relatively in short time, though restrictions of ships' drafts existed. In the circumstance, costal ships such as ship equipped with crane transported reportedly 6,000 tons/day of compound feed for livestock in the Tohoku regions from Hokkaido, from Kyushu and from west of Honshu.

As seen above, it is apparent that transportation of goods by sea was extremely useful in the realistic responses to the natural catastrophic disaster when infrastructure such as road/bridge and railway were severely damaged.

Many ocean going vessels staying in ports also sustained damage.

At Hachinohe port, a 77,739 DWT bulker swept from her berth and washed ashore near the port. A 56,752 G/T drill ship "Chikyu" owned by Japan Agency for Marine Earth Science & Technology (JAMSTEC) lost one of its propulsion pod while the vessel was evacuating the port at full speed.

At Kamaishi port, Panama flag G.C.ship of 6,175 DWT was washed onto the road and remained there when tsunami receded.

At Ishinomaki port, a Panama flag 32,385 handy size bulker was swept from her berth, drawn to breakwater and finally went aground in shallow harbor. At Sendai port a VLCC sustained hull damage when evacuating the port. A Korea flag G.C. vessel of 6,901 DWT washed up on shore.

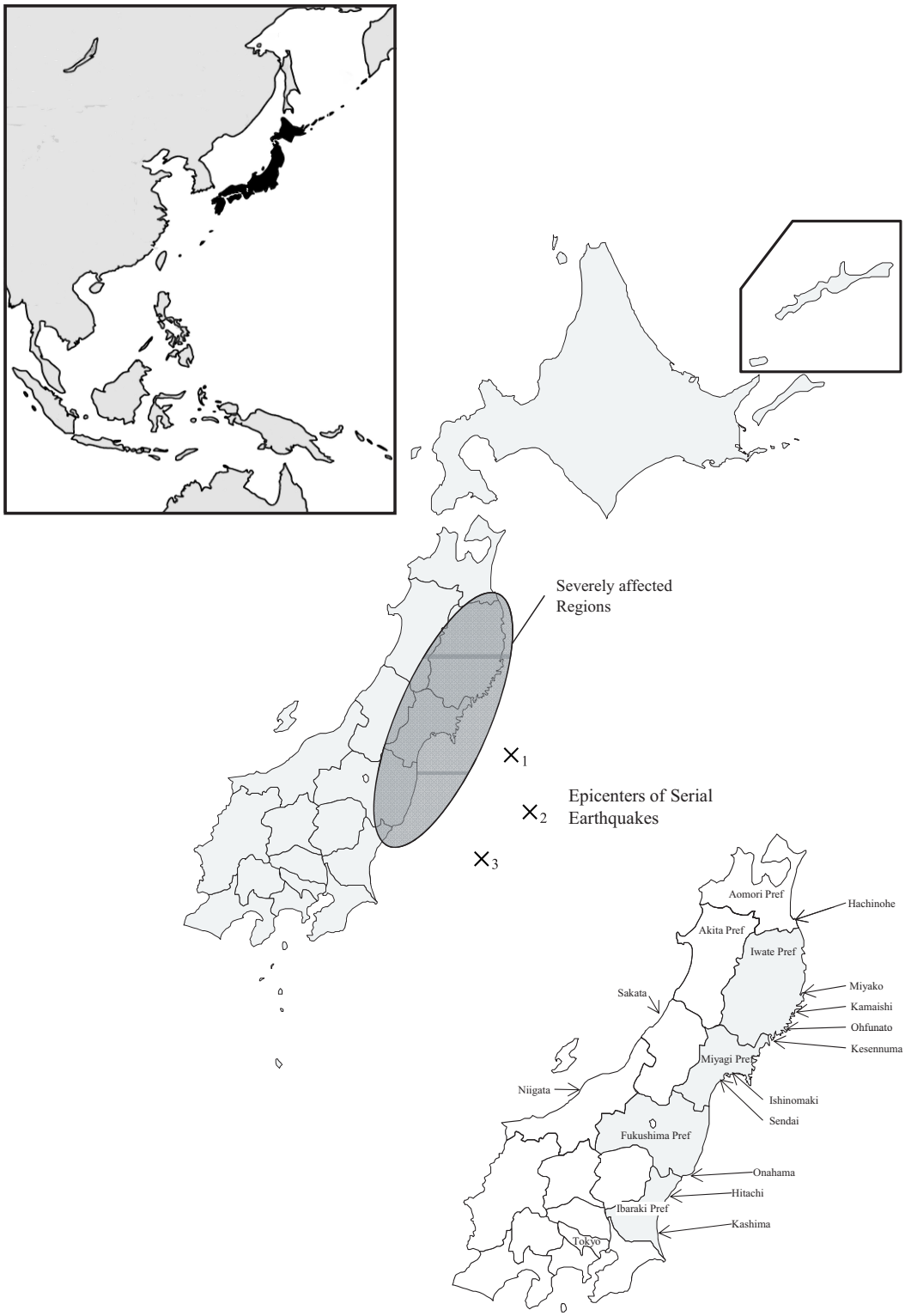
At Onahama port a Japanese flag 91,439 DWT bulker discharging coal was driven against the dock and suffered hull damage and leaked fuel.

Among others things, Kashima port, the 6th largest port in Japan by volume handling, was notoriously fragile to tsunami due to its constitution defects. Kashima port is an artificially constructed port by excavating the soft land such as potato field towards inside from the shore. For that reason, Tsunami waves hushing inside the port basin had no passage way to escape, other than the entrance, which caused 5.7 meters height tsunami wave at the entrance arose 8.4 meters height at the dead end of South Public berths. So, the vessels being moored to the berths in the port were tossed up by the Tsunami waves breaking off their mooring ropes. Vessels swept off the berths collided with each other in the port basin. Those vessels include 207,791 DWT capesize bulker, 175,775 DWT capesize bulker, Panamax size bulker, 51,419 DWT box hold bulker, 22,089 handy size bulker, 9,515 DWT chemical tanker and 47,027 G/T LPG carrier.

In general, large size ocean going vessels sustained less serious damage in ports, compared with fishing boats. It is reported that approx. 28,000 fishing boats swept away or sustained total loss.

I felt a great courage of the seamen on board the coastal vessels and how well the parties concerned dealt with the huge task of the early days immediately after the disaster. I have no doubt that with the great Japanese spirit, things will gradually getting better and Japan will emerge from the tragedy even stronger.

Main Disaster Area and Distribution of Ports



Summary of a judgment

Concerning Arbitration Agreement and Substantive Claim before Court

A Cargo Underwriter brought an action before the Tokyo District Court against the Carrier in respect of a claim for the cargo damage after it had paid the Consignee the insurance money and subrogated the Consignee's claim.

The Carrier requested before the Court to dismiss the said action stating that the bill of lading (hereinafter referred to "the Bill of Lading") contained the TOMAC arbitration clause and the Underwriter's claim should be submitted to TOMAC.

The Tokyo District Court dismissed the Underwriter's claim and on appeal by the Underwriter, the Tokyo High Court (Court of Appeal) gave the following judgment on 27 August, 2008.

Facts found

The Court found from the statements and evidence submitted by both parties as follows:

The Carrier through its agent, *Korai*, entered into a Contract of Affreightment (hereinafter referred to as "the Contract") with the Shipper for the carriage of cargoes of "FROZEN ALASKAN POLLACK ROE" stowed in nine reefer containers (hereinafter referred to "the Cargo") from Busan, Korea to Hakata, Japan and issued a surrendered Bill of Lading which contained a stamp of "SURRENDERED" on its face in accordance with the request of the Shipper's agent, *Ginzan*, on 20 July, 2005. And then the Carrier kept it in its hands and *Korai* faxed a photo-copy of the face thereof to *Ginzan*.

The face of the Bill of Lading contained pre-printed words "RECEIVED by the Carrier Goods stated below . . . subject to the terms and conditions provided for on the face and back hereof." and overleaf thereof contained an Arbitration Clause and clauses in detail on governing law, exemptions of the carrier, limit of liability, etc. There were no details of the Contract other than the Bill of Lading.

Korai and *Ginzan* had been dealing with more than one hundred transactions of carriage of goods by sea every year before the Contract was entered into. In these transactions, *Korai* made surrendered bills of lading and then faxed the photo-copies of the face of them to *Ginzan,* or issued bills of lading. All of these bills of lading were made by using one format same as the Bill of Lading.

The Cargo carried from Busan was discharged at Hakata and delivered to the Consignee from 22 to 23 July, 2005, and soon afterwards the contents of the containers were found damaged.

Judgment

(1) On Article 6 of Japan COGSA

Under the circumstances stated above, it is recognized that delivery of the original copy of the Bill of Lading from the Carrier to the Shipper and then from the Shipper to the Consignee and also production thereof by the Consignee to the Carrier had not been intended. And in fact such intention was realized. Accordingly, the Bill of Lading cannot be a bill of lading provided in Article 6 of the Law for International Carriage of Goods by Sea of Japan (hereinafter referred to as "Japan COGSA") which premised on such delivery and production.

(2) Meaning of Article 13 (2) and (3) of the Arbitration Law

Ginzan must have recognized that the Arbitration Clause and other clauses of the Contract were provided on the overleaf of the Bill of Lading and would apply to the Contract when *Ginzan* received the photo-copy of the face without the overleaf thereof.

Further, in consideration that neither *Ginzan* nor the Shipper had made any question about details of the Contract to *Korai* or the Carrier after their receipt of the said photo-copy, it can be said that they agreed the application of such clauses including Arbitration Clause to the Contract.

Article 13 (2) of the Arbitration Law provides, "the arbitration agreement shall be in the form of a document signed by all the parties, letters or telegrams exchanged between the parties, or other written instrument". As the purpose of this provision is to clarify the parties' intention to make an arbitration agreement and to record it in order to prove the existence of such agreement and its contents for future disputes, it is considered to be sufficient that "other written instrument" means a document recording the arbitration agreement and being used as evidence afterwards.

Documents required to be "exchanged" in this paragraph shall mean letters or telegrams each of which is unilaterally sent and cannot clarify the receivers' intention. As the Bill of Lading, although only the face thereof was faxed, was premised on the agreement between the parties, the Bill of Lading and its photo-copy are appropriately included in "other written instrument" which is not necessary to be exchanged.

Article 13 (3) of the said Law provides "when a written contract refers to a document that contains an arbitration clause and the reference is such as to make that clause part of the contract, the arbitration agreement shall be in writing". The photo-copy of the face of the Bill of Lading which corresponds to "other written instrument" as stated above, stipulates "the cargo has been received subject to the terms and conditions provided for on the face and back". As the back provides the Arbitration Clause, the requirement of this paragraph is satisfied.

(3) On Owner's Defense to Consignee

On arrival of the Cargo at the destination, Port of Hakata, the Consignee acquired the rights of the Shipper against the Carrier under the Contract, i.e. requiring delivery of the Cargo, claims for damage, etc. and reciprocally the Carrier was in a position to have same defense against the Consignee as against the Shipper.

(4) Discharge from Liability

The Underwriter stated before Tokyo High Court that if the appeal was dismissed, its claim for damage would be lost because of limitation of time provided under Article 14 of Japan COGSA. However, according to Article 14 (2) of Arbitration Law, an arbitral tribunal may commence or continue the arbitral proceedings and make an arbitral award even while the action referred to is pending before the court, and the Underwriter could use both litigation and arbitration at the same time. Accordingly, the Underwriter's argument is unreasonable.

Conclusion

As the Carrier's defense against the Underwriter's cargo claim is reasonable, this appeal should be dismissed.

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TOMAC Arbitration Clause

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

Arbitration Law of Japan

Article 13. (Effect of Arbitration Agreement)

(1) Unless otherwise provided by law, an arbitration agreement shall be valid only when its subject matter is a civil dispute that may be resolved by settlement between the parties (excluding that of divorce or separation).

(2) The arbitration agreement shall be in the form of a document signed by all the parties, letters or telegrams exchanged between the parties (including those sent by facsimile device or other communication device for parties at a distance which provides the recipient with a written record of the transmitted content), or other written instrument.

(3) When a written contract refers to a document that contains an arbitration clause and the reference is such as to make that clause part of the contract, the arbitration agreement shall be in writing.

(4) When an arbitration agreement is made by way of electromagnetic record (records produced by electronic, magnetic or any other means unrecognizable by natural sensory function and used for data-processing by a computer) recording its content, the arbitration agreement shall be in writing.

(5) When the parties to the arbitral proceedings exchange written statements in which the existence of an arbitration agreement is alleged by one party and not denied by another, the arbitration agreement shall be in writing.
(6) Even if in a particular contract containing an arbitration agreement, any or all of the contractual provisions, excluding the arbitration agreement, are found to be null and void, cancelled or for other reasons invalid, the validity of the arbitration agreement shall not necessarily be affected.
Article 14. (Arbitration Agreement and Substantive Claim before Court)
(1) A court before which an action is brought in respect of a civil dispute which is the subject of an arbitration agreement shall, if the defendant so requests, dismiss the action. Provided, this shall not apply in the following instances:
  (i) when the arbitration agreement is null and void, cancelled, or for other reasons invalid;
  (ii) when arbitration proceedings are inoperative or incapable of being performed based on the arbitration agreement; or
  (iii) when the request is made by the defendant subsequent to the presentation of its statement in the oral hearing or in the preparations for argument proceedings on the substance of the dispute.
(2) An arbitral tribunal may commence or continue arbitral proceedings and make an arbitral award even while the action referred to in the preceding paragraph is pending before the court.

Law for International Carriage of Goods by Sea (Japan COGSA)
Article 6 (Duty to issue bill of lading)
(1) After loading the goods on the ship the carrier or the master or agent of the carrier shall, on demand of the shipper and without delay, issue to the shipper one or more originals of bill of lading, showing that the goods have been loaded on the ship . . .

Article 14 (Discharge from Liability)
(1) The carrier shall be discharged from its liability for the good unless a legal action is brought within one year from the date of delivery of the good (or in the case of the total loss of the good, the date when the good should have been delivered).

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