WaveLength

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Developments in the Revision of the Transportation Law and Maritime Commerce Law in Japan

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1. Background and Future Direction of Revision of the Transportation Law and Maritime Commerce Law

In Japan, work has been underway at the Ministry of Justice since April 2014 on drafting revisions for the transportation law and maritime commerce law. There are two reasons as to why this work of revision started. First, Japan's basic legislation is currently being modernized. Second, the provisions of the Japanese transportation and maritime commerce laws date back over 100 years, rendering them obsolete.

The discussions on the abovementioned revisions are currently being carried out by the Commercial Code Committee (sections relating to transportation and maritime commerce) of the Legislative Council of the Ministry of Justice. The subjects of the revisions are extensive, and all of the provisions of the transportation and maritime commerce laws of the current Japanese Commercial Code are subject to review. Based on the discussions thus far, as well as establishing general provisions of transportation law that will apply to all modes of transportation, provisions are also due to be established on air transportation and multimodal transportation that were not previously envisaged in the past in the former Commercial Code, and new provisions are also to be established relating to time charters and sea waybills.

2. Points of Contention in the Discussions

As of the time of February 2015, the work of drafting a tentative intermediate plan in order to revise the transportation law and maritime commerce law is being carried out by the abovementioned Committee. Here, of the subjects of the tentative plan being discussed, I shall be introducing three particular points of contention. The first issue concerns the liability of the carrier, the second issue concerns the obligation of notification of dangerous goods and the third issue concerns the range of application of the legal aspects relating to maritime transportation.

(1) Issue concerning the liability of the carrier

Debate over the legal aspects relating to the first point of contention, which is the

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liability of the carrier, revolves around the handling of the case when there is gross negligence on the part of the carrier.

Under the Japanese Commercial Code, if freight is lost or damaged, or delayed, unless the carrier proves that it was not negligent in exercising due care in the receipt, delivery, storage or transportation of the freight, the carrier will be held liable for compensation of damage (Article 577 of the Commercial Code); provided, however, that the amount of damages shall be limited to the value thereof at the place of destination on the day of delivery of the freight (in cases of total loss or a delay, the day on which the freight should have been delivered) (Article 580 of the Commercial Code). Moreover, in cases of delivering expensive goods, the carrier shall not be held liable for compensation of damage unless the consignor declared the type and value thereof to the carrier (Article 578 of the Commercial Code); provided, however, that the carrier shall be held wholly liable if the freight was lost, damaged or delayed due to an intentional act of the carrier or gross negligence (Article 581 of the Commercial Code), and the application of Article 580 and Article 578 of the Commercial Code shall be excluded.

The issue which has become problematic in the work of revision is whether to maintain this concept of gross negligence. In general, whether there was "gross negligence" in the carrier's act is not a point that is called into question in international treaties, but rather whether this was a "reckless act that was carried out with the knowledge that damage would probably result" (see Section (5) (e) of Article IV of the Hague-Visby Rules). In this revision work, the question is whether to replace this traditional concept of gross negligence with a "reckless act that was carried out with the knowledge that damage would probably result".

Matching the contents of the provisions of the Japanese Commercial Code to those of international treaties allows for a certain degree of consistency, including the advantage of ensuring clarity for other countries. On the other hand, future careful consideration is required when making changes to this point owing to the fact that the concept of gross negligence is a familiar concept in terms of Japanese law and is a stable legal concept for which interpretations exist in the legal precedents of the Supreme Court.

(2) Issue concerning the obligation of notification of dangerous goods

The subject of debate with respect to the second point, which concerns the legal aspects affecting dangerous goods, is liability in cases where the consignor who requested the transportation of the dangerous goods was in violation of the obligation of notification of the dangerous goods.

In international treaties on the international carriage of goods by sea, if the freight constitutes dangerous goods, the consignor is obligated to notify the freight's carrier of the

nature of the dangerous goods before delivering the freight to the carrier (see Article 32 (a) of the Rotterdam Rules). Moreover, in certain cases, the carrier is permitted to take such reasonable measures as destroying the freight (see Section (6) of Article IV of the Hague-Visby Rules and Article 15 of the Rotterdam Rules).

In Japan, the Act on International Carriage of Goods by Sea, on the basis of the Hague-Visby Rules, allows for the possibility of taking reasonable measures such as the destruction of dangerous goods (Article 11 of the Act on International Carriage of Goods by Sea). On the other hand, provisions relating to the obligation of the consignor of notification of the dangerous goods exist neither in the Commercial Code nor the Act on International Carriage of Goods by Sea. Therefore, it was decided in this revision that provisions relating to this obligation of notification should be established in the Commercial Code. Moreover, a provision admitting the consignor's liability towards the carrier to compensate for damage is also to be stipulated in cases where the consignor is in breach of its obligation.

The current point of contention with regard to the provision admitting the liability of the consignor for compensation of damage towards the carrier lies with whether this should be either strict liability, or liability for negligence. Making this strict liability would allow for simple processing of the legal relationship between the carrier and the consignor, and the remaining legal issues would be processed through internal reimbursement between the consignor and the interested parties. However, in such instances as when a consumer or the consigned freight forwarding carrier becomes the consignor, there is strong opposition to this being treated as strict liability taking into account cases where there was insufficient information on the freight which constituted the dangerous goods. Therefore, it is expected that further consideration will be given to this point.

(3) Issue concerning the range of application of the legal aspects relating to maritime transportation.

The third issue of the range of application of the legal aspects relating to maritime transportation is whether transportation in such areas as lakes, rivers and ports (calm water areas) should be left to the rules of maritime transportation. In particular, the issue is whether the carrier should assume the obligation of warranting that it is capable of navigating the waters (Article 738 of the Commercial Code) in cases where the transportation is made by a ship which is only navigating through calm water areas.

Previously, the Japanese Commercial Code applied the same rules for land transportation to transportation in calm water areas by reason of the transportation not incurring the inherent dangers of the sea (Article 569 of the Commercial Code). On the other hand, there are some areas even in calm waters which may pose a certain danger, and

therefore some opinions have been expressed that it is expedient to handle forms of transportation which navigate on water in the same manner regardless of the type of navigated area. Therefore, a matter of debate is whether the conventional rules on calm water areas should be subject to revision.

3. Future Discussions

The tentative intermediate plan is to be compiled and published in March of this year, and then will be made open to public comment. Subsequently, after referring to the opinions received from various circles, discussions are scheduled to be carried out by the Committee in order to compile the final draft of the revised transportation law and maritime commerce law.

Developments in the Revision of the Maritime Commerce Law in the Japanese Commercial Code

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1.Introduction

The transport law and the maritime commerce law in the Japanese Commercial Code have not been subject to any major amendments in the 115 years since the Code's enactment in 1899. However, since April last year, the legislation has been under review and discussion by the transport and maritime commerce section of the Commercial Code Committee of the Legislative Council of the Ministry Justice ("the Committee"). The Committee has been tasked with considering almost all of the provisions of the transport law and the maritime commerce law during its review.

The Committee's work is at a crucial stage, the conclusion and publication of a tentative intermediate plan is imminent. I shall outline the Committee's discussions on main topics so far, from the viewpoint of hull & machinery property insurers, on a selection of the subjects under review: general average, collision between ships, salvage and marine insurance.

2.General average

(1) Fundamental policy of the revision

The Japanese Commercial Code has 11 articles (from Art.788 to Art.796, Art.798 and Art.799) in Chapter 4, Book 3 dealing with issues relating to general average, all of which are discretionary. Usually the contract of carriage (such as the bill of lading) and the charterparty incorporate one of the following versions of the York-Antwerp Rules (YAR), i.e. YAR1974, YAR1974 as amended 1990, YAR1994 or YAR2004. Almost all claims for general average expenditure and general average sacrifice are settled in accordance with the specific version of YAR incorporated into the contract of carriage and, therefore, cases to which the provisions of the Commercial Code directly apply are quite rare.

A fundamental policy objective of the Committee is that the existing articles of the Commercial Code should be revised to make them consistent with the corresponding rules of YAR 1994, which is most widely adopted in bills of lading and charterparties. However,

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there are limits to this policy objective. The existing articles of the Commercial Code are all based on the "Common Safety" allowances theory ("common safety" approach) and there is no article based on the "Common benefit" allowances theory ("common benefit" approach).[1] As it is expected that the revisions will not introduce new rules consistent with the latter theory, the revisions relating to general average will not match all the rules in YAR1994. For example, the following will still not be allowed as general average under the Commercial Code even after the anticipated revisions: (i) wages and maintenance of the master, officers and crew members reasonably incurred, fuel and stores consumed, and port charges incurred during the extra period of detention in any port/place of refuge after common safety has been secured; and (ii) any substituted expenses, such as costs of forwarding cargoes and temporary repairs.

(2) Essential features necessary to constitute a general average act, contributory value and loss/damage to be allowed as general average

Under the present Commercial Code (Art.788-1 and Art.789) the essential features required to constitute a general average act include: (1) a common risk which affects the ship and cargo; (2) the act/disposition performed by the master to minimize or avert a common risk; and (3) that the act/disposition by the master is successful in its aim of saving the ship and cargo (the cause-and-effect relationship between the act/disposition by the master and saving of ship and cargo).

Whereas under Rule A of YAR1994 "the common risk to the property involved in a common maritime adventure" is one of its essential features. Thus it includes not only ship and cargo but also time charterers' bunkers, freight at risk, empty containers and other property onboard. Rule A does not require that a general average act must be performed by the master nor that any particular act shall be shown to have contributed to the ultimate success of the whole operation for the saving of the property. The Committee is proposing that Art.788-1 (definition/essential features necessary to constitute a general average), Art.789/790 (contributory interest/value) and Art.794 (the amount of loss/damage to be

[1] At Lowndes & Rudolf General Average and York-Antwerp Rules 14th ed. (2013) p.43, "Common safety" allowances and "Common benefit" allowances are explained as follow:
The York-Antwerp Rules have recognized two main types of allowance:
(1) "Common safety" allowances: sacrifice of property (such as flooding a cargo hold to fight a fire) or expenditure (such as salvage or lightening a vessel) that was made or incurred while the ship and cargo were actually in the grip of peril. Since the early 19th century, English law and practice has largely recognised only this category of general average.
(2) "Common benefit" allowances: once a vessel was a at port of refuge, European countries and the United States generally viewed expenses necessary to enable the ship to resume the voyage safely (but not the cost of repairing accidental damage to the ship) as also being general average; for example, the cost of discharging, storing and reloading cargo as necessary to carry out repairs, port charges and wages etc. during detention for repairs and outward port charges.

treated as general average) should be revised to reflect the above principles described in Rule A of YAR1994.

The Committee is also proposing a new rule: in cases where expensive goods are carried, loss of or damage to such expensive goods should not be allowed as general average unless the shippers/charterers declared the type and value thereof to the carriers before the commencement of the voyage. However, as there is no similar rule in YAR1994 and this proposal seems to be rather harsh to such cargo interests and there is opposition to introducing this new proposal.

As I will mention in paragraph 4-(8) below, it is proposed that special compensation payable for salvage operations by the shipowner where the ship or her cargo threatens damage to the environment, should be introduced to Chapter 5 of Book 3 of the Commercial Code to harmonize it with Article 14 of the London Salvage Convention 1989. It is also proposed that a provision should be introduced to Chapter 4 that special compensation should not be allowed as general average and should not be deducted from the ship's contributory value so that the provisions of the Commercial Code match Rules VI and XVII of YAR 1994. There was unanimous support for this proposal during the Committee's review.

3. Collision between ships

(1) Fundamental policy of the revision

The Japanese Commercial Code has only 2 articles (Art.797 and 798) in Chapter 4 of Book 3 concerning issues of collision between ships. If the issue is not covered by these two articles, the tort provisions of the Civil Code will apply. Japan has ratified the International Convention for the Unification of Certain Rules of Law with respect to Collisions between Vessels, 1910 (Collision Convention 1910), but has not enacted the Convention into the domestic law. In cases where a collision occurs between/among Japanese flagged vessels, the Japanese Civil Code and the Art.797 and 798 of the Commercial Code will apply. Where a Japanese flagged vessel collides with a vessel/vessels which is/are registered in another contracting country to the Collision Convention 1910, the provisions of the Collision Convention 1910 shall apply. The provisions of the Commercial Code differ from those of the Collision Convention 1910 in several important respects including the applicable time bar. Under the existing legal system in Japan (the Commercial Code/the Civil Code and the Collision Convention 1910), the question of which provisions of the Commercial Code/the Civil Code or of the Collision Convention 1910 should apply to the case will depend on the accidental/coincident fact, i.e. flags of

vessels involved in each specific collision.

Although the Committee's fundamental policy is that the current rules in the Commercial Code should be revised from the viewpoint of making them consistent with the corresponding provisions of the Collision Convention 1910, that has received objections on the following particular two points.

(2) Nature of shipowner's liability (joint-and-several liability or divisible obligations)
If two or more vessels are at fault in the collision, each shipowner's liability will be "joint-and-several" under Art. 719-1 of the Civil Code. On the other hand Art. 4-2 of the Collision Convention 1910 does not provide for "joint-and-several" liability but "divisible obligations" as follows:

> *If two or more vessels are in fault the liability of each vessel is in proportion to the degree of the faults respectively committed. Provided that if, having regard to the circumstances, it is not possible to establish the degree of the respective faults, or if it appears that the faults are equal, the liability is apportioned equally.*
> *The damages caused, either to the vessels or to their cargoes or to the effects or other property of the crews, passengers, or other persons on board, are borne by the vessels in fault in the above proportions, and even to third parties a vessel is not liable for more than such proportion of such damages. …*

Under the Japanese Civil Code, when both ships are at fault, the innocent owner of cargo on board either ship can recover the whole of his loss against the owners of either ship. Whereas under the Collision Convention 1910 each shipowner will only be severally liable for his proportion of the damage or loss to cargo carried in any one of them.

During the Committee's review, it was pointed out that the application of "joint-and-several" liability provided by Art.719-1 of the Civil Code to these cases will cause the carrying vessel/vessels to bear liability from which he/they is/are exempted by any contract of carriage incorporating Hague-Visby Rules including "negligent navigation defense" under Art. IV Rule 2, and will undermine the intention of this contractual defense. It was suggested that in property damage claims, especially in the particular case of damage of cargo and other property onboard the vessel, a provision matching to Art. 4 of the Collision Convention 1910 should be newly introduced to the Commercial Code. However, there is strong opposition because, in practice, usually there is no "negligent navigation defense" in the contracts of carriage in the Japanese coastal trade and therefore it is argued that Art 719-1 of the Civil Code should continue to apply.

(3) Time bar

Art. 798 of the Japanese Commercial Code provides that any claim related to a collision between ships shall be extinguished after one year has elapsed. There are two famous court decisions in Japan regarding this time bar. Firstly, the old Supreme Court held that this article applies only to the claim relating to property damage (infringement of property rights). Secondly, the current Supreme Court held that Art. 798 is a special provision in respect of the period of time bar for Art.724 of the Civil Code and time only starts to run from the day when the injured party came to know of the wrongdoer. In contrast, and with the swift and uniform settlement of rights and liabilities among plural concerned parties in mind, Art. 7-1 of the Collision Convention 1910 provides that the action for the recovery of any type of damages are time barred after an interval of two years from the date of the casualty.

It was suggested that Art. 798 should be revised to match the provisions of the Collision Convention 1910 to extend the time bar period for all claims caused by the ship collisions, whether personal damages or infringement of property rights, from one year to two years. During the Committee's review, there was a lot of support for the time bar for claims relating to infringement of property rights being unified to two years in line with the Collision Convention 1910. However, for personal injury claims there was strong opposition to the above suggestion on the grounds that it would impact on the respect of human life and more generous provisions of the Civil Code should apply.[2]

4. Salvage

(1) Fundamental policy of the revision

The Japanese Commercial Code has 15 articles (from Art. 800 to Art. 814) in Chapter 5 of Book 3 dealing with issues relating to salvage. All of these articles are considered to be discretionary except Art. 805 which provides for the distribution of salvage award among the owner of the salvage vessel, her master and crew members. In cases where all parties involved in the salvage operation (both salvors and salvees, i.e. owners of salved property) are registered or domiciled in Japan the above articles shall apply. Japan has ratified the International Convention for the Unification of Certain Rules of Law respecting Assistance and Salvage at Sea, 1910 (Brussels Convention 1910), but has not enacted the Convention into the domestic law. In cases where Japanese flagged vessels salve other vessels which are registered in other contracting countries to the Brussels Convention 1910, the

[2] The Civil Code is now also under the review and revision. The time bar period for personal injury tort claim under the current Japanese Civil Code is 3 years from the day when the injured party comes to know of the wrongdoer. It is now proposed that this period should be extended to 5 years.

provisions of that convention shall apply.

In 1989 the International Convention on Maritime Salvage, 1989 (London Salvage Convention 1989) was adopted which, from the standpoint of valuing the importance of protecting environment, modified the traditional "no-cure, no-pay" principle adopted by the Brussels Convention 1910. Although Japan is not a contracting state to the London Salvage Convention 1989 yet, as many as 65 countries have already ratified it.

The provisions in the Commercial Code differ from those of both international conventions in several important points including the time bar of the claim for the salvage award. Under the existing legal system in Japan (the Commercial Code and the Brussels Convention 1910), the question as to which of the provisions of the Commercial Code or the Brussels Convention 1910 should apply to the case, will depend on the accidental/ coincident fact, i.e. flags of vessels involved in each specific salvage operation.

In reality, the salvage operations that are rendered to the vessels and their cargoes in Japanese territorial waters are usually conducted under the Japan Shipping Exchange's Salvage Agreement (JSE form) or Lloyd's Standard Form of Salvage Agreement (LOF), both of which are based on the London Salvage Convention 1989.

Although the Committee is not in a position to consider and deliver an opinion on whether our country should ratify the London Salvage Convention 1989, taking the above reality into account, it was suggested and agreed that the provisions of the Commercial Code should be basically revised to harmonize them with those of both international conventions. There was unanimous support for the above proposal during the Committee's review.

(2) Voluntary salvage and contractual salvage

Art. 800 provides the definition and the necessary features to be an act of salvage as follows:[3]

> *Where the whole or part of a ship or the shipped goods were involved in a marine accident, a person who has salved the same without being obliged do so may claim a reasonable salvage award corresponding to the consequence of the salvage*.

From the above wording, especially the words "without being obliged do so", the

[3] This translation is based on the translation in the Japanese Law Translation Database System, 2015, Ministry of Justice, Japan.

provisions in the Commercial Code are generally understood to cover voluntary salvage. On the other hand, there is a court decision which held that this article could also apply to cases where a salvage contract was concluded after the casualty occurred. In addition to the above, Art. 802 is clearly aimed at covering the salvage operation conducted under a salvage contract.[4] Therefore, it is not clear whether the Commercial Code should apply only to voluntary salvage or contractual salvage as well.

The Brussels Convention 1910 is generally considered to apply to the voluntary salvage only, whereas by Articles 6 and 7, the London Salvage Convention 1989 clearly applies to contractual salvage as well. During the Committee's review it was suggested that Art. 800 should be revised to clearly provide that the Commercial Code will apply to both voluntary salvage and salvage operations conducted under a salvage contract. Contractual salvage includes salvage operations conducted by the professional salvors as well by non-professional salvors. It was suggested that it should be made clear to which type of salvage operation each provision of the Commercial Code should apply. This suggested revision has received a lot of support.

(3) Subject matter of salvage (Salvable property)

Under the Brussels Convention 1910, salvable property is defined as "vessels in danger, of any things on board, of freight and passage money". Under the London Salvage Convention 1989 it is defined as the "vessel or any other property in danger", whereas Art. 800 of the Commercial Code refers to "a ship or the shipped goods" only. LOF provides "the vessel, her cargo freight bunkers stores and any other property thereon but excluding the personal effects or baggage of passengers master or crew" and JSE form describes the "vessel her cargo and other property". It was suggested and basically agreed that Art. 800 should be revised to extend the salvable property to "vessel her cargo and other property" to harmonize it with the provisions in the international conventions and the wide-spread commercial salvage contracts.

(4) Authority to conclude salvage contract

Art. 6-2 of the London Salvage Convention 1989 provides the master and the shipowner with the authority to conclude the contract for salvage operation on behalf of the owners of the property on board the vessel. The Commercial Code does not contain the same direct

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[4] Art. 802 of the Commercial Code provides as follow:
Where the salvage award for a marine accident is specified by a contract, if the amount thereof is significantly unreasonable, a party to the contract may demand an increase or decrease of the amount. In this case, the provisions of the preceding Article shall apply mutatis mutandis.
The above translation is based on the translation in the Japanese Law Translation Database System, 2015, Ministry of Justice, Japan.

provision to grant the master such authority but it is generally understood that the master can conclude a salvage contract on the behalf of cargo owners pursuant to the authority provided in Art. 712(1)[5]:

> *The master shall, while the ship is on a voyage, dispose of the shipped goods by a method which is in the best interests of the interested parties.*

In the intended revisions, as mentioned above, it was suggested that the salvable property will be extended to cover the "vessel her cargo and other property". However, under the current Art. 712 of the Commercial Code, the master will not be able to conclude a salvage contract on behalf of time charterer's bunkers, empty containers and freight. Furthermore, if the vessel is in distress and is abandoned by the master and crew this might give rise to difficulties in validly concluding a salvage contract by the shipowner. Taking the above into account, the master and the shipowner should be given direct authority similar to Art. 6-2 of the London Salvage Convention 1989 to conclude a salvage contract. During the Committee's review it was proposed that a new provision in these terms should be introduced into the Commercial Code and the suggestion has received a lot of support.

(5) Criteria for fixing the salvage award

Art. 801 provides that the degree of risk, the consequence of the salvage, the labor and costs incurred and any other circumstances concerned should be taken into account in fixing the salvage award. Art. 13-1 (b) of the London Salvage Convention 1989 provides that the skill and efforts of the salvors in preventing or minimizing damage to the environment should be also taken into account. It is uncertain whether the above skill and efforts of the salvors should/can be considered under the present Commercial Code, i.e. whether wording "any other circumstances concerned" of Art. 801 includes such skill and efforts.

During the Committee's review it was suggested that clear wording should be introduced into the Commercial Code to harmonize it with Art.13-1 (b) of the London Salvage Convention 1989 and this suggestion has received unanimous support.

(6) Limit of salvage award

Art. 803-1 provides that the amount of the salvage award may not exceed the total value of the property that has been salved, unless there are special provisions to the contrary. This provision is almost the same as Art.13-3 of the London Salvage Convention 1989 and

[5] This translation is based on the translation in the Japanese Law Translation Database System, 2015, Ministry of Justice, Japan

should be maintained.

Art. 803-2 further provides that as to the value of the property, i.e. the limit of salvage award[6]:

> *If there is any statutory lien with a prior rank, the amount of the salvage award may not exceed the amount that remains after deducting the amount of the claim held by the holder of the statutory lien from the value of the salved property.*

No similar provision exists in the Brussels Convention 1910, the London Salvage Convention 1989, LOF nor JSE and the above provision of the Commercial Code is totally different from the general understanding in the current shipping world that salved value should be recognized as the sound market value less damage or costs of damage repairs.

As to the assessment of salved value under English admiralty/maritime law, the position is that the English Courts/LOF arbitrators look at the market value of the vessel in her salved condition and they do not take account of the existence of maritime liens as a deduction in arriving at the salved value. This is an historic but consistent approach taken in salvage matters both under LOF and at common law. The test is the value of the vessel in the open market for purchase by a third party, not the value to the owner of the vessel. In certain instances, the benefit of a long term charter may be taken into account as a factor in increasing a vessel's sound market value. Other matters are taken into consideration for the purpose of deductions from the sound value to arrive at a salved value. These will include the cost of repairs and pending freight, but not maritime liens. Therefore, the "value to the owner test", which would include maritime liens outstanding on the vessel, is a very different test from that required for purposes of salved values in LOF and English common law assessment of salvage.

During the Committee's review, it was firstly suggested that Art. 803-2 would remain and would not be revised, however, it is now basically agreed that Art.803-2 should be deleted.

(7) Apportionment of salvage award among the owner of the salvage vessel, her master and crew members

Although the ratio of the apportionment of the salvage award between the owner of salvage vessel and her crew members is under discussion, crew members' rights to claim a salvage award under Art.805 will be maintained. In order to protect crew members' rights

[6] This translation is based on the translation in the Japanese Law Translation Database System, 2015, Ministry of Justice, Japan

this provision will continue to be mandatory, i.e. any contract that is more unfavorable to crew members than the provisions of the Commercial Code will be void.

It was suggested that this provision will not apply to salvage operations conducted by professional salvors and crew members of salvage vessels owned by professional salvors will not have the right to claim their portion of salvage award. This suggestion received unanimous support.

(8) Special compensation (Environmental services)

Property salvage is traditionally concerned with the saving or preservation of property in danger at sea and the entitlement to a salvage award essentially depends upon saving property from danger. Although the Brussels Convention 1910, which is based on the "no-cure, no-pay" principle, was adopted at the beginning of the 20th century, increasingly in modern times, with larger vessels and greater cargoes including those with various noxious and hazardous nature, vessels and their cargoes have enhanced potential to cause harm to the environment and thereby to expose those responsible for such damage. Therefore, a situation of the casualty necessitating salvage services may also require services designed to prevent or mitigate damage to the environment. Thus, those services are increasingly burdensome and expensive, whereas salvage awards remained subject to the requirement of traditional "no-cure, no-pay" principle. Therefore, in some cases a salvor might hesitate or be reluctant to render salvage services to a casualty necessitating environmental services, fearing the possibility of failing to earn an award (i.e. failing to recover expenses which he has actually incurred) and bearing liability for damage to the environment such as oil pollution caused by or during his salvage operations. As to the reaction to these problems, with the immense oil pollution damage caused by the grounding of the VLCC "AMOCO CADIZ" off the coast of Brittany, France in 1978 as a trigger, LOF was revised to modify the traditional "no-cure, no-pay" principle by incorporating a "safety net" into LOF1980 in order to introduce an incentive for a salvor to render salvage services in such cases. Under this new form a salvor responding to a laden oil tanker was guaranteed that the amount of expenses, which he has reasonably incurred, would be indemnified and, in addition, he could receive an increment of up to a maximum of 15 per cent of his expenses, if he succeeded in preventing or mitigating damage to the environment. However, salvors were still keen that their interests were secured on a legislative basis. Art.14 of the London Salvage Convention 1989 extended and replaced the "safety net" provisions of LOF 1980, establishing a new incentive scheme of "special compensation" which applies not only to casualties of oil tankers laden with a cargo of oil but more widely regardless of the type of vessel. Most of provisions of the London Salvage Convention 1989 on environmental damage were given contractual effect by incorporation into LOF 1990 and JSE form 1991.

The current provisions of the Japanese Commercial Code are based on the traditional "no-cure, no-pay" principle in the same way as the Brussels Convention 1910. They do not allow for any special compensation in relation to environmental services. Taking into account the above global movement over the last 35-40 years, during their review the Committee proposed that the system of "special compensation" under Art. 14 of the London Salvage Convention 1989 should be newly introduced to the Japanese Commercial Code and that suggestion has received a lot of support.

(9) Time bar

Art. 814 provides any claim for a salvage award shall be extinguished upon one year elapsing from the time of the salvage. On the other hand, Art.10-1 of the Brussels Convention 1910 provides that a salvage action is barred after an interval of two years from the day on which the operations of assistance or salvage terminate. The London Salvage Convention 1989 has almost the same provision as the Brussels Convention 1910. Nowadays, in a salvage operation conducted to container vessels, huge numbers of cargo owners are involved and it takes a considerably long time for the salvors to receive salvage awards from all salvees. Under such circumstances, it should be reasonable to revise Art. 814 to harmonize it with the provisions of both international conventions by extending the time bar period from one year to two years. During the Committee's review, the above revision has received a lot of support.

5. Marine insurance[7]

(1) Necessity of provisions on marine insurance

The Japanese Commercial Code used to contain, in its former Chapter 10 of Book 3, provisions on insurance contracts of both non-life insurance (from Art.629 to Art.672) including inland transit cargo insurance (from Art.669 to Art.672) and life insurance (from Art. 673 to Art.683). These provisions were revised to further protect the policyholder and were replaced by the Insurance Act, which was enacted in 2008 and came into force in April 2010. The provisions regarding non-life insurance contained in the Insurance Act apply to marine insurance. In addition the Commercial Code in its present Chapter 6 of Book 3 continues to contain provisions applicable to marine insurance (from Art.815 to Art. 841-2), all of which are discretionary. In terms of applicability, special law takes precedence over more general law. Therefore, the order of application to marine insurance

[7] The illustration of the current status of Japanese laws on marine insurance (except (3) duty of disclosure) is largely based on the following document with the author's consent.
Satoshi Nakaide, "Marine Insurance Law in Japan –A Structure Based on a Combination of Civil Law and English Marine Policy Wordings-", Waseda Shogaku No.440, p.1

contracts in Japan is; firstly, provisions on marine insurance contained in the Commercial Code, secondly, the Insurance Act, and lastly, the general contract law contained in the Civil Code, which is now also in the process of a thorough revision.

Provisions of the Insurance Act can be divided into three categories based on their nature: (i) discretionary, (ii) unilateral mandatory and (iii) absolute mandatory. The unilateral mandatory provisions were newly introduced to protect consumers and the unilateral effect does not apply to marine insurance, property insurance of cargoes carried by aircraft and other non-life insurance covering losses arising out of business activities including inland transit cargo insurance etc (Art.36).

It was suggested mainly by the marine insurance industry that although, as mentioned above, the unilateral effect of unilateral mandatory provisions in the Insurance Act does not apply to the marine insurance contract and all of the present provisions on marine insurance are merely discretionary, those provisions need to be contained in the Japanese Commercial Code. The reasons are as follows:

Firstly, provisions on marine insurance in the Commercial Code have valuable roles for showing “the default rules” or a kind of “general law” to apply to the insurances covering the risks relating to the business activities which can be distinguished from the consumers’ insurances which the Insurance Act mainly aims to cover.

Secondly, marine insurance business is negotiated and concluded in the international insurance markets. But for legislation on marine insurance contracts it may become extremely difficult for the Japanese marine insurers to show a clear view of the standard or the principles of Japanese law on marine insurance to their customers, i.e. prospective policyholders, and to receive the customers’ understanding of Japanese marine insurance law and their consent to accept Japanese law as the governing law of the insurance contract. It may also become difficult for Japanese insurers to get reinsurers in foreign markets to provide them with the reinsurance cover. During the Committee's review it was discussed whether provisions on marine insurance should continue to be contained in the Commercial Code. It was basically agreed that they are valuable and necessary and for the above reasons they should remain in the Commercial Code as discretional provisions.[8]

[8] Many of maritime states such as UK, Canada, Australia, France, India, Singapore, China and Korea have legislations on marine insurance except US and Germany.

(2) Definition/scope of marine insurance law

The current Commercial Code defines marine insurance in Art. 815-1 as follows:[9]

> *Marine insurance contracts are to indemnify loss caused by accidents related to navigation.*

There is the court decision by the old Supreme Court which held that "accidents related to navigation" should be constructed as "maritime perils".

In practice marine insurance embraces any kind of insurance on property or interest exposed to marine risks. Insurance of cargoes, hulls and other property at sea are generally understood to be typical examples of marine insurance. Risks during the international combined transport containing the carriage of goods by sea are usually undertaken by one marine cargo insurance policy. Section 2 of the English Marine Insurance Act 1906 provides that the insurance of cargo transported by combined transport can be marine insurance. Insurance of cargo transported by air, truck or train without the carriage of goods by sea may not be regarded as marine insurance. However, such insurance is usually treated similarly as marine cargo insurance in practice when the cargo is transported across different countries. For example insurance of cargo transported by air is usually undertaken in the conditions such as ICC (Air). Taking the above business practice into account it was mainly suggested by the marine insurance industry that the marine insurance contract should be defined as follow:

> *Marine insurance shall indemnify the damage and/or loss that may be caused by a fortuitous accident relating to property at sea and property being transported by sea and/or damage and/or loss that may be caused by a fortuitous accident in a marine business activity (including accidents relating to this activity).*

There is another suggestion that the definition of marine insurance should be extended to cover risks during the combined transport containing a carriage of goods by sea.

With regard to the above two suggestions the Ministry of Justice pointed out the following points and expressed a negative view on the revision of the current provision:

The risks to cargo transported by air, truck or train do not involve any marine element in the risk and the above wording suggested by marine insurance industry is rather vague and

[9] This translation is based on the translation by the Non-life Insurance Institute of Japan, *The Insurance Act the Rules of Insurance Contracts in Japan, 2011*

does not clearly define the scope to which provisions on marine insurance in the Commercial Code should apply. All of the provisions on marine insurance in the Commercial Code are discretionary and have roles for showing “the default rules” to be applied to the insurances covering risks relating to business activities. As insurances covering the above mentioned property and transportation are insurances relating to business activities and the unilateral effect of unilateral mandatory provisions will not apply to them (Art.36-2 and 36-4), parties concerned can agree the insurance conditions referring to provisions of marine insurance of the Commercial Code or by using conditions usually used in marine insurance contracts or similar conditions, even if those insurances are not defined as marine insurance to which provisions of the Commercial Code will directly apply. Therefore, the definition of marine insurance in Art. 815-1 need not be revised.

(3) Duty of disclosure

The Insurance Act revised the previous rules on disclosure. Previously, under the Commercial Code, policyholders were required to disclose all material information concerning risks voluntarily, whether or not insurers actually asked for this information. Under the Insurance Act, policyholders do not need to disclose all material information voluntarily and only need to answer the questions which are actually requested by insurers in respect of material facts for them to determine the terms and conditions of the policy (Art. 4). In short, the provision has been amended from "a duty of voluntary declaration" to "a duty of question and answer". The above provision regarding the duty of disclosure is a unilateral mandatory provision of which the unilateral effect will not apply to marine insurance contract and insurers can contract it out. The standard hull clauses, written in Japanese, still contract out of it and adopt the original "duty of voluntary declaration". However, the provisions of the standard cargo clauses written in Japanese, which are used for inland waterway cargo insurance, were amended from "a duty of voluntary declaration" to "a duty of question and answer" at the time of the enforcement of the Insurance Act.

The adoption of "a duty of question and answer" by the Insurance Act is based on the assumption that the insurer has sufficient capacity for collecting various information/data necessary to assess the risk which he will underwrite in the policy. However, risks undertaken under a marine insurance policy often relate to foreign matters. Also the variety of nature of the subject matter of insurance itself, and the circumstances where it will be involved is quite wide. In those circumstances, the nature/degree of the risk may not be easily indentified by the insurer. Also, sometimes the insurer is not given enough time to obtain the information required to determine whether or not he will underwrite the risk through a "question and answer" process. In UK the Marine Insurance Act 1906 provides

the “a duty of voluntary declaration". The new UK Insurance Act 2015 (which recently received Royal Assent (February 2015) and will come into force in August 2016) has revised the test for a breach of the duty of disclosure to a new test of “duty of fair presentation of the risk”. However, the new test remains based upon the principle of “duty of voluntary declaration” by the assured and it is still adopted for insurance covering risk relating to the business activities by corporations. This is also the position in France. Under the above circumstances, in Japan, although, as mentioned above, “a duty of question and answer” can be contracted out of, if such a disclosure duty is provided as the default rule for marine insurance, a special additional clause stipulating that the “duty of voluntary declaration” applies to the insurance contract will have to be attached to the standard clauses such as ICC and ITC-Hulls if insurers require the consistent level of protection.

Expressly requiring the above special clause, which will be unfamiliar to foreign customers and reinsurers, may cause concern and may result in misunderstanding, and development of opinion that the Japanese Commercial Code is uncertain. As a result, the inclusion of Japanese law provisions in marine insurance contracts may try to be avoided. That may also cause some inconvenience and trouble in international transactions including the placement of reinsurance in the international insurance markets, potentially

[10] In the Japanese marine insurance market English governing law clauses, which stipulate that English law and practice shall apply as to liability for and settlement of insurance claims, are always attached to cargo and hull insurance policies with Institute Clauses in English.
The exact wordings of the English governing law clauses may vary according to the class of insurance and amongst difference insurance companies. A typical wording attached to a cargo policy is;
Notwithstanding anything contained herein or attached hereto to the contrary, this insurance is understood and agreed to be subject to English law and practice only as to liability for and settlement of any and all claims.
A typical wording attached to hull policy is;
Art.1 English law and practice shall apply as to liability for and settlement of any and all insurance claims. In all other respects, including issues as to the existence and validity of this insurance, this insurance is subject to Japanese law and practice.
(Art.2 This insurance shall be subject to the exclusive jurisdiction of the Tokyo District Court of Japan, except as may be expressly provided herein to the contrary.)
As understood from the above wordings, the English governing law clause to be attached to cargo insurance does not provide law to apply to issues as to the existence and validity of the insurance .
The issue of the applicable law under a policy with an English governing law clause presents some difficulties. There are two different court decisions on the applicable law to duty of disclosure. One court decision in a cargo insurance case held that breach of duty of disclosure should be regarded as a matter as to liability for insurance claim. That means that English law (“a duty of voluntary declaration”) will apply. The other court decision, which is also related to a cargo insurance case, held that the duty of disclosure is a matter of the existence and validity of the insurance and therefore, Japanese law, i.e. law of the place where the insurance contract was concluded, should apply. That means that under the current Insurance Act “a duty of question and answer” will apply.
In order to avoid the above confusion, "a duty of voluntary declaration" should be introduced as the default rule for marine insurance in the new Commercial Code, in line with global standards.

resulting in the rise of insurance and/or reinsurance premium. In order to avoid the above mentioned possible concerns "a duty of voluntary declaration" should be introduced as the default rule for marine insurance in the new Commercial Code, in line with global standards. The shipper industry pointed out that it would not be uncommon for small and medium sized shippers not to receive sufficient information on the details of cargo and expressed their anxiety that in rather many cases the breach of “a duty of voluntary declaration” would be claimed by the insurer. However, under Japanese law the insurance contract can be cancelled only in cases where willful misconduct or gross negligence of the policyholder for his breach of “a duty of voluntary declaration” can be proved. During the Committee's review, the above proposal has received a lot of support.

(4) Abandonment

Neither the Insurance Act nor provisions on marine insurance in the Commercial Code contain any definition of total loss. Further, neither give any concept of actual total loss or constructive total loss. However, the Commercial Code grants the assured a right to abandon the subject matter of insurance to the insurer and to demand payment of the insured amount in certain specified circumstances.

Under the Commercial Code (from Art. 833 to Art. 841) the right of abandonment is allowed by the assured when: (i) the vessel sinks; (ii) the vessel is missing; (iii) the vessel cannot be repaired; (iv) the vessel or cargo is captured; or (v) the vessel or cargo was confiscated by governmental procedure and has not been released for six months. When the assured abandons the vessel, the insurer automatically, i.e. without any act by the insurer, acquires all the rights of the assured concerning the property. It will be understood from the above conditions for the abandonment provided by the Commercial Code that abandonment is the right of the assured to claim the payment of a total loss in return for the transfer of the subject matter of insurance.

In many cases, the remains of the subject matter of insurance, such as the wreck, is damaging inheritance (*damnosa hereditas*), because of potential liabilities. Obvious liabilities are expenses incurred or to be incurred for the removal of the wreck and damage caused or to be caused by oil pollution. In practice, over the decades, there have been no actual cases in Japan where an insurer has accepted the assured’s abandonment and taken over the assured's proprietary interest. Under the current version of the standard clauses of hull and cargo insurance written in Japanese, the concept of abandonment had been already abolished for many years and in the case where abandonment by the assured could be allowed under the previous versions, the assured can simply claim a total loss payment as “a constructive total loss” which is provided in the standard clauses. Therefore, it was

suggested mainly by the marine insurance industry that provisions of abandonment in the Commercial Code should be abolished and instead, the provision of the definition of constructive total loss should be introduced so that the assured can claim a total loss payment without the procedure of abandonment.

During the Committee's review the above proposal to abolish the concept of abandonment received unanimous support. However, in respect of constructive total loss, there is no provisions relating to constructive total loss in other type of insurance such as automobile insurance, although for that type of insurance, a total loss claim can be admitted in certain cases other than an actual total loss. The Insurance Act does not contain provisions voiding the concept of constructive total loss. There are strong dissenting views that such provision is not necessary and it should be left to the parties concerned to deal with it in the insurance contract terms.

6. Future discussions

The Committee's tentative intermediate plan will be concluded and published at the end of March 2015 and will be open to public comment. This process will last until the middle of May 2015.

After the above process, taking the opinions received from various interested parties into account, further discussions are scheduled to be carried out by the Committee in order to draw up the final report and draft of the revised transport law and maritime commerce law of the Commercial Code.

The Manufacturer's Product Liability for Self-Heating Substances and Self-Reactive Substances under IMDG Code

- "NYK Argus" -Tokyo High Court Judgment on 29th October 2014-

Ohki Hirata *

I. Introduction

1 The case concerns the damage to the cargoes of the third parties on board "NYK Argus" and the vessel itself arising from the thermal decomposition of the dangerous cargoes[1] that were not declared as dangerous goods under the International Maritime Dangerous Goods Code (hereinafter referred to as "IMDG Code")[2] by DKSH Japan K. K (former name was Nihon Siber Hegner K.K.) (hereinafter referred to as "the Shipper"), when they were shipped on board "NYK Argus" at Kobe.

2 Daito Chemix Corporation (hereinafter referred to as "the Manufacturer") produced the chemical products and issued Material Safety Data Sheet (hereinafter referred to as "MSDS")[3] in which it appeared not to make proper warnings of dangerous goods by way of referring to UN Numbers stipulated under IMDG Code when the Manufacturer delivered the dangerous goods to the Shipper.

3 The owners of the cargoes who suffered the damage or loss, the cargo underwriters who paid insurance money to the assureds, and the demise charterer, NYK Argus Corporation (hereinafter referred to as "the Claimants") firstly commenced

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[1] The dangerous cargoes were NA-125 and PSR-80. NA-125 is photosensitive materials classified as UN Class 4.2 solid of IMDG Code. PSR-80 is classified as UN Class 4.1 solid of IMDG Code.

[2] IMDG Code stands for International Maritime Dangerous Goods Code that was originally adopted by the fourth IMO Assembly in 1965 and give a guideline to the safe transportation of dangerous goods by water on vessel. The Code should cover the matters as packing, container traffic and stowage, with particular reference to the segregation of incompatible substances.It is stated in the Code that the provision contained in the Code are applicable to all ships to which the International Convention for the Safety of Life at Sea, 1974 (SOLAS 74), as amended, applies and which are carrying dangerous goods as defined in regulation 1 of part A of chapter VII of that Convention.It is explained in the foreword of the Code that the Code was recommended to Governments for adoption or for use as the basis for national regulations in pursuance of their obligations under regulation VII/1.4 of the 1974 SOLAS Convention and regulation 1 (3) of Annex III of MARPO 73/78. Japan declared accession to this Convention on 15 May 1980.

[3] MSDS stands for A Material Safety Data Sheet that is a document that contains information on the potential hazards (health, fire, reactivity and environmental) and how to work safely with the chemical product.

proceedings against the Shipper to claim damages on the ground of tort before Tokyo District Court.

4 The Claimants contended that the Shipper failed to make declaration to the carrier that the cargoes were dangerous goods under IMDG Code and, if it had made, the cargoes should have been stowed on deck in accordance with IMDG Code and no accident should have occurred. The Shipper contended that it was not at fault because it was not informed that the cargoes were dangerous goods by the Manufacturer.

5 Furthermore, the Shipper contended that the cause of the damage or loss of the cargoes was the fire rather than the thermal decomposition of the dangerous goods and by virtue of application of Act on Liability for Fire caused by Negligence, unless the Claimants prove the gross negligence of the Shipper for the fire, it was not liable for the damage or loss of the cargoes. The Claimant appealed to Tokyo High Court. The judges of Tokyo High Court did not agree to the judgement of Tokyo District Court that held the damage or loss was caused by the fire. They held the damage or loss was caused by the thermal decomposition reaction of the dangerous goods.

6 Then they moved to decide to the issue of the fault of the Shipper regarding the dangerous goods. The Claimants' above contention satisfied the judges and they rendered a judgment in the Claimants' favour.[4]

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[4] The Claimants commenced proceedings against the Shipper who failed to make a declaration of dangerous goods to the carrier before Tokyo District Court.

On 23rd July 2010 Tokyo District Court rendered the judgment in favor of the Shipper holding that the Claimants failed to prove the gross negligence of the Shipper with regard to the fire that the judges considered to be the cause of the damage and loss of the cargos, applying Act on Liability for Fire caused by Negligence. This is exceptional rule to general tort rule in Japan. It is stipulated unless the wrongdoer was gross negligence with regard to loss caused by the fire, it should not be liable for the loss. In other word the ordinary fault or negligence is not enough to admit liability of the wrongdoer if the damage was caused by the fire.In addition to the issue of applicability of Act on Liability for Fire caused by Negligence, there are two other issues to decide. The first issue was whether NA-125 and PSR-80 would fall with the dangerous goods stipulated in IMDG Code. The Shipper denied it. The second issue was the cause of the Accident. The Claimants contended that the damage and loss of the cargos was caused by the thermal decomposition reaction of the thermally unstable goods. The Shipper contended that the extreme over-heating of the fuel oil tank due to human error on the part of the crew should cause the thermal decomposition reaction.

On 28th February 2013, Tokyo High Court rejected the Shipper's several arguments. In respect of the first issue, the judges found that NA-125 and PSR-80 were dangerous goods under IMDG Code. With regard to the second issue the judges held that the cargo (PSR-80) had been raised in temperature for about 55 successive hours due to heated fuel oil and it reached to the self-accelerating decomposition temperature and thereafter the both cargo took rapidly self accelerating decomposition reaction and reached to the temperature of 400 °C(thermal runaway). It resulted that the cargos of the third parties suffered loss.

7 In addition to the first proceedings, the Claimants secondly commenced proceedings against the Manufacturer to claim damages on the basis of Product Liability Act 1994 (hereinafter referred to as "PL Act 1994")[5], because the Manufacturer delivered the goods which had defect to the Shipper and if the Manufacturer had made a proper warning of danger of the products to the Shipper, the damage or loss to the cargoes would not have occurred.

8 The Manufacturer contended that (1) the damage or loss to the cargoes was caused by the fault of the Shipper who should had exercised due diligence to examine whether the cargoes were dangerous goods or not under IMDG Code. It also contended that there was no defect of the products because the Manufacturer duly provided sufficient information for the Shipper to carry out due diligence to examine the goods. Therefore the principal issue at the trial concerned the question whether the Manufacturer was liable for damage or loss due to the defect of products by way of warning under the circumstance where the Shipper failed to make declaration of dangerous goods to the carrier.

9 In addition to the above, the Manufacturer contended several issues including (2) the governing law of the claim based on tort claim (under Japanese Law, the product liability claim is one kind of tort claims) and (3) the cause of damage or loss to the cargoes was the bunkers overheated by the demise charterer.

10 This paper would deal with mainly the above issue (1) of the second proceedings against the Manufacturer, while the cause of the damage or loss is referred below briefly.

The judges of Tokyo High Court had a different view from the judges of the fist instance that Act on Liability for Fire caused by Negligence should not be applicable to the case where the fire took place during international carriage of goods by sea. Further more the judges were satisfied that the Accident was not fire but it was from thermal decomposition reaction of NA-125 and PSR-80 without oxygen with the result that there was no basis for Act on Liability for Fire caused by Negligence to apply to this case.The Shipper, furthermore, contented that it was not negligence because it was not informed that the cargoe were dangerous goods. The judges held that the Shipper should be liable, even though it was not informed so.

The judgment of Tokyo District Court is reported by Hairei-Jihou Vol. 2181 1st June 2010 p44 and Maritime Law Review (Kaijiho Kenkyu Kaishi) published by Japan Shipping Exchange Vol. 222 February 2014, p 79.The judgment of Tokyo High Court is reported by Hanrei-Jihou Vol.2181 1st June 2013, p 3 and Maritime Law Review (Kaijiho Kenkyu Kaishi) published by Japan Shipping Exchange Vol. 221 November 2013 p 53. See Junpei Osada "The Shipper's liability towards Third Parities Imposed on Dangerous Goods-Analysis on the "NYK Argus" [2013] (Tokyo High Court Hanrei –Jihou Vol. 2181, p3)-"Wave Length-JSE Bulletin No59 (March 2014)

II. Relevant Facts

1 The Manufacturer sold and delivered the two chemical products called as NA-125 (50 kilograms X100 fiber drums) and PSR-80 (10 kilograms X40 cartons) to the Shipper in September 2004 and also gave MSDS of NA-125 and PSR-80 to it.

2 The Shipper did not make any declaration of dangerous goods when it handed over NA-125 and PSR-80 to the contracting carrier. NA-125 and PSR-80 were loaded into a container (OCLU094925-9) (hereinafter referred to as "the Container") on the basis of CFS/CFS.

3 The Container was loaded on "NYK Argus". It was in fact stowed in the position (stowage position 23-08-02), which was surrounded on three sides by a fuel oil tank in the hold No. 3. Please see the Figure 1 (The cargo hold viewed by the back). If they had been declared as dangerous goods to the carrier, they should have been stowed on deck.

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[5] Product Liability Act (Act No.85 of 1994) came into force on July 1, 1995.
Unofficial translation of it is as follows:-
Article 1 (Purpose)
The purpose of this Act is to protect the victim of the injury to life, body, or property which is caused by a defect in the product by setting forth liability of the manufacturer, etc. for damages, and thereby to contribute to the stabilization and improvement of the life of the citizens and to the sound development of the national economy.
Article 2 (Definitions)
(1) The term "product" as used in this Act shall mean movable which is manufactured or processed.
(2) The term "defect" as used in this Act shall mean a lack of safety that the product ordinarily should provide, taking into account the nature of the product, the ordinarily foreseeable manner of use of the product, the time when the manufacturer, etc. delivered the product, and other circumstances concerning the product.
(3) The term "manufacturer, etc." as used in this Act shall mean the following:
(i) any person who manufactured, processed, or imported the product in the course of trade (hereinafter referred to as "manufacturer");
(ii) any person who provides his/her name, trade name, trademark or other indication (hereinafter referred to as "representation of name, etc.") on the product as the manufacturer of such product, or any person who provides the representation of name, etc. on the product which misleads the others into believing that he/she is the manufacturer;
(iii) apart from any person mentioned in the preceding item, any person who provides any representation of name, etc. on the product which, in light of the manner concerning the manufacturing, processing, importation or sales of the product, and other circumstances, holds himself/herself out as its substantial manufacturer.
Article 3 (Product Liability)
The manufacturer, etc. shall be liable for damages arising from the infringement of life, body or property of others which is caused by the defect in the delivered product which was manufactured, processed, imported, or provided with the representation of name, etc. described in item 2 or item 3 of paragraph 3 of the preceding Article, provided, however, that the manufacturer, etc. shall not be liable when the damages occur only with respect to such product.
It is omitted to produce the translated English version of Article 4 to Article 6 of PL ACT1994.

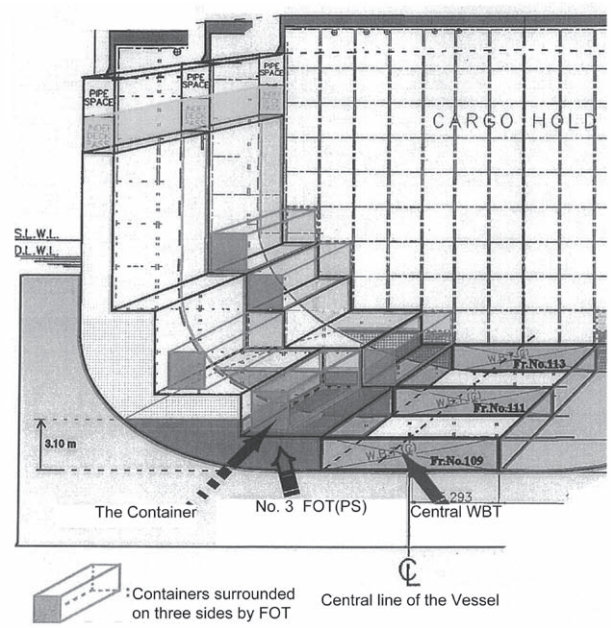

Figure 1 (The cargo hold viewed from the back)

4 The vessel sailed on 28th September 2004 (local time) from Kobe in Japan to Southampton and Rotterdam via Singapore. On 17th 2004 October (local time) the vessel passed Suez channel and at 5 pm on the same day the fuel oil in the hold No. 3 began to be heated.

5 On October 19th 2004 at 23:55 (local time) the smoke detector gave alarm from the hold No. 3. Thereafter it was verified that smoke was emerging from No 3 hold at the middle of the Mediterranean Sea (High Sea).

6 The captain of the vessel ordered the crew the firefighting by releasing CO2 into the hold No. 3. Later on, water was pumped into the hold. On 20th October 2004 at 2:00 am the captain confirmed the above accident was extinguished (hereinafter referred to as "the Accident"). The firefighting was carried out by way of pumping seawater into the No. 3 caused many cargoes of the third parties to suffer seawater damages.

7 The Container was discharged at Rotterdam and it was found that the shape of the Container looked as if it were a balloon at the side of it. From this, it may be common understanding that the Accident should have started in the Container.

8 It may be appropriate to say that the cause of the Accident should be summarized

below for the purpose of this paper as the judges of Tokyo High Court were satisfied with such cause.

9 It was found that the cargo (PSR-80) which had a character that the degree of SADT[6] of it was lower temperature than that of NA-125 had been kept heating for about 55 successive hours due to heated fuel oil in the hold No.3 and keeping the condition where the rate of heat production exceeded the rate of heat loss. Due to promoting decomposition reaction the both cargo reached to its respective self-accelerating decomposition temperature. With that result PSR-80 firstly and NA-125 secondly took rapid self-accelerating decomposition reaction and they reached to high temperature. These high temperature and gas in high temperature were inferred to cause the package of the above cargoes, the Container itself and other cargoes nearby to be damaged.

III. The First Instance

Tokyo District Court rendered a judgment in favour of the Shipper on 27th May 2013. The judges of Tokyo District Court dismissed the claims of the Claimants on the following reasons.[7]

Held

1 When the Manufacturer made a sales contract of NA-125 and PSR-80 with the Shipper, it provided the Shipper with MSDS for both goods and the certificate of analysis. These documents contained the instruction to keep the product at cool place. The label attached to the package of PSR-80 showed the instruction to avoid heat.

2 MSDS of NA-125 indicated that the product did not fall within any UN Class and UN Number and it indicated in the column of knowledge of danger and hazard that this did not fall within self-reactive substances. But MSDS of NA-125 did not expressly indicate that it was not self-heating substance.

The column of UN Class and UN Number of MSDS of PSR-80 were blank, but this did not give any information to deny positively that the PSR-80 was the dangerous goods, which fall within UN Class and UN Number.

[6] It is explained in IMDG Code that SADT stands for self-accelerating decomposition temperature, which is defined as follows in Section 28 Test Series H 28.1 of recommendations on the Transport of Dangerous Goods Manual of Tests and Criteria. The SASDT is defined as the lowest temperature at which self-decomposition may occur with a substance in the packaging as used in transport. The SADT is a measure of the combined effect of the ambient temperature, decomposition kinetics, package size and the heat transfer properties of the substance and its packing.

3 The Shipper was the trading house that dealt with the export, import and sales of the chemical productions and others whose materials were chemical productions. The Shipper had a statutory obligation under the Regulations to examine the goods and classify whether the goods would fall within inflammable substance or not.[8]

4 It could be accepted that Daito Chemix Corporation who was the manufacturer of NA-125 and PSR-80 had made warning, through the above information, not only to the Shipper but also to the carrier that the products should be stowed at cool place and kept distance from a source of heat and in the case that it were stowed near a source of heart there would be danger of the decomposition or fire. It is reasonable to have expected that the shipper and the carrier would take care to stow the products especially PSR-80 at cool place and keep them from a course of heat.

5 Therefore, the judges of Tokyo District Court did not accept the Claimant's contention that there was the defect of warning of the products.

The Claimants appealed to Tokyo High Court as appeal court.

IV. Appeal Court

The main issue is whether the Manufacturer was liable for damage or loss on the basis that the goods had defect under PL Act 1994, where the Shipper had a statutory obligation to examine and classify the goods and declare the carrier that it was dangerous good.[9]

The judges of Tokyo High Court allowed the appeal of the Claimants and set aside the order of the judges of Tokyo District Court, accepting the Claimants' contention that the Manufacturer should be liable for loss under PL Act 1994.

In order to decide whether the Manufacturer was liable for damage or loss on the basis of PL Act 1994, the judges of Tokyo High Court introduced three criteria.

Held

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[7] It is reported by Hanrei Jihou Vol. 2211 1st April 2014, p58.

[8] The Regulations means "The Regulations for the Carriage and Storage of Dangerous Goods in Ship (hereinafter referred to as "the Regulations"). In order to enforce IMDG Code we have two ministerial ordinances of the Ministry of Land, Infrastructure, Transport and Tourism. One is "the Regulations" and another is the Notification for Establishing Standards for the Carriage of Dangerous Goods on Ships (hereinafter referred to as "the Notification".)" Japanese translation of IMDG Code is now incorporated into the Notification. Article 17 of the Regulations requires the shipper of dangerous goods to prepare a paper called as the particulars of the dangerous goods in which the proper Shipping Name of the goods, UN Class, UN Number, place of stowage, secondary danger, and Class of package should be mentioned.

1 Criteria

Criterion A

Article 2 (2) of PL Act 1994 stipulates that the term "defect" as used in this Act shall mean a lack of safety that the product ordinarily should provide, taking into account the nature of the product, the ordinarily foreseeable manner of use of the product, the time when the manufacturer, etc. delivered the product, and other circumstances concerning the product.

It should be interpreted that “defect” shall include not only design defect and production defect but also the situation where the manufacturer failed to make proper indication and warning by way of indicating and warning that the content and degree of the danger of the product and proper way of transportation and stowage of the products to avoid the occurrence of damage, in the case that there is a possibility that the character of the product would cause damage to the third party’s property and also that the manufacturer could foresee such danger (hereinafter the “defect” should include “indication and warning defect”.)

Criterion B

Article 3 of PL Act 1994 stipulates that the manufacturer, etc. shall be liable for damages arising from the infringement of life, body or property of others which is caused by the defect in the delivered product which was manufactured, processed, imported.

In the light of the purpose of this article, the manufacturer of the dangerous product, as it should be in the best position to know the indication and warning that the content and degree of the danger of the product and proper way of transportation and stowage of the products to avoid the occurrence of damage, shall in principal make proper indication and warning as to the above matters and also be liable for damages arising from the infringement of property of others that was caused by failure of making such indication and warning not only against the buyer who bought the product from the manufacturer but also against the third parties, who include a person who entered into a fresh contract with the buyer, (those who did not directly entered into a contract with the manufacturer).

Criterion C

In the case that the buyer who bought the dangerous product from the manufacturer of

[9] This case is reported by Hanrei Jihou Vol.2239 January 11 2015, p 23

it, with its fault, failed to exercise the statutory duty to provide a proper information that the content and degree of the danger of the product and proper way of transportation and stowage of the products to avoid the occurrence of damage and such failure of the buyer caused the person who entered into a fresh contract with the buyer and any third party who joined the chain of distribution of it through the above person suffered the damage, the manufacturer, together with the buyer, shall compensate damage for such damage or loss as the dangerous product has the indication and warning defect, if it could be assessed that the indication and warning of dangerous product that the manufacturer made would have high probability of causing the buyer's fault.

2 Application to the above criteria to this particular case

Criterion A

NA-125 should at least fall within a self-heating substance whose UN Number is 3088 and UN Class is 4.2. It is required for NA-125 to be stowed on deck. PSR-80 should at least fall within a self-heating substance whose UN number is 3226 and UN Class is 4.1 or whose UN Number is 3228 and UN Class is 4.1. It is required for PSR-80 to be stowed on deck and to be stowed "away from" all possible sources of heat. The judges decided that the above facts satisfied the criterion A.

Criterion B

UN Class and UN Number are important information for the sea transportation of dangerous goods. MSDS of NA-125 apparently made an error in writing that the product did not fall within dangerous goods under IMDG Code. MSDS of PSR-80 has the content that the column of UN Class and UN Number were blank, which would lead to misunderstanding that the product did not fall within a dangerous goods under IMDG Code. So the judges decided that the criterion B was satisfied.

Criterion C

The Manufacturer contended that as it had provided the Shipper with necessary information for the Shipper to exercise its obligation of examine and classify dangerous goods, it should not be liable for the damage under PL Act 1994.

While Technical date provided by the Manufacturer to the Shipper before the Accident showed that the product should be stowed at a cool place and not be exposed to direct sunlight, this indication did not mean that the Manufacturer made proper indication and warning for dangerous product.

The certificate of valuation for danger that was provided by the Manufacturer to the Shipper around in December 2003 described that NA-125 did not fall within self -reactive substance under IMDG Code.

From around in 1998, the Manufacturer had been selling NA-125 and PSR-80 many times and had known that the subject of the sales of chemical products would be carried by sea.

The Manufacturer realized that the Shipper mainly relied on the information provided by the Manufacturer in order for it to decide whether the products would be dangerous goods or not.

On 21st April 2003 a staff of the Manufacturer gave the instruction to the person in charge of export of the goods of the Shipper that the product should be stowed at the bottom of the hold of the vessel.

From the above, it could be assessed that the indication and warning of the products of NA-125 and PSR-80, which included some kind of information provided by the Manufacturer, would have a high probability to lead to the aforesaid fault of the Shipper. So the criterion C is satisfied. The Manufacturer should be liable for damage with the shipper.

3 The judges of Tokyo High Court concluded that the both MSDS made by the Manufacturer had indication and warning defect under PL Act 1994 and it was liable for damage or loss, in the case the Shipper had a statutory obligation to examine and classify the goods and there is high possibility that such MSDS would lead to the fault of the Shipper.

V. Comment

1 It is noted that there are several reported casualties arising from handling of the dangerous goods during the sea transportation around the world, one of which is "Aconcagua"[10] that involved the explosion of the dangerous goods of calcium hypochlorite. The "NYK Argus" case involved the product liability claim against the Manufacturer that provided MSDS of chemical products that had wrong information to the Shipper who failed to make declaration of the dangerous goods to the carrier under IMDG Code. Therefore, the interpretation of PL Act 1994 was highlighted.

2 The Shipper was claimed in the separate proceeding and it is not the subject to this

paper. But it is still worth noting that it is important to know the danger of the chemical products that are recognized in IMDG Code in order for us to consider whether there is the defect of the products under PL Act 1994.

3 Danger of NA-125

It is explained in IMDG Code that Class 4.2 solid includes Self-heating substances, which are substances, other than pyrophoric substances, which, in contact with air without energy supply, are liable to self-heating. It is also explained in IMDG Code that self-heating substance classified as 4.2 will ignite only when in large amounts (kilograms) and after long periods of time (hours or days). Self-heating of substances, leading to spontaneous combustion, is caused by reaction of the substances with oxygen (in air) and the heat developed not being conducted away rapidly enough to the surroundings. Spontaneous combustion occurs when the rate of heat production exceeds the rate of heat loss and the auto ignition temperature is reached.

4 Danger of PSR-80

Self-reactive substances are included in Class 4.1 solid. It is also explained in IMDG Code that self-reactive substances, for the purpose of IMDG Code, are thermally unstable substances liable to undergo a strongly exothermic decomposition even without participation of oxygen (air). Substances are not considered to be self-reactive substances of class 4.1 if their self-accelerating decomposition temperature (SADT) is greater than 75°C for a 50 kg package. It is worth noting that SADT of NA-125 is 80°C that is greater than 75°C and on this reason NA-125 should not be classified as 4.1 under IMDG Code. But this dose not mean to change the nature of NA-125 that is self-reactive substances, while it is not fall within Class 4.1.

5 Criteria

Tokyo High Court set up three criteria for product liability claim with regard to the "defect" of the product.

(1) Criterion A deals with the definition of "defect". Article 2 (2) of PL Act 1994 states inter alia that the term "defect" shall mean a lack of safety that the product ordinarily should provide. This article dose not specify the kinds of the "defect". The judges of Tokyo High Court confirm that it should be interpreted that "defect" shall include not only design defect, production defect but also "indication and warning defect". It is reasonable that they held the information

[10] English case "Aconcagua" deals with the dangerous goods of dry form of calcium hypochlorite, which was classified as UN Number of 1748. Court of Appeal case [2010] EWCA Civ 1403 (9th December 2010)

concerning the nature of dangerous and the way of transportation and stowage of the dangerous goods under IMDG Code should fall within the "indication and warning defect" of the product.

(2) Criterion B deals with the scope of the parties to whom the manufacturer should make a proper warning. The judges held that the manufacturer of the dangerous product shall in principal make a proper indication and warning not only against the buyer who bought the product from the manufacturer but also against the third parties, who include a person who entered into a fresh contract with the buyer, (those who did not directly entered into a contract with the manufacturer). This is correct and MSDS must be accurate regarding UN Class and UN Number.

(3) Criterion C deals with the special circumstance where the buyer who bought the dangerous product from the manufacturer of it, with its fault, failed to exercise the statutory duty to provide a proper information that the content and degree of the danger of the product and proper way of transportation and stowage of the products to avoid the occurrence of damage and such failure of the buyer caused the person who entered into a fresh contract with the buyer and any third party who joined the chain of distribution of it through the above person suffered the damage. The Manufacturer contended in the court that it was not liable for the damage and loss because it provided the buyer with sufficient information so that the buyer could exercise due diligence to examine and classify the goods.

The judges held that if it could be assessed that the indication and warning of dangerous product that the manufacturer made would have a high probability of causing the buyer's fault, the buyer should be liable for damage and loss, together with the buyer who failed to examine.

6 In closing that it should be stressed that the criterion C in the judgment of Tokyo High Court is important rule to decide the liability of the manufacturer under PL Act 1994 as to whether the products have defect in the type of indication and warning in the event that there is the buyer who has a statutory obligation to examine whether the goods is dangerous goods or not.

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