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All correspondence should be addressed to:
The Japan Shipping Exchange, Inc.
Tel: +81-3-5802-8363
Fax:+81-3-5802-8371
E-mail: tomac@jseinc.org
Website: www.jseinc.org

Judgment: Japanese court jurisdiction over its insolvency law issues despite London arbitration clause

*Shohei Tezuka (Mr.)**

In the Orient Vega[1], the Tokyo District Court was asked to consider whether it has the jurisdiction over issues as to the construction of the Japanese Corporate Reorganization Act, despite the dispute resolution clause in the underlying time charterparty providing for London arbitration, and confirmed its jurisdiction as an interim judgment.

I. Background

1. On 23rd July, 2008, Polestar Ship Line S.A. (the "Owners"), a Panamanian subsidiary of Japanese shipping company, and Sanko Steamship Co., Ltd. (the "Charterers"), a Japanese ship operator, entered into a time charterparty for the tanker "Orient Vega" (the "Vessel") on an amended New York Produce Exchange 1946 form for the period of 13 years (two months more or less at the Charterers' option) at the hire rate of US$ 22,000 per day (the "Charterparty"). Pursuant to the Charterparty, the Vessel was delivered to the Charterers on 20th June, 2011. Clause 17 of the Charterparty provided for London arbitration as the dispute resolution[2] (the "Arbitration Clause") and its Clause 83 set out English law as the governing law of the Charterparty.

2. On 2nd July, 2012 (the "Filing Date"), the Charterers, facing substantial financial difficulties, filed a petition for the commencement of insolvency proceedings, Corporate Reorganization proceedings, at the Tokyo District Court (the "Court"). On 23rd July, 2012 (the "Commencement Date"), the Court accepted the petition, ordered for the commencement of Corporate Reorganization proceedings and appointed a trustee (the "Trustee") for the Charterers.

3. In pursuance of Article 61.1 of the Corporate Reorganization Act (the "Reorganization Act"), entitling a trustee of the Reorganizing company to elect either to continue or

* Attorney-at-law qualified in Japan at HIGASHIMACHI, LPC. (Kobe), LLM International Commercial Law (University College London).

[1] Polestar Ship Line S.A. v Sanko Steamship Co., Ltd. (Tokyo District Court judgment rendered on 28th January, 2015).

[2] It seems to the author from the texts of the judgment in Japanese language that the Arbitration Clause was identical to clause 17 of NYPE 1946 form except for an amendment of the seat of arbitration from New York to London.

terminate a "bilateral contract" under which the obligations of both parties have not been completely performed by the time of commencement of the Reorganization proceedings, the Trustee elected to terminate the Charterparty and served a notice of termination dated 13th August, 2012 (the "Termination Notice") to the Owners.

4. On 7th September, 2012, the Owners notified in writing to the Trustee that the Owners thereby set off the Charterers' claim for the bunkers, remaining on board the Vessel at the time of her redelivery, at the amount of US$ 170,779.07 (the "Bunker Claim"), against an equivalent proportional amount of the charterhire, which shall otherwise fall into the "Reorganization Claim" and therefore be subject to the distribution proceedings in accordance with the Reorganization plan (the "Owners' Set-off).

5. Arguing that the Termination Notice was delivered to the Owners on 14th August, 2012 and, accordingly, the Charterparty terminated on the same date, the Owners commenced separate proceedings against the Charterers at the Tokyo District Court. The Owners claimed the charterhire for the periods (1) from the Filing Date until the immediately preceding date of the Commencement Date[3] (the "Dispute Claim I") and (2) from the Commencement Date until the Termination Date[4] (the "Dispute Claim II", collectively with the Dispute Claim I the "Dispute Claims") as the "Common Benefit Claim" under the Reorganization Act. Under the said Act, the Common Benefit Claims are granted priority over the Reorganization Claims and enforceable for their full amount, irrespective of the Reorganization plan and its distribution proceedings[5].

6. In the separate proceedings above, the Trustee relied upon the Arbitration Clause and argued that the Dispute Claims should have been referred to London arbitration, and Japanese courts should not have the jurisdiction over these claims. The Trustee also submitted their arguments as to the merits that the Dispute Claims were not the Common Benefit Claims but the Reorganization Claims and that the Owners' Set-off was not permissible under the Reorganization Act[6] and therefore invalid. On this basis

[3] The Owners relied on Article 62.2 of the Reorganization Act, which stipulates that a claim arising from the performance by the counterparty to a "bilateral contract" set forth in 62.1 thereof from the filing of a petition for commencement of reorganization proceedings until the commencement of reorganization proceedings shall be a common benefit claim.

[4] The Owners' case was that the charterhire for the said period fell into "a claim for expenses for the management of the reorganizing company's business and the administration and disposition of the company's property after the commencement of reorganization proceedings" set out as a Common Benefit Claim in Article 127.2 of the Reorganization Act.

[5] Article 132 of the Reorganization Act

[6] Article 49.1.1 of the Reorganization Act prohibits creditors to effect a set-off where they have assumed debts to the reorganizing company after the commencement of reorganization proceedings.

the Trustee set off the Dispute Claims to the extent of US$ 170,779.07 against the Bunker Claim at the equivalent amount. The Owners counter-argued the reliance of the Trustee upon the Arbitration Clause and submitted that Japanese courts had the jurisdiction. Amongst others, the details of each party's submissions as to this jurisdiction issue shall be summarised in subsequent paragraphs.

7. The Reorganization proceedings in Japan were recognized as the foreign main proceedings by the High Court in England on 30th July, 2013 under the Cross-Border Insolvency Regulations 2006. The English court ordered, *inter alia*, that no legal process, including arbitration, may be instituted or constituted against the Charterers or their property, except with the consent of the Foreign Representative or the permission of the English court (the "English Court Order").

8. The following arguments were submitted before the Tokyo District Court, and on 28th January, 2015, the court rendered an interim judgment as to the jurisdiction issue.

II. Owners' Submissions

9. Whether an arbitration agreement has been concluded
   (1) The Vessel was substantially owned by a Japanese parent company despite being registered under the ownership of their Panamanian subsidiary, and the Owners were subject to Japanese tax authority through consolidated accounting with the parent company.
   (2) The Charterparty was agreed through negotiation in Japan, through Japanese persons in charge of both the Owners and Charterers (the "PICs"). Despite the Owners' standard form of charterparty including the Arbitration Clause being used for the Charterparty, it was an agreement between the parties that, in the event of dispute, they should mutually discuss the matter in Japan through their Japanese PICs and, in cases where the matter would not be resolved through such discussions, it should be referred to Japanese courts, where fewer legal costs would be incurred, rather than referring it to London arbitration and instructing English solicitors and/or barristers. In the shipping practice in Japan, most disputes are referred to Japanese courts or TOMAC Arbitration[7] even if the underlying contract contains a London arbitration clause.

[7] Tokyo Maritime Arbitration Commission of the Japan Shipping Exchange, the details of which are described at: http://www.jseinc.org/en/tomac/index.html.

10. Termination of Arbitration Clause

Even if the Arbitration Clause had once existed, the said clause lost its effect together with the full effect of the Charterparty upon its termination by the Trustee. In this regard, the Trustee applied for and obtained the English Court Order with the intention to gather as many proceedings relating to the Charterers' insolvency as possible in Japan. Such action by the Trustee evinces the intention of the Charterers to refer any legal dispute as to the Charterparty to Japanese courts.

11. Scope of arbitration agreement

(1) Even if the Arbitration Clause is in itself legally valid, it should be construed as an agreement to resolve English law disputes in arbitrations in London. In other words, disputes to be resolved in London are confined to those on the point of English law.

Arbitrators in London are not suitable to consider legal issues of the Reorganization Act of Japan. The parties of the Charterparty would not have intended to refer such issues to arbitrators in London who would not be able to construe and apply the provisions of the Reorganization Act otherwise than through their English translation.

(2) The issue in question is whether the Dispute Claims are the Common Benefit Claims or Reorganization Claims. This is an issue specific to the Reorganization proceedings and the Charterers and/or Trustee are not entitled to refer it to an arbitration in London.

In the present case, the point in issue is not an issue arising from the Charterparty but an issue of how the Dispute Claims should be dealt with under the Reorganization Act. The nature of the Dispute Claims, i.e. whether they are the Common Benefit Claims or Reorganization Claims, is an issue between the claimant and all creditors against the insolvent company. The Arbitration Clause is merely an agreement to resolve individual disputes between one creditor and the insolvent company and its scope shall not extend to the present issue.

12. Eligibility for Arbitration

The Arbitration Clause stipulates that the arbitrators shall be "commercial men", where not legal practitioners but shipping practitioners such as executives of shipping companies, marine surveyors and master mariners are intended to be the main source of the arbitrators. The dispute in the present case is a specific case which could arise only after commencement of insolvency proceedings. It would adversely affect the practice of the Corporate Reorganization proceedings in Japan if such a case were considered by arbitrators in England, who could be amateurs with respect to the

Reorganization Act of Japan. Such an outcome would not be acceptable as a matter of judicial policy.

13. Article 14.1.2 of the Arbitration Act

Article 14.1.2 of the Arbitration Act of Japan, which entitles the court to accept a filing of a claim which is subject to an arbitration agreement when it is impossible to carry out arbitration proceedings pursuant to said arbitration agreement, applies to the present case. This is because (1) the present case is a dispute relating to the legal issue of Japanese insolvency laws and, as such, a tribunal in London would not be able to consider and make decisions properly, and (2) the Owners are barred from submitting the claim to arbitration in London by virtue of the English Court Order.

14. Emergency Jurisdiction

It is accepted under international civil procedure laws that the courts in one jurisdiction (the "Alternative Jurisdiction") shall have the jurisdiction over a dispute even if the courts of another jurisdiction (the "Exclusive Jurisdiction") have the exclusive jurisdiction, where (1) it is impossible or unreasonable to carry on the proceedings in the Exclusive Jurisdiction, (2) there is sufficient connection between the dispute and the public order of the Alternative Jurisdiction and (3) there are no other grounds for the Alternative Jurisdiction to have the jurisdiction over the dispute. This principle similarly applies to the construction of an arbitration agreement.

15. Possibility of Violation of Public Order of Japan

The principle established by a Supreme Court judgment that, where an international jurisdiction agreement is extremely unreasonable and in violation of the public order such an agreement[8] shall not apply, is applicable to arbitration agreements. This principle should apply where following the jurisdiction agreement would lead to significant loss or delay in the proceedings.

16. Breach of Duty of Good Faith and Abuse of Rights

The Trustee's reliance upon the Arbitration Clause, while he also applied for and obtained the English Court Order prohibiting any institution or constitution of legal proceedings in England, is against the duty of good faith and constitutes abuse of rights.

[8] Supreme Court Judgment rendered on 28th November, 1975.

III. Trustee's Submissions

17. The Trustee relied upon the Arbitration Clause and asked for the court to dismiss the claim for the following reasons:

18. Whether arbitration agreement has been concluded

The Charterparty including the Arbitration Clause has been executed by the representative of the Owners. It is quite common in shipping practice in Japan that a charterparty provides for English law as its governing law and arbitrations in England as the dispute resolution for disputes arising from time charterparties or other contracts. Even if it could practically be the case that the contractual parties agree subsequent to arising of a dispute to refer it to the courts or any other alternative dispute resolution in Japan, such practical possibility shall not support the Owners' argument that the Arbitration Clause would become invalid by reason of the intention of one party.

19. Termination of Arbitration Clause

An arbitration agreement is incorporated into a contract in order to resolve disputes arising out of, or in connection with, the main body of that contract. The main body and arbitration agreement are separate and independent agreements and, therefore, termination of the main body would not cause termination of the arbitration agreement. Such a legal principle is supported by a Supreme Court Judgment[9] as well as scholars' views[10].

20. Scope of arbitration agreement

The Arbitration Clause stipulates that any and all the disputes arising from the Charterparty shall be referred to arbitration. Arbitration agreements and governing law issues do not logically link between each other. Judges and arbitrators are, in general, expected to make decisions by applying foreign laws and, therefore, in the present case the governing law clause in the Charterparty providing for English law does not narrow the scope of the arbitration agreement.

21. Eligibility for Arbitration

Eligibility for arbitration is not an issue relating to the nationality and/or skill of arbitrators but an issue of whether a dispute can be resolved by arbitration. The present

[9] Supreme Court Judgment rendered on 15th July, 1975.

[10] In Japan, it is not uncommon that, in addition to court precedents, scholars' views on legal issues are referred to in the parties' submissions.

case, being a normal civil claim, shall not be denied its eligibility for arbitration.

22. Article 14.1.2 of the Arbitration Act

The Arbitration Act of Japan is applicable to arbitration proceedings the seat of which is in Japan[11], thus it shall not apply to the Arbitration Clause setting out arbitrations in London. Moreover, even if said act were applicable, its Article 14.1.2 does not apply because even under the English Court Order arbitrations in London can be instituted by obtaining the consent of the Trustee or permission of the English court.

23. Emergency Jurisdiction

Under Japanese law there is no room for the emergency jurisdiction because the principle was intentionally not incorporated into the recent amendments to the Civil Procedure Code and Civil Preservation Act of Japan in 2011. Moreover, the present case does not satisfy the general requirements for the emergency jurisdiction.

24. Possibility of Violation of Public Order of Japan

It is unclear why the Supreme Court judgment referred to by the Owners could apply to arbitration agreements. Moreover, the possibility of delay in the proceedings shall not be the grounds for denying the validity of the Arbitration Clause because the parties in the present case have agreed in advance to refer any disputes to arbitrations in England, which is widely adopted as the dispute resolution in the shipping practice in Japan.

25. Breach of Duty of Good Faith and Abuse of Rights

The Trustee applied for the English Court Order in order to achieve the Reorganization under the Reorganization Act and fair and equal treatment between creditors. The application and obtaining of said order shall not adversely affect the Trustee's reliance upon the Arbitration Clause. The Owners can commence an arbitration for the present case in England.

IV. Interim Judgment

26. Governing Law of the Arbitration Clause

Applying the conflict of laws rule of Japan[12], the court construed that, by setting out English law as the governing law of the Charterparty and London as the seat of

[11] Article 1 of the Arbitration Act of Japan.

[12] Article 7 of the Act on General Rules of Application of Laws of Japan stipulates that "The formation and effect of a juridical act shall be governed by the law of the place chosen by the parties at the time of the act."

arbitration, the parties have impliedly agreed to English law being the governing law of the Arbitration Clause.

27. Whether the Arbitration Clause has been agreed
    (1) Whether the Arbitration Clause has been agreed shall be determined in accordance with English law as the governing law of said clause. It is interpreted that under the Arbitration Act 2006 of England an arbitration agreement shall be concluded where the parties reach an agreement to refer to arbitration[13].
    (2) The Charterparty was on the New York Produce Exchange 1946 form as amended, which has been used by the Owners as their standard form of time charterparties. The Arbitration Clause was based upon clause 17 of said form with the amendment of the seat of arbitration from New York to London. The authorized representatives of each party affixed their signatures to the last page of the Charterparty. English law and arbitration in London are broadly adopted in international shipping disputes because of the accumulated English court precedents, accessibility for tribunals in London to English law issues and concentration of shipping experts in London. In view of these aspects, the court regarded it reasonable for the Charterparty to stipulate English law as the governing law and arbitrations in London as the dispute resolution and accordingly the parties reached an agreement to refer to arbitrations in London. Whilst the Owners were a one hundred percent subsidiary of a Japanese company, and its representative and PIC are Japanese citizens, these did not affect this determination.
    (3) The director of the Owners stated in his witness statement that he understood that, in most cases, time charterparty disputes have been referred to the courts in Japan or TOMAC Arbitration, and as both parties to the Charterparty were substantially Japanese companies, the Charterparty would have contained either the jurisdiction clause specifying Tokyo District Court or TOMAC Arbitration clause. It could be the case that the parties reach an agreement after a dispute arises to refer it to the courts in Japan or TOMAC Arbitration despite an inconsistent arbitration clause; however, it would not affect the validity of the arbitration agreement concluded upon execution of the contract. The Owners' understanding evidenced in their witness statement did not have material effect to alter the effect of the Arbitration Clause, and no other evidence suggested any agreement other than the Arbitration Clause as contended by the Owners.

[13] Articles 5 (1) and 6 (1) of the Arbitration Act 1996 of England.

28. Termination of Arbitration Clause

Article 7 of the Arbitration Act 1996 of England stipulates that "Unless otherwise agreed by the parties, an arbitration agreement which forms, or was intended to form, part of another agreement (whether or not in writing) shall not be regarded as invalid, non-existent or ineffective because that other agreement is invalid, or did not come into existence or has become ineffective, and it shall for that purpose be treated as a distinct agreement". Pursuant to this article, termination of the Charterparty by the Trustee could not automatically terminate the Arbitration Clause.

The court accepted the submission of the Trustee as to the purpose of his application for the English Court Order[14] and accordingly held that such an application could not be construed as termination of the Arbitration Clause.

29. Scope of Arbitration Clause

The Arbitration Clause adopted the original wording of Clause 17 of NYPE 1946, "That should any dispute arise", for determination of the subject of a dispute to be referred to arbitrations, which wording was broad and without limitation. However, as stated in paragraph 27, the main reasons for London arbitrations being agreed to as dispute resolution for international shipping disputes are the accumulated English court precedents, accessibility to English law issues and concentration of shipping experts in London. Moreover, whilst "commercial men" as the requirement for arbitrators, as set out in the Arbitration Clause, refers to shipping practitioners rather than scholars or former judges in the practice of London arbitrations, the main issues of the Dispute Claims are specific to the construction of the Reorganization Act namely (1) whether the Dispute Claims are the Common Benefit Claims[15] and (2) whether the Owners' Set-off is permissible[16], which would be difficult for arbitrators in London to properly determine. Furthermore, under English law, creditors may not institute arbitrations against debtors applying for insolvency proceedings unless exceptional cases such as an English Court's permission being rendered. Taking these circumstances into account, the Arbitration Clause could not be construed as including the Dispute Claims as the dispute to be referred to arbitration in London.

30. Conclusion

The Dispute Claims are not within the scope of the Arbitration Clause. Thus, the reliance upon said clause by the Trustee is dismissed. The court hereby renders an interim judgment on this point.

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[14] ibid [26].
[15] Articles 62.2 and 127.2 of the Reorganization Act (n 3,4)
[16] Article 49.1.1 of the Reorganization Act (n 6).

V. Comments

31. The court took the approach of construction of the parties' intentions from the wording of the Arbitration Clause. Such an approach is widely adopted by the courts for the construction of contracts or agreements and is generally accepted by the practice.

32. From the implication of the judgment, the court could have reached a different conclusion if the Arbitration Clause expressly included disputes relating to insolvency proceedings or construction of relevant insolvency laws. However, in the context of arbitration clauses, the phrase frequently come across in practice would be "any disputes arising from or in connection with this Agreement" or in its similar wording and further detailed wordings in the determination of the disputes to be subject to the arbitration clause could rarely be seen. Assuming such above phrase and the phrase of Clause 17 of New York Produce Exchange form 1946, "That should any dispute arise", are practically adopted in common, it would be beyond the parties' expectations at the time of conclusion of the contract if they are required to expressly refer to the disputes relating to insolvency proceedings or their laws in addition to the wording of "any disputes" and otherwise their intention would be construed as excluding such disputes from the arbitration agreement.

33. The court put emphasis on the difficulty which arbitrators in London could face in construing and applying the Reorganization Act. In view of the scarcity of English-language books and journal articles on Japanese law, and the fact that all court proceedings in Japan are conducted in the Japanese language[17], it could be true that arbitrators in London are not so familiar to Japanese laws and they would have to rely significantly upon expert evidence to be submitted by the parties as to the legislation itself and from its basic principles to construction of specific articles and its legal issues. In such sense it was sensible to reach the conclusion that the Dispute Claims are not subject to the Arbitration Clause and that Japanese courts shall have the jurisdiction.

34. However, contractual parties may agree to refer disputes to arbitration in a state where the agreed governing laws (of another state) are not frequently practiced by the arbitrators. Even in such a case, the basic position for the courts would be to appreciate the agreement by the parties. To the extent that the court took into account the difficulty for the arbitrators in considering and applying the laws of another state, the

[17] Any documentary evidence written in a foreign language to be submitted to the court must be accompanied by its Japanese translation and any submissions must be in Japanese language.

judgment in the present case would be an exceptional decision.

35. (1) While the interim judgment was a decision on the effect of the arbitration agreement only, shipping practitioners should be interested in the merits of the case, i.e. (1) whether the Dispute Claims I and II are the prioritised Common Benefit Claims or non-prioritised Reorganization Claims and (2) whether the Owners' Set-off is permissible under the Reorganization Act, particularly because some ship operators have recently commenced insolvency proceedings in some jurisdiction and others have also been facing financial difficulty due to the current extreme downturn of the shipping markets.

    (2) It has not been reported that the court has rendered judgment on the merit of the present case and no other court decisions dealing with these issues relating to charterparties have been confirmed by the author of this article. However, such issues would inevitably arise when charterers commence insolvency proceedings and these issues should have been resolved by local legal counsels. Any parties having concern with overseas insolvent shipping companies are recommended to consult local legal counsels of the debtors' state to protect their interests.

[end]

The Revision of the Transport Law and the Maritime Commerce Law in the Commercial Code of Japan

*Kenji Sayama (Mr.)**

I. Introduction

The long deliberation regarding the revision of the transport law and the maritime commerce law in the Commercial Code of Japan, which has been held by the Transport and Maritime Commerce Section of the Commercial Code Committee of the Legislative Council of the Ministry of Justice since April 2014 ("the Committee"), came to an end in this February 2016. The Outline of such revision ("the Revision Outline") as a result of the above deliberation was approved in the general meeting of the Council on February 12, 2016 and was finally submitted to the Minister of Justice.

In the context of the amazing fact that the above laws has been left untouched without significant revision for over 100 years since their enforcement in the year of 1899, through a stage of reflection of public comments on the tentative revision proposal published in March 2015, the Revision Outline was finally prepared responding to the Minister's request made in February 2014 that the thorough review and drastic revision on these somewhat obsolete provisions would be necessary from the three points of view; the response to the change of social and economic situation since the enforcement of such laws, the rational coordination of interests among shipper, carrier and other parties relating to the transport, and the response to the global movement in regard to the maritime legal system.

The target of this revision is mainly Part II (Commercial Transactions), Chapter 8 (Transport Business), namely the article 569 – 592, and Part III (Maritime Commerce), namely the article 684 – 851 of the Commercial Code, which originally regulate the domestic transport and maritime commerce, and therefore, the influence of the revision to the field of international transport and maritime commerce, which for instance is governed by the Carriage of Goods by Sea Act of Japan, would be thought to be partial and limited.

The suggestion by the Revision Outline has made also in consideration of consistency with the Carriage of Goods by Sea Act of Japan, which applies to the international maritime transport, and several relevant international conventions or rules (For example, the York-Antwerp Rules 1994, the International Convention for the Unification of Certain Rules of Law with respect to Collision between Vessels 1910, the International Convention on

* LLB (Waseda University), Attorney-at-Law, Yoshida & Partners,

Maritime Salvage 1989 and so on.).

As the subjects revised in the Revision Outline are extensive, hereby the writer roughly introduce the contents of it focusing on the particular subjects which are thought to be highlighted in the sense that they would bring about some significant changes on the current legal system regarding the transport and maritime commerce.

II. Highlighted Subjects in the Revision Outline

1. Transport Law

(1) General Provisions concerning Transport

In the Revision Outline the general provisions which cover land, maritime and air transport has been created. The Provisions concerning domestic air transport which had not been seen in the current law were newly added this time[1].

Also, there had been in the deliberation one of the subjects of great debate made which was thought to be remarkable, namely the change of the borderline between land and maritime transport. Article 569 of the Commercial Code[2] provides: The term "carrier" means a person who engages in the business of transporting goods or passengers on land, over lakes and rivers, or at ports and harbors. The extent of "lakes and rivers, or at ports and harbors" is in detail designated as "calm water areas" in accordance with the other laws (article 122 of the Enforcement Act of the Commercial Code and the Ministerial Ordinance of the Ministry of Communication No.20). Thus, under the current transport law the land transport includes the carriage over lakes and rivers or at ports and harbors (However, even under the current law it is not thought as the land-and-maritime combined transport that a voyage starting from a port to outside the calm water areas, but just as maritime transport as a whole).

Backed by several persuasive grounds such as that it is not natural in light of common sense to regard such transport on calm water areas including for instance a large part of the Seto Inland Sea as land transport and that vessels navigating anywhere in water area should integrally be governed by the regulations required to the maritime transport, in the Revision Outline the meaning of the word "maritime transport" has been drafted as the transport of goods or passengers by means of vessel provided in the Commercial Code.

Under the Revision Outline, transport by vessel or barge only on the calm water areas would newly be governed by the provisions regarding maritime transport which

[1] Regarding the international air transport, Japan has ratified the Warsaw Convention, the Hague Protocol to the Warsaw Convention and the Montreal Convention.

[2] English translation of the provisions in the current Commercial Code of Japan is cited from the website "Japanese Law Translation" operated by the Ministry of Justice. http://www.japaneselawtranslation.go.jp/

requires vessels to be seaworthy, for instance (article 738).

(2) Shipper's Obligation to inform the Carrier of the Necessary Information in case of Dangerous Goods Transport

Concerning this point there is no provision in the current Commercial Code and therefore, the ground of shipper's obligation to inform the carrier of the necessary information regarding dangerous goods has been sought under the so-called fair and equitable principle. Based on the growing mood of safe transport and the diversity of the kinds of dangerous goods these days (For instance, a shipper of dangerous goods is obliged to submit the Declaration of Dangerous Goods to the shipowner or the master of the vessel which is scheduled to load them, in accordance with article 17 of The Regulations for the Carriage and Storage of Dangerous Goods by Ships.), in the Revision Outline the provision regarding the shipper's obligation to inform the carrier of the necessary information, such as the name, nature and required handling instruction, has been newly added.

Concerning the meaning and the extent of "dangerous goods" has been drafted as the goods which have dangerousness such as the inflammable or explosive character.

Also, according to the Revision Outline, such obligation is to be imposed on the shipper of dangerous goods regardless of whether the carrier is aware of such dangerousness of the goods (The carrier who is aware of it shall be under the obligation to scrutinize the handling instruction of the goods and to prevent an accident from occurring.[3] However, in such case, the shipper's liability may be reduced by such as fault offsetting).

The nature of shipper's liability was also one of the subjects of great debate in this deliberation. Based upon discussion in the Committee and many comments collected through the process of the public comment, it has been finally drafted that the nature of shipper's liability is negligence liability, namely the liability from which the shipper may be exempted in case the breach of such obligation is due to grounds not attributable to the shipper. The contents of the Revision Outline in this regard is said to be the proposition taking the concept of carrier protection a step further from the current position of the law by easing the carrier's burden of proof (under the Revision Outline the carrier would not be required to establish concerning the shipper's negligence but only to the fact that the damage was caused due to the absence of the notification from the shipper.), in view of that it is thought to be of great difficulty for the shipper to prove that he is not negligent.

[3] Sup. Ct. Mar. 25, 1993.

(3) Discharge of the Carrier's Liability in case of the Goods of High-Value without the Shipper's Declaration

Article 578 of the Commercial Code provides: A carrier shall not be liable to compensate for damage with regard to cash, negotiable instruments of value or other expensive goods unless the consignor declared the type and value therefore upon entrusting such goods for transport.

This provision has been basically maintained even in the Revision Outline. However, the express provision of exemption has been newly added in the Revision Outline that such discharge of the carrier's liability shall not apply in case the carrier is aware at the time of conclusion of a contract that the goods is of high-value and in case the loss, damage or delay occurred intentionally or by gross negligence of the carrier.

(4) Prescription Time for Claim pertaining to the Carrier's Liability

The current Commercial Code provides in regard to extinguishment of the carrier's liability for loss or damage of the goods: The liability of a freight forwarder shall be extinguished by prescription when one year has elapsed from the day on which the consignee received the freight (article 566(1). Although this article originally applies to the liability of a freight forwarder, this shall apply mutatis mutandis to the carrier's liability in accordance with article 589 of the Commercial Code). However in this regard, the prescription time shall be 5 years in case the carrier has knowledge of the loss or damage at the time of discharge of the goods (article 589, 566(3) and 522 of the Commercial Code).

Backed by several persuasive grounds such as that the prescription time shall not be influenced by whether or not the carrier has knowledge of the loss or damage considering the period required to prepare the claim has to be the same from the view of the cargo interests such as consignee, the current provision on this point has been in the Revision Outline revised as being equivalent to the provision in the Carriage of Goods by Sea Act of Japan[4], which is equivalent to the Hague Visby Rules.

(5) Relationship between Contractual and Tort Liability of the Carrier

Under the current law the contractual liability and tort liability of the carrier can separately arise and in principle they do not have influence on each other[5], and therefore, the choice of the ground when for instance the claim is brought before the

[4] Article 14 (1) and (2) of the Carriage of Goods by Sea Act of Japan provides: In any event the carrier shall be discharged from all liability unless a judicial claim for loss or damage of the goods is made within one year from the date on which the goods were delivered (or the date on which those should have been delivered in case those were lost). Such period may be extended by the agreement only after the damage to the goods arose.

[5] Sup. Ct. Oct. 17, 1969.

court is up to the claimant. In order to ensure the realization of the Commercial Code which has several provisions regarding the exemption of the carrier's liability such as the exemption regarding the goods of high-value (article 578), calculation of total amount recoverable for damage (article 580) and the prescription time for claim pertaining to the carrier's liability (article 589 and 566(3)), in the Revision Outline it has been drafted that such provisions of exemption in the Commercial Code shall apply mutatis mutandis to the carrier's tort liability for loss or damage to the goods. In this regard, considering that the legal position of the shipper is different from that of consignee who usually does not make a carriage contract with the carrier, in the Revision Outline it is drafted that such application with modifications shall not be made on the carrier's liability to the consignee who in advance refused to accept such transport under the contract made by the shipper (Although the Carriage of Goods by Sea Act of Japan has the equivalent provision of the article 20-2(1), it has no such limitation concerning the consignee's status.).

Also, another and further issue should be noted whether or not an agreement exempting the carrier's contractual liability has an effect on the carrier's tort liability. This issue is beyond even the new regulation suggested by the Revision Outline and therefore shall be concluded by considering several aspects such as the construe of such agreement.

By the way, also the institutionalization of the rule shown in the well-known Himalaya Clause concerning, for instance, the employees of the carrier in the maritime transport contract has been suggested in the Revision Outline, which is almost the same as the Article 20-2(2) of the Carriage of Goods by Sea Act of Japan.

(6) Rules for Combined Transport

In the Current Commercial Code there is no provision concerning combined transport, namely the transport which includes at least two kinds of mood of transport (regarding land transport, transport by railway and truck are regarded as the separate mood of transport, for instance.). In the context that combined transport is very common today, in the Revision Outline the provision regarding combined transport has been newly added.

Regarding the carrier's liability in case of combined transport, it is provided to be determined by the provisions of Japanese law or of the international conventions Japan has ratified, which would have applied if the contracting parties had made a separate and direct contract in respect of the particular stage of the transport during which the loss or damage occurred. For instance, according to the Revision Outline, under the combined transport contract with the Japanese law as the governing law, if damage occurred in the transport between the foreign ports, the carrier would be liable under

the Japanese law namely the Carriage of Goods by Sea Act of Japan. In this respect, in the Revision Outline it is not clearly provided concerning which law applies in case it is unknown where the loss or damage occurred and that indicates this provision regarding combined transport shall apply only on the case where the transport during which the loss or damage occurred is clearly identified.

Also, in the Revision Outline the provisions have been newly added concerning the combined transport documents.

(7) The Carrier's Liability in case of Passenger Transport

Current Commercial Code set out the provisions concerning the passenger transport separately in land transport and maritime transport. This time the general provisions have newly drafted in the Revision Outline concerning the passenger transport which cover land, maritime and air transport.

In the discussion there had been one of the subjects of great debate raised, namely the carrier's liability to passenger's damage. The current Commercial Code provides: A passenger carrier may not be released from the liability of compensating for the damage suffered by a passenger due to transportation unless the passenger carrier proves that he/she or his/her employee was not negligent in exercising due care in carrying out the transportation (article590(1)).

In the discussion by the Committee the subject was focused whether to set out the provision that makes any agreement contrary to the contents of article 590(1) and having a disadvantage for the passenger, for instance the agreement exempting the carrier from the liability for personal injury damage, null and void. This issue has been clearly raised in view of the respect for human life.

On the other hand, a somewhat persuasive point of view was raised that especially in case of emergency carriers tend to reject offer of passenger transport under such strict provision, although even in such situation transport service is necessary.

Finally, in the Revision Outline it has been drafted that any agreement shall be null and void exempting or reducing the carrier's liability for the damage caused by the bodily harm to a passenger (except the damage caused by the delay in transport), provided, however, that such rule shall not apply to the transport in case of wide-scale disaster or its risk does exist, or to the transport of the passenger who would be exposed to the risk of fatal damage to his/her life or body by the vibration which would generally arise associating with the normal transport.

2. Maritime Commerce Law

(1) Seizure or Provisional Seizure on a Vessel for which Preparations for Departure have been finished

Article 689 provides: No seizure or provisional seizure (excluding provisional seizure by means of registration) may be executed on a ship for which preparations for departure have been finished; provided, however, that this shall not apply to any obligation arising from the ship due to its departure. This provision is said to be backed by the consideration on the difficulty in preparation of a substitute vessel mainly in the tramper service if the vessel were to be seized after completion of the preparation for departure. However, such realization is not necessarily appropriate in the situation these days where liner service has become popular. In addition, impoundment of the certificates necessary for seizure, such as the certificate of the vessel's nationality, is practically feasible to the vessel tied up even after completion of the preparation for departure. Therefore, in the Revision Outline the acceptable range of seizure has been slightly expanded by revising the above provision as that no seizure or provisional seizure may be executed on a vessel on a voyage (conversely, seizure or provisional seizure may be executed on a vessel tied in harbor even after the completion of the preparation for departure.).

(2) Provisions concerning Time Charterparty

There has been no provision concerning time charterparty in the current Commercial Code although such kind of contract is very common and popular not only in Japan but also in other countries (In the Commercial Code of Japan provisions starting from article 737 only provide regarding voyage charterparty.).

In this Revision Outline, provisions concerning time charterparty have been newly added. However, as the thinkable contents of time charterparty can vary widely, in the Revision Outline the time charterparty has been legally positioned as one type of contract which generally utilizes the function of the vessel. In the Revision Outline several basic and typical issues have been covered by the clear provisions such as the charterer's burden of expense including bunker, pilotage, port charges, and any other normal costs required to the use of the vessel (these provisions are discretionary provisions therefore individual and concrete contents of the contract would depend on each contract in question, as ever.).

(3) The Obligation for vessel's seaworthiness

Article 738 of the Commercial Code provides: A shipowner shall warrant to a charterer or a consignor that the ship is capable of making a safe voyage as of the time of its departure.

This provision concerning the vessel's seaworthiness applies to voyage charterparty and contract of affreightment.

The nature of such obligation imposed on the shipowner or carrier has been construed as the strict liability[6].

Through discussion in the Committee and backed by several persuasive grounds such mainly as that the carrier's obligation for seaworthiness has been construed as the negligence liability under the Carriage of Goods by Sea Act of Japan (article 5) and the inconsistency in regulation between domestic and international transport on this point should be eliminated, finally it has been drafted in the Revision Outline that the obligation for seaworthiness shall be revised as the negligence liability and the contents of obligation shall be clearly specified in the same items as those provided in the article 5(1) of the Carriage of Goods by Sea Act of Japan.

Such revisions in the Revision Outline apply not only to the voyage charterparty and contract of affreightment but also to the newly added time charterparty.

(4) Prohibition of any Agreement intending Exemption of the Liability of Carrier's Side

Article 739 of the Commercial Code provides: A shipowener may not be released from the liability of compensating for any damage arising from his/her own negligence, an intentional act or the gross negligence of a mariner or other employee or from the ship not being seaworthy, even when he/she has agreed to any special provisions to the contrary.

This provision is said to have been set out in accordance with the resolution passed in the international conference held in Brussel in 1888, where the over-used exemption clause was opposed. However, in the International Convention for the Unification of Certain Rules Relating to Bill of Lading, 1924, from which the Carriage of Goods by Sea Act of Japan is originated, it was set out that the carrier shall be exempted from all liability arising out of the crew's fault in navigation or management of the vessel (such exemption is not provided in the Hamburg Rules nor in the Rotterdam Rules.).

In the context of such inconsistency between the regulation on domestic and international maritime transport, it was pointed out that the general risk of extremely unfair agreement would be low even without the above provision considering that the intervention by law into the agreement made by the parties is not necessarily required these days as the most of maritime transport contract appears to be so-called B to B contract and that several administrative regulations such as the Coastal Shipping Act would prevent an unfair contract from being made.

[6] Sup. Ct. Mar. 15, 1974

In view of the above, finally in the Revision Outline the provision concerning the exemption agreement from the carrier's liability for any damage arising from its own negligence, an intentional act or gross negligence of a mariner or other employee has been deleted.

Also, whether to accept the exemption agreement concerning the carrier's obligation for seaworthiness was one of the subjects of great debate in the discussion by the Committee. With respect to the voyage charterparty in the international maritime transport field, the provision concerning shipowner's obligation for seaworthiness is generally construed as the discretionary provision (article 16 of the Carriage of Goods by Sea Act of Japan, GENCON form, for instance.).

On the other hand, in the contract of affreightment in the international maritime transport, such obligation is still generally construed as compulsory provision (article 15 of the Carriage of Goods by Sea Act of Japan).

On this issue many opinions had been raised even after the tentative revision proposal was published and public comments were collected. Finally in the Revision Outline, in connection with the current article 739, obligation for seaworthiness in voyage charterparty has been revised as the discretionary provision but on the other hand it in contract of affreightment has been maintained as the compulsory provision.

With respect to the time charterparty, provisions concerning such obligation have been drafted as the discretionary provision.

(5) Provisions regarding Sea Waybill

In the current Commercial Code there is no provision regarding sea waybill.

However, there have been many cases reported where the bill of lading is not received by the consignee at the time of the vessel's arrival to the port of discharge for some reasons, such as the speeding up of vessel.

In addition, sea waybill is said to be used often as an alternative to the bill of lading for instance in the transaction between group companies. In the context that the CMI Uniform Rules for Sea Waybills was adopted in 1990 and some other countries have set out the provisions concerning sea waybill, this time the provisions regarding sea waybill have been newly created in the Revision Outline.

The establishment of these provisions also aims to promote appropriate and sufficient description on the sea waybill and finally appropriate use of it.

(6) Collision liability

In the Commercial Code there are only two articles regarding the collision of the vessels (article 797 and 798). This time in the Revision Outline several revisions have been suggested considering the inconsistency in contents between the Japanese

domestic law and the International Convention for the Unification of Certain Rules of Law with respect to Collisions between Vessel, "1910 ("the Collision Convention")", which Japan has already ratified.

Firstly, revision has been suggested concerning how to handle the determination which vessel was more seriously negligent in the relationship between the colliding vessels. In case the Collision Convention shall not apply namely for instance where one of the colliding vessels is of the flag state which has not ratified the Collision Convention, the current provision provides that if a victim is negligent, the court may take the relevant factors into consideration when determining the amount of compensation. In order to eliminate the inconsistency between Japanese law and the Collision Convention in such case, in the Revision Outline it is suggested that, when deciding the collision liability and further the amount of compensation, the court has to take it into account which vessel was more seriously negligent.

On the other hand, concerning the nature of collision liability of the colliding vessels in relation to the other parties such as the cargo owner, there has not been any revision in the Revision Outline. In this regard, article 4(2) of the Collision Convention provides for so-called divisible liability as follows: 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.

However, in this regard, the Japanese Civil Code provides as follows and such provision of so-called joint-and-several liability was maintained even after the thorough discussion in the Committee for some reasons such as the significance of the relief of the victim: If more than one person has inflicted damages on others by their joint tortious acts, each of them shall be jointly and severally liable to compensate for those damages. The same shall apply if it cannot be ascertained which of the joint tortfeasors inflicted the damages (article 719(1) of the Civil Code).

In regard to the negative prescription (time bar), article 798(1) provides: Any claim arising from a general average or the collision of ships shall be extinguished by prescription when one year has elapsed. It is thought that this article shall apply only to the claim regarding property damage[7] and that the prescription time starts to run from the date on which the party who had suffered damage came to have the knowledge of its damage and the tortfeasor.[8]

In this point, on the other hand, article 7(1) of the Collision Convention provides that the action for the recovery of any type of damages is time barred after an interval of

[7] Daishin-in(Predecessor of the Sup. Ct.) Apr. 24, 1915

[8] Sup. Ct. Nov. 21, 2005

two years from the date of the collision.

Finally in the Revision Outline, in view of the respect for human life, the prescription time for the personal injury claim was maintained as 3 years in accordance with article 724 of the Civil Code[9], whilst the prescription time for the property damage claim has been revised as 2 years in accordance with the Collision Convention.

(7) Maritime Lien

In the Revision Outline, in view of the respect for human life, it has been newly suggested the order of the claims which are secured by the maritime lien as follows:

1. Personal damage claim based on damage resulting directly from loss of life or personal injury (article 2(1)(v) of the Act for Limitation of Liability of Ship Owners)
2. The salvage charge and the general average to be borne by the vessel (current article 842(v))
3. The taxes imposed on the vessel in connection with the voyage, the pilotage charge and towage charge (current article 842(iii) and (iv))
4. Any claims which arise from the necessity of continuing the voyage (current article 842 (vi))
5. Any claims of the captain and other mariners which arise from employment contracts (current article 842(vii))
6. Property damage claim other than a personal damage claim (article 2(1)(vi) of the Act for Limitation of Liability of Ship Owners)

Also, article 704(2) of the Commercial Code[10] is suggested in the Revision Outline to be applied mutatis mutandis to the case of time charterparty, by reason that it is unjustifiable the view that the protection of creditors should be set back further in case of time charterparty than in case of demise charterparty, because the shipowner in the case of time charterparty is obviously well involved in the maritime business activity with the vessel in question by, for instance, outfitting and operating such vessel.

III. To the Enactment of the Revised Laws

Now that the Revision Outline as a result of the long discussion in the Committee has

[9] The Japanese Civil Code is now under revision procedure where it is proposed that this prescription time on this point should be extended to 5 years. Thus the revision of the Civil Code would have influence also on the construe of the prescription time for collision liability.

[10] It provides: In case referred to the preceding paragraph, any statutory lien arising from the use of the ship also be effective against the shipowner, provided, however, that this shall not apply if the holder of the statutory lien knows that the use of the ship is in violation of the contract. This translation is also cited from the website “Japanese Law Translation” operated by the Ministry of Justice.

submitted, the amendment bill of the Commercial Code which will be submitted to the Diet is currently under preparation basically in line with the contents of the Revision Outline, although the detailed wording of the provisions in connection with the revision this time can be slightly changed.

The Costs for a ship arrest in Japan

*Mitsunari Taketani (Mr.)**

I.Introduction

1. There are two ways of ship arrest in Japan. One is arresting a ship for compulsory auction sales (hereinafter called the "Arrest"). Another is arresting a ship by way of provisional attachment to preserve the debtor's asset (hereinafter called the "Provisional Arrest").

2. The Arrest can be executed by the following grounds:
   ・maritime liens,
   ・mortgages, and
   ・judgments in Japan.
   A compulsory legal auction is commenced after the Arrest.

3. The Provisional Arrest is a procedure to arrest a vessel provisionally for a judgement in the future.
   A compulsory legal auction is not commenced in the Provisional Arrest.

4. The Arrest or the Provisional Arrest will involve various costs. Main costs are maintenance expenses and counter-security. But it is difficult to find reference materials about them. The purpose of this article is to explain these costs based on our law firm's experiences.
   But please note that the figures quoted in this article are only a guide, because figures will be different depending on the facts of each case.

II.Arrest

1. Procedure
   Japanese laws have a procedure to confiscate the certificate of the vessel's nationality before the Arrest: "Order to Deliver the Certificate of the Vessel's Nationality, etc. Prior to the Filing of a Petition for Execution against a Vessel" (Civil Execution Act Article115 (1)).

* A partner in the law firm of Tagawa Law Office in Tokyo, Japanese qualified attorney- at-law, LL.B. (Hitotsubashi University).

A petition for the Arrest has to be filed within five days from the day on which the certificate of the vessel's nationality was confiscated (Civil Execution Act Article 115(4)).

And a court will order the prepayment of expenses (Civil Execution Act Article 14(1)).

In practice, many cases seem to get settled between the parties before paying the Prepayment of Expenses to the court.

Even when the Prepayment of Expenses is paid to the court, vessels are often released by providing guarantees.

In the procedure of the Arrest, no counter-security can be requested.

2. Maintenance expenses

The amount of the Prepayment of Expenses is decided from the view point of that how much it will cost to maintain the vessel considering her size. If the actual maintenance fees are likely to exceed the Prepayment of Expenses, the court will order to pay the additional Prepayment of Expenses.

When the vessel is sold by the legal auction, the receipts are distributed to pay the arrestor for Prepayment of Expenses prior to others.

3. Example

Case 1 and Case 2 are handled by our law firm. Case 3 is based on the reported publication.[1]

Case 1 Hiroshima district court Heisei24nen (ke) No.106

Two vessels were arrested at the same time based on maritime lien.

Flag	Japan
GRT	387
Type	passenger ship

Flag	Japan
GRT	388
Type	passenger ship

Prepayment of Expenses for two vessels was JPY10million

The vessels were released 2 months after the Arrest since a guarantee was provided.

The actual expenses occurred to maintain the vessels for 2 months were about

[1] Kinyuuhoumujijyou No.1941 page 116-120

JPY6.7million.

Case2 Shizuoka district court Heisei25nen (ke) No.202

The petition for the Arrest against the below vessel was filed based on maritime lien.

Flag	Sierra Leone
GRT	2,962
Type	cargo ship

JPY10million were required for the Prepayment of Expenses.
The vessel was released before prepaying the expenses.

Case3 Hakodate district court Heisei22nen

The below vessel was arrested based on a mortgage.

Flag	Panama
GRT	17,663
Type	bulk carrier

The vessel was sold by the legal auction at JPY 1,530million.
It took about 6 months from the Arrest to the completion of the legal auction. The court at first requested to pay JPY13.5million as the Prepayment of Expenses, but it requested to pay the additional Prepayment of Expenses. Its final figures amounted to about JPY 80million.

III. Provisional Arrest

1. Procedure

   The amount of counter-security is informed by the court after filing the petition of the Provisional Arrest. The execution of the Provisional Arrest is done after the payment of the amount.

   If a long time has passed after the Provisional Arrest, the court will order to pay the Prepayment of Expenses.

2. Counter-security

   The amount of counter-security is determined by the court depending of the following factors.

   ① a ship value,

   ② a type and an amount of the claim,

③ losses the ship owner will suffer,
④ a degree of a prima facie proof of the claim and the necessity of the Provisional Arrest.

As to ① a ship value, a court will subtract an amount of the mortgage (e.g. The ship's value is JPY100million. If she has the mortgage of JPY20million, the court will consider ① the sip value as JPY80million.).
③ Losses the ship owner will suffer will be usually a large amount. Therefore an expensive counter-security is often requested. But in our experience so far the price of counter-security to be requested doesn't exceed the amount of claims in any case.

3. Example

These cases were handled by our law firm. Soon after the Provisional Arrests, they were withdrawn because the parties reached settlements in both cases.

Case1 Yamaguchi district court Ube branch Heisei25nen (yo) No.1
The below vessel was provisionally arrested based on the below claims.

Claim amount: about USD500,000
The speed and consumption claims.

Flag Switzerland
GRT 32,297
Type bulk carrier
Ship value JPY 2,300million
Revolving mortgage-maximum amount CHF32million

The court ordered JPY20million as counter-security.

Case2 Kagoshima district court Kanoya buranch Heisei27nen (yo) No.8
The below vessel was provisionally arrested based on the below claims.

Claim amount: about KRW100million
Claims, delayed damages and the costs of a lawsuit based on the confirmed Korean judgement[2].

[2] We can't arrest a vessel by foreign judgements or arbitration awards unless the procedure of recognition and enforcement of a foreign judgement is followed. Therefore we provisionally arrested the vessel.

Flag	Belize
GRT	1,970
Type	bulk carrier
Ship value	USD1.7million
Mortgage	N/A

The court ordered JPY6.4million as counter-security.

IV.Conclusion

The amount of the Prepayment of Expenses and counter-security is decided by the court depending on facts of each case. There is some room for negotiation. Therefore it is important that to explain the details of the case to the court and negotiate with them so that only the reasonable amount will be ordered.

Also, if a case is likely to go forward to the completion of a legal auction, we need to foresee how much maintenance fees will be charged in total and the price of a vessel to be sold.

The Japan Shipping Exchange, Inc.
Wajun Building, Koishikawa 2-22-2,
Bunkyo-ku, Tokyo 112-0002, Japan
Tel: 81 3 5802 8363
Fax: 81 3 5802 8371
Website: www.jseinc.org