# *WaveLength*

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CONTENTS

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# An Influence of Japanese Civil Code Reform upon the Current Bill of Lading Transactions

*Narabu Ito**

## Introduction

In Japan, the Civil Code reform movement has been proceeding. After long discussion at the Japanese law commission (the Legislative Council of the Ministry of Justice), the Civil Code Reform Bill was introduced in Parliament and it is now under the deliberation at the House of Representatives. The Bill, which is expected to be passed in no distant future, covers various issues which can affect businesses, one of which is the law reform relating to standard form contracts. From the shipping industry's perspective, this is related to bill of lading transactions. This paper will argue an influence of the same law reform upon the current bill of lading transactions.

## Overview of Japanese Civil Code Reform

Japanese Civil Code[1] was enacted in 1896 and, surprisingly, it has basically remained unchanged to date. It is however obvious that the state of affairs surrounding us has dramatically changed since the enactment of the Code.[2] Under such circumstances, the Civil Code reform movement has been proceeding. On 28 October 2009, the Minister of Justice consulted with the Legislative Council of the Ministry of Justice (LCMoJ)[3] for the revision of the provisions relating to the law of obligations[4] in the Civil Code.[5] In response to this consultation, a working group the purpose of which is to study and deliberate this issue was established in the Council, which is called as the 'Working Group on the Civil Code (Law of Obligations)' (WG). On 10 February 2015, after extensive discussions for

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1 The Code is the fundamental legislation governing civil activities including contract law matters and it applies to businesses' commercial activities as well as individuals' activities.

2 For example, our daily life has been much influenced by globalisation and the development of information and communication technology.

3 This council is the advisory body to the Minister of Justice and deliberates the necessity of law reform as well as what reform should be upon a request of the Minister.

4 The law of obligations is one of the fields of private law under the civil law legal system, which includes contract law.

5 Minister of Justice, 'Consultation No. 88' <http://www.moj.go.jp/content/000005084.pdf> accessed 18 February 2017; LCMoJ, 'The Minutes of the 160th Meeting' <http://www.moj.go.jp/content/000005081.pdf> accessed 18 February 2017.

five and a half years, the WG submitted a consultation paper[6] to the general meeting of LCMoJ, which was adopted by the general meeting on 24 February 2015 and subsequently submitted to the Minister of Justice.[7] In response to this, the Civil Code Reform Bill was introduced in Parliament on 31 March 2015[8] and the deliberation at the House of Representatives started on 16 November 2016.[9] The reason why such a considerable time has been required to commence the deliberation of the Bill is purely the political schedule and it is considered that the Bill will be passed in the not-too-distant future.

## Law Reform regarding Standard Form Contracts

Whereas the Bill covers a wide range of subjects relating to the law of obligations, which is one part of the Civil Code,[10] according to the explanation of the Bill, the following four issues are, among other things, important: (i) the revision to time bar system, (ii) the introduction of the statutory floating interest rate, (iii) the revision to the law of guarantee, and (iv) the establishment of provisions with respect to standard form contracts.[11] The forth one, the law reform relating to standard form contracts, will be addressed.

No provisions as to standard form contracts can be found in the current Civil Code. It is however obvious that, in the modern society, standard form contracts are essential legal means in order that a lot of transactions are effectively and reasonably handled.[12] On the other hand, it has been submitted that standard form contracts also involve the problem that there is the possibility that one party who is tendered standard terms and conditions prepared by the other party is put in a weak position and his interests may be harmed as he has no sufficient opportunity to review the contents of the terms and conditions at or before the time of contract. In such circumstances, it is proposed in the Bill that some articles governing standard form contracts should be newly established in the Civil Code.[13]

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[6] WG, 'The Draft Summary of Essential Points regarding the Revision of the Civil Code (Law of Obligations)' <http://www.moj.go.jp/content/001136445.pdf> accessed 18 February 2017; WG, 'The Minutes of the 99th Meeting' <http://www.moj.go.jp/content/001146440.pdf> accessed 18 February 2017.

[7] LCMoJ, 'The Minutes of the 174th Meeting' <http://www.moj.go.jp/content/001139633.pdf> accessed 18 February 2017.

[8] MoJ, 'The Civil Code Reform Bill' <http://www.moj.go.jp/MINJI/minji07_00175.html> accessed 18 February 2017.

[9] Nikkei Inc. 'The Civil Code Reform Bill is now under deliberation '*The Nikkei* (Tokyo, 16 November 2016) <http://www.nikkei.com/article/DGXLASFS16H22_W6A111C1PP8000/> accessed 18 February 2017.

[10] The number of articles of the Code which is revised, newly established or deleted by the Bill exceeds 300.

[11] MoJ, 'The explanation of the Civil Code Reform Bill' <http://www.moj.go.jp/content/001142183.pdf> accessed 18 February 2017.

[12] In our jurisdiction, generally speaking, standard form contracts tend to be used in carriage, insurance or bank transactions.

[13] It should be noted, however, that the Bill specifically defines the standard form contracts governed in the Bill and therefore it does not intend to cover all types of standard form contracts. More detailed discussion in this regard will follow later in this section.

More specifically, the Bill proposes the establishment of three articles in this respect, namely Arts. 548-2, 548-3 and 548-4. The first one provides the requirements for the formation of standard form contracts. The second one governs the duty of the parties who prepare and tender standard terms and conditions to disclose the contents of such terms and conditions upon a request of the other parties (i.e. the parties who are tendered the terms and conditions.). The last one governs the requirements for amendment of standard terms and conditions. Although it is considered that all of the three articles embrace interesting issues, only the first one, Art. 548-2, will be discussed hereafter.

Article 548-2 (1) provides, *inter alia*, that:

> The parties who mutually agreed to enter a Standard Transaction (*Teikei Torihiki*) (This means a transaction (i) which a particular person or corporate body carries out with a large number of unspecified persons or corporate bodies, and (ii) the whole or part of the contents of which is standardised, and also (iii) such standardisation of which is reasonable for the both parties.) are deemed that they also agreed to the individual terms and conditions stipulated in a Standard Terms and Conditions (*Teikei Yakkan*) (This means the aggregated terms and conditions which are prepared by the person or corporate body carrying out a transaction with a large number of unspecified persons or corporate bodies for the purpose of incorporating those into their contract in respect of a Standard Transaction (*Teikei Torihiki*).), provided that:
>
> a. Where the parties agreed that the Standard Terms and Conditions (*Teikei Yakkan*) will be incorporated into their contract;
> b. Where the party who prepared the Standard Terms and Conditions (*Teikei Yakkan*) has represented to the other party, in advance, that such terms and conditions will be incorporated into their contract.

Honestly speaking, the contents and construction of this Article are by no means straightforward, especially about the concept of Standard Transaction (*Teikei Torihiki*), which will be elaborated below. As mentioned earlier, the concept of Standard Transaction (*Teikei Torihiki*) consists of three parts, namely the above (i) to (iii). The purpose of the first part is to clarify that Standard Transaction (*Teikei Torihiki*) must be a transaction which does NOT focus on the individuality of the unspecified persons or corporate bodies. In this context, it is explained in the WG's paper that, for example, labour contracts do not

fall within the scope of Standard Transaction (*Teikei Torihiki*) since they are transactions focusing on labourers' individuality.[14] The purpose of the second and third parts is to test (a) whether, under the transaction, it is usual for one party to make a contract with a large number of unspecified persons or corporate bodies on the same terms and conditions, and (b) whether, under the transaction, it is commonly considered to be reasonable that one party enters into the contract with the other, accepting the whole of the terms and conditions prepared by such other party without negotiation.[15]

## Impact of the Law Reform on the Current Bill of Lading Transactions

As discussed earlier, businesses' commercial activities are generally governed by the Civil Code (as well as the other relevant legislation such as the Commercial Code),[16] which means the maritime transport business may also be affected by the present law reform. In these circumstances, the question arises as to whether bills of lading are deemed to be valid as a contract of carriage between the parties under Article 548-2 (1); in other words whether the current bill of lading transactions will fulfil the requirements of the Article should be considered.

### *Applicability of the new law to bill of lading transactions*

The first issue to be discussed here is whether Article 548-2 (1) shall apply to bill of lading transactions. In the light of the contents and construction of the same paragraph of the Article, which was discussed before, such question can be divided into two sub-questions: (a) whether bill of lading transactions are considered to be Standard Transaction (*Teikei Torihiki*) and (b) whether the terms and conditions on the reverse side of bills of lading are considered to be Standard Terms and Conditions (*Teikei Yakkan*).

As to the first sub-question, it is necessary to consider whether bill of lading transactions satisfy three conditions of Standard Transaction (*Teikei Torihiki*) provided in Article 548-2 (1), the specific meaning of which was discussed in the last paragraph of the previous section. The first test to be considered here is therefore whether bill of lading transactions are transactions which do NOT focus on the individuality of the unspecified persons or corporate bodies. It seems that the answer to this test is positive as, under usual maritime transport services in respect of which bills of lading are issued, no carriers focus

[14] WG, 'The materials of discussion No. 86-2' <http://www.moj.go.jp/content/001131467.pdf> accessed 18 February 2017.
[15] WG, 'The materials of discussion No. 83-2' <http://www.moj.go.jp/content/000126620.pdf> accessed 18 February 2017.
[16] See n 1.

on the individuality of the shippers or consignees. The second test is whether, under bill of lading transactions, it is usual for one party to make a contract with a large number of unspecified persons or corporate bodies on the same terms and conditions. The answer to this is obviously positive. The third test is whether, under bill of lading transactions, it is commonly considered to be reasonable that the shipper enters into the contract with the carrier, accepting the whole of the terms and conditions prepared by the carrier without negotiation. It can be said that the answer to this is also not negative taking into consideration the fact that (a) such procedure can contribute to efficiently managing a large number of carriage, from which the both parties enjoy the benefit, and therefore that (b) the same procedure is well established in the maritime transport industry.

The second sub-question is more straightforward. Given that bill of lading transactions are considered to be Standard Transaction (*Teikei Torihiki*), it is obvious from its definition[17] that the terms and conditions on the reverse side of bills of lading are considered to be Standard Terms and Conditions (*Teikei Yakkan*).[18]

In sum, Article 548-2 (1) shall apply to bills of lading transactions.

*"Representation" requirement and the current booking operation in liner services*

Under Article 548-2 (1), which, as discussed previously, shall be applicable to bills of lading transactions, the terms and conditions on the reverse side of bills of lading shall constitute a contract of carriage between the parties, provided that:

a. Where the parties agreed that the terms and conditions on the reverse side of the relevant bill of lading will be incorporated into their contract;
b. Where the carrier has represented to the shipper, in advance, that the terms and conditions on the reverse side of the relevant bill of lading will be incorporated into their contract.

From the practical point of view, it is arguably quite rare that the parties to the contract of carriage of goods by sea expressly agree that the terms and conditions printed on the reverse side of the relevant bill of lading will be incorporated into their contract. In these

[17] Standard Terms and Conditions (*Teikei Yakkan*) is defined as the aggregated terms and conditions which are prepared by the person or corporate body carrying out a transaction with a large number of unspecified persons or corporate bodies for the purpose of incorporating those into their contract in respect of a Standard Transaction (*Teikei Torihiki*).

[18] In this respect, although, in the course of discussion at the WG, some opined that no standard form contracts utilising between businesses should fall within the ambit of Standard Terms and Conditions (*Teikei Yakkan*), such opinion was not accepted in the WG. See WG (n 14).

circumstances, whether the above second requirement, namely the prior representation with respect to the incorporation of the terms and conditions on the reverse side of the relevant bill of lading into the contract of carriage, is fulfilled or not will be significant in order that such bill of lading can be considered to be valid as a contract of carriage between the parties.

In this regard, based on the limited information gathered from the internet, it appears that Japanese liner service operators do not represent to the shipper, prior to the shipper's booking, that the terms and conditions printed on the reverse side of their bills of lading will be incorporated into the contract of carriage. For example, no description or representation which satisfies the above second requirement can be found on the booking web page of NYK Container Line Ltd.[19] The same[20] or similar[21] situation can also be found for Mitsui O.S.K. Lines (Japan), Ltd.[22] and "K" Line (Japan) Ltd.[23]

Considering the above, it cannot be denied that there is the possibility that the current booking operation in Japanese liner services is held to be inconformity with the requirements of Article 548-2 (1).

*Possible counterargument of making public terms and conditions on website*

There might be a counterargument against the above discussion to the effect that the carriers have made public their terms and conditions via their website and therefore it should be considered that they do not have to make an individual representation at each time of booking. Whereas such argument seems to be apparently reasonable, it arguably cannot be supported by the courts.

Indeed it had been proposed, in the process of the discussion at the WG, that the above-mentioned prior representation requirement should not be imposed where the party who prepared Standard Terms and Conditions (*Teikei Yakkan*) publicly announces that such Standard Terms and Conditions (*Teikei Yakkan*) will be incorporated into the contract between the parties.[24] However it is considered that there are two reasons that the same counterargument can be dismissed. First, as far as we can ascertain from the information gathered through the internet, presumably Japanese liner service operators merely disclose

[19] <http://www.nykcontainerline.com/html/AP02_1.html> accessed 18 February 2017.
[20] No description or representation which satisfies the above second requirement can be found on the booking web page of MOL Lines (Japan).
[21] No description or representation which satisfies the above second requirement can be found on the web pages of "K" Line (Japan).
[22] <https://www.moljapan.co.jp/charge/inquiry/booking/ex.html> accessed 18 February 2017.
[23] <https://www.klj.kline.com> accessed 18 February 2017.
[24] WG, 'The materials of discussion No. 81-B' <http://www.moj.go.jp/content/000125160.pdf> accessed 18 February 2017; WG, 'The materials of discussion No. 83-2' <http://www.moj.go.jp/content/000126620.pdf> accessed 18 February 2017.

their terms and conditions on their website and do not expressly announce that such terms and conditions will be incorporated into the contract between the parties. Second, the purpose of the above discussion at the WG was to exclude transactions which have a highly public nature, such as carriage of passengers by rail, postal service and telecommunications service, from the ambit of Article 548-2 (1). This is because it has been considered that, in such transactions, it would be in the consumers' interest to incorporate terms and conditions prepared by the service providers into the contract between the parties without requiring strict prior representations.[25] It should be noted that transactions discussed here are those which are carried out between businesses and consumers, which is unusual in bill of lading transactions.

It is therefore considered that the above counterargument cannot be accepted by the courts.

## Conclusion

Once the Civil Code Reform Bill is enacted, the carriers issuing bills of lading governed by Japanese law have to fulfil one of the following two requirements in accordance with Article 548-2 (1):

a. To agree with the shipper that the terms and conditions printed on the reverse side of the carrier's bill of lading will be incorporated into their contract;
b. To represent to the shipper, in advance, that the terms and conditions printed on the reverse side of the carrier's bill of lading will be incorporated into their contract.

Supposedly, it is, and will be, uncommon that the parties to the contract of carriage of goods by sea expressly agree that the terms and conditions printed on the reverse side of the relevant bill of lading will be incorporated into their contract. Hence, whether the second requirement, the prior representation with respect to the incorporation of the carrier's terms and conditions into the contract of carriage, is fulfilled or not will be significant in order that the relevant bill of lading can be considered to be valid as a contract of carriage between the parties under the new law. It is however conceivable that as matters stand Japanese liner service operators do not represent to the shipper, prior to the shipper's booking, that the terms and conditions printed on the reverse side of the relevant bill of lading will be incorporated into the contract of carriage. Considering the

[25] WG, 'The materials of discussion No. 86-2' <http://www.moj.go.jp/content/001131467.pdf> accessed 18 February 2017.

above, it can be said that one of the pressing issues for the carriers issuing bills of lading governed by Japanese law is to take appropriate measures to obey the new law, which will arguably be done by reviewing the current booking operation in liner services.

# End of Conundrum or Beginning of Conundrums? - FIOST after Japan's Maritime Law Reform -

*Kenichiro Kurosawa**

## I. Introduction

### The present position of FIOST in Japan

There are two sources of law governing bills of lading[1] – the Commercial Code[2] and the International Carriage of Goods by Sea Act ("ICOGSA")[3]. The law which provides for the general rules of transportation and maritime commerce, including bills of lading, is the Commercial Code. ICOGSA is a special enactment on the areas of international carriage of goods by sea, and implement the Hague-Visby Rules into the Japanese jurisdiction[4]. ICOGSA furthermore incorporates a few provisions of the Commercial Code in relation to the laws which the Hague-Visby Rules do not cover, such as the shipper's right to redirect goods and the consignee's obligations against the carrier. This paper focuses primarily on the rules on bills of lading governed by ICOGSA.

Japan is no exception when it comes to tackling the debate familiar to shipping lawyers regarding the scope of the carrier's contractual duties provided for in Article III rule 2 of the Hague-Visby Rules: "… the carrier shall properly and carefully load, handle, stow carry, keep, care for, and discharge the goods carried." In Japan, this provision is implemented by Article 3, paragraph (1) of ICOGSA in the following terms:

> "The carrier shall be liable for the loss, damage or delayed arrival of the goods which is caused by his own or his servant's negligence for the receipt, loading,

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1 Souichiro Kozuka, 'The outline of the Japanese maritime law', Wave Length No.49 (2004) 12; Souichiro Kozuka, 'Japan's maritime law reform in an international and regional context', (2016) 30 A&NZ Mar LJ 125 at 129 <https://ssl.law.uq.edu.au/journals/index.php/maritimejournal/article/view/289> accessed 9 January 2017.

2 English translation, see <http://www.japaneselawtranslation.go.jp/law/detail/?id=2135&vm=04&re=01> accessed 9 January 2017.

3 English translation, see <http://www.jseinc.org/en/laws/japanese_cogsa.html> accessed 9 January 2017.

4 Whilst Japan has ratified the Hague Convention as amended by the Brussels Protocol 1968, there are however a few discrepancies between ICOGSA and the Hague Visby Rules, which are beyond the scope of this article.

stowage, carriage, custody, discharge and delivery of such goods."

Furthermore, Article 15, paragraph (1) of ICOGSA, implementing Article 3, rule 8 of the Convention, prohibits any special agreement in bills of lading which is contrary to Article 3 and which is not in favor of the B/L holders. These special agreements shall be considered null and void.

Therefore, as there used to be a debate in England before the House of Lords made a decision in the *Jordan II* [2004] UKHL 49, it is still unclear whether ICOGSA prohibits the FIOST clause, i.e. an agreement to limit the scope of the carrier's contractual duties. Whilst the majority has considered that it is valid[5], uncertainty remains in practice because there is no case law in Japan which touches upon this issue and is equivalent to *Pyrene v Schidia* [1954] 2 QB 402 or *Renton v Palmyra* [1957] AC 149. Furthermore, as no clear answer to this threshold question has been presented, discussions on more practical matters have not been well posed in Japan, unlike under English law. Such as: (i) what conditions a valid FIOST clause must meet;[6] (ii) in which situation the carrier shall still be liable for the cargo damage sustained during cargo handling;[7] or (iii) whether the carrier is exempted from unseaworthiness caused by bad stowage.[8]

**Reform of Japanese maritime law**

New ideas may be brought into this debate after the process of revision of the Commercial Code and ICOGSA are concluded.

The Commercial Code, which was enacted in 1899 and covers maritime law in general, including the carriage of goods by sea, has been intact for more than 100 years with only minimal amendments. It has been long thought to be obsolete and in need of an overhaul.[9] The proposed law to amend the rules on transportation and maritime commerce in the Commercial Code has been submitted to the National Diet. With regret, it is uncertain when the parliamentarians will both start and complete their deliberations, but the provisions of the proposed law are less likely to be modified in their considerations.

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[5] See also "Responses of the Maritime Law Association of Japan" in CMI Yearbook 1999, p.203 at [1.1.3].

[6] *The Jordan II* [2003] EWCA Civ 144; *The Sea Miror* [2015] EWHC 1747 (Comm)

[7] *The Eems Solar* [2013] 2 Lloyd's Rep. 487. See also *Court Line v Canadian Transport* [1940] AC 934; *The Panaghia Tinnou* [1986] 2 Lloyd's rep. 586; *The Imvros* [1999] 1 Lloyd's Rep. 848; *CSAV v ER Hamburg* [2006] 2 Lloyd's Rep. 66; London Arbitration 10/08 (2008) 749 LMLN; London Arbitration 12/08 (2008) 752 LMLN.

[8] *The Eems Solar*. See also *The Imvros*; *CSAV v ER Hamburg; The Socol 3* [2010] 2 Lloyd's Rep. 221.

[9] For the background and overview of the revision process, Tomotaka Fujita, 'Maritime law reform in Japan', CMI Yearbook 2014, 413; Hideyuki Matsui, 'Developments in the revision of the transportation law and maritime commerce law in Japan', Wave Length No.60 (2015) 1; Souichiro Kozuka, 'Japan's maritime law reform in an international and regional context', (2016) 30 A&NZ Mar LJ 125.

ICOGSA, which is in principle to implement the Hague-Visby Rules into Japanese law, is also scheduled to be revised on this occasion. Whereas there seems no imminent necessity to revise this legislation, the proposed new provisions on the contemporary rules of carriage of goods by sea, which are to be stipulated in the new Commercial Code but are not covered by the Hague-Visby Rules, will be reflected in ICOGSA[10]. A substantial number of the proposed new provisions are therefore planned to be incorporated into ICOGSA and, as a result, ICOGSA will become a more comprehensive law on international carriage of goods by sea.

**FIOST after the law reform – The aims of this paper –**

Will these law reforms assist in settling the conventional conundrum on the interpretation of the Article 3, paragraph 1 of the present ICOGSA, i.e. whether the scope of the carrier's contractual duties may be limited by agreement as discussed in the Article III, rule 3 of the Hague Conventions? This paper firstly looks at the relevant proposed provisions of the Commercial Code to be incorporated into ICOGSA and then discusses whether these proposals enhance the majority's position.

On the other hand, however, if its validity becomes more certain after the law reforms, Japanese shipping lawyers may then have to move on to new and even more complex conundrums, which are for example: (i) the conditions of validity; (ii) the carrier's cargo liability in the FIOST situation; and (iii) the carrier's liability for unseaworthiness caused by the stevedore's bad stowage. There have been no extensive discussions on these topics in Japan so far, but this paper will try to explore briefly in chapter III below.

[10] For more details of the proposed new rules, see Fumiko Masuda, 'Maritime Law Reform in Japan' (the slides presented at CMI New York Conference in 2016) <http://www.cmi2016newyork.org/session-18> accessed 9 January 2017; Kenji Sayama, 'The revision of the transport law and the maritime commerce law in the commercial code of Japan', Wave Length No.61 (2016) 12.

## II. The new proposed provisions of ICOGSA

**Proposed new provisions**

The relevant provisions of the present and the proposed laws are as follows:

| Laws currently in force | Proposed laws |
|---|---|
| **ICOGSA, Article 20 (Application of the Commercial Code etc.)**<br><br>(1) The provisions of the Commercial Code except Articles 738, 739, 759 and 766 to 776 shall apply to the carriage of goods by ship under Article 1 of this Act. | **ICOGSA, Article 15 (Application of the Commercial Code)**<br><br>The provisions of the Commercial Code in Part 2 Chapter 8 Section 2 and Part 3 Chapter 3 except Articles 575, 576, 584, 587, 739 paragraph 1 (including applied mutatis mutandis under Article 756, paragraph 1) and 2, 756 paragraph 2 and 769 shall apply to the carriage of goods by ship under Article 1 of this Act. |
| **Commercial Code, Article 749**<br><br>(1) Where a contract, the subject of which is carriage of individual goods is entered into, the shipper shall load the goods without delay in accordance with the captain's instructions.<br>(2) If the shipper fails to load the goods, the captain may depart immediately. In this case, the shipper shall pay the full amount of the freight; provided, however, that any freight that the shipowner receives from other goods shall be deducted. | **Commercial Code, Article 737 (Loading of goods etc.)**<br><br>(1) The carrier shall load and stow goods when the carrier receives goods from the shipper under a contract of carriage of individual goods (i.e. a contract, the subject of which is carriage of individual goods).<br>(2) If the shipper fails to deliver the goods, the captain may depart immediately. In this case, the shipper shall pay the full amount of the freight; provided, however, that any freight that the carrier receives from other goods instead of the goods to be delivered by the shipper shall be deducted. |
| **Commercial Code, Article 752**<br><br>(4) Where a contract, the subject of which is carriage of individual goods is entered into, the consignee shall discharge the goods without delay in accordance with the captain's instructions. | (Deleted) |

| | |
|---|---|
| **ICOGSA, Article 3 (Carrier's duty to exercise care over the goods)**<br><br>(1) The carrier shall be liable for the loss, damage or delayed arrival of the goods which is caused by his own or his servant's negligence for the receipt, loading, stowage, carriage, custody, discharge and delivery of such goods. | **ICOGSA, Article 3 (Carrier's duty to exercise care over the goods)**<br><br>(1) (No amendment) |
| **ICOGSA, Article 15 (Prohibition of special agreement)**<br><br>(1) Any special agreement which is contrary to the provisions of Articles 3 to 5, Article 8, Article 9 or Articles 12 to 14 and is not in favor of the shipper, receiver or holder of the bill of lading, shall be null and void. | **ICOGSA, Article 11 (Prohibition of special agreement)**<br><br>(1) Any special agreement which is contrary to the provisions of Articles 3 to 5 or Article 7 to 10, or the provisions of Articles 585, 759 or 760 of the Commercial Codes, and is not in favor of the shipper, receiver or holder of the bill of lading, shall be null and void. |

The focus here is on the impact of the proposed Article 737 of the Commercial Code, which is to be incorporated into ICOGSA by the proposed Article 15 of ICOGSA. This proposed Article is, according to the discussions in the Legislative Council of the Ministry of Justice and several materials submitted thereto, said to rule the division of functions, in that, to provide a default rule that the carrier shall load and stow the cargo as opposed to the current rule under Article 749. After this revision, both Article 3 paragraph (1) and this proposed article *appear to* touch upon the carrier's contractual duties to load and stow the cargo. As aimed as a default rule, this proposed Article 737 is not subject to the "null and void" principle under the proposed Article 11, paragraph 1 of ICOGSA, whereas Article 3 paragraph (1) is.

One may then observe that these two provisions have different functions, in that Article 737 non-mandatorily covers the scope of the carrie's contractual duties to load and stow and Article 3, paragraph (1) mandatorily imposes the due diligence in performing their duties so owned by Article 737 or agreement. If so, will the school of thought that Article 3, paragraph (1) mandatorily provides for the scope of the carrier's contractual duties survive in this new regime?

Prior to analysing the possible outcome of this reform in connection with FIOST, it seems necessary to study the lawmakers' intentions behind these amendments in the next sub-chapter.

**The discussions over these amendments in the reform process**

It has to be confirmed firstly that, in the present regime, Article 749 of the Commercial Code, being incorporated into ICOGSA by Article 20, paragraph (1) is not aimed at dealing with the division of the functions. Instead, as indicated by the words "without delay", it imposes the obligation on the shipper to "deliver" the cargo to the carrier so that the carrier can load and stow before the departure. This aim is clarified in its paragraph (2) which states that, when the shipper fails to comply with this obligation, the carrier is still entitled to receive the freight for this cargo. Accordingly, there have been no academics who argue that the FIOST clause is valid because of Article 749 and the debate regarding whether the carrier can transfer to the cargo interests its contractual duties to load, stow and discharge the cargo has been discussed only in Article 3, paragraph (1) of ICOGSA.

If it is considered that the aim of Article 749 is still reasonable, the reasons why this Article is scheduled to be replaced with the proposed Article 737 should be clarified. The lawmakers considered that Article 749, paragraph (1) ruled on the division of the functions and this could be interpreted to impose on the shipper a contractual duty to load the cargo. The lawmakers then assumed that this allocation of contractual duties was not in line with the prevailing policy that it was originally the carrier's duty. This is the reason of the amendment to Article 749, paragraph (1).

Furthermore, whilst this proposed Article 747, paragraph (1) is aimed to provide for the default rule, it was once thought that, in the reform process, it might be unnecessary to codify it and thus Article 737, paragraph (1) could be deleted. The draftsmen, however, have decided to retain this paragraph but with the above amendments because it interacts with paragraph (2), in that if paragraph (2) remains, the paragraph (1) must also remain. On the other hand, as to discharging in Article 752, there is no provision corresponding to Article 749, paragraph (2) so the draftsmen have assumed that it is not necessary to codify the directory rule that the carrier shall discharge the cargo. Therefore Article 752, paragraph (4) is scheduled to be deleted.[11]

**Any impacts on FIOST?**

*The lawmakers' likely position*

Is there any impact to the debate on validity of the FIOST clause? One interpretation

[11] The comments of Mr Uno (Ministry of Justice) in response to Professor Masuda's questions in the minutes of the 10th meeting of the Committee on Commercial Law (Transport and Maritime Law).

seems that this reform has no influence at all. Indeed, this FIOST issue was not examined in the Legislative Council of the Ministry of Justice. The likely response from the lawmakers seems therefore that, since this issue was not intended to be settled in this reform process, the two schools of thought still remain unchanged. Nevertheless, this paper boldly endeavours to interpret these new provisions.

*Conservative views*

If one wishes to protect the school of thought which denies the validity of the FIOST clause, the below two lines of interpretation may be proposed.

The first line admits the overlap of the function between these two provisions in the sense that both Article 737 of the new Commercial Code and Article 3, paragraph (1) of ICOGSA deal with the scope of the carrier's contractual duties, namely that the carrier shall undertake loading and stowage of the cargo. This line follows that, even though Article 737 is not subject to the null and void principle, Article 3, paragraph (1) still prohibits the FIOST agreement.

If this overlap is thought be odd, the second line may then be interpreted as such that Article 737 does not set out a rule on the division of functions. The scope of the service to be provided by the carrier is dealt with by Article 3, paragraph (1) only (as in the present regime), and therefore this reform has no impact on the FIOST debate. This line of thought, however, seems more odd because it deviates from the natural interpretation of the proposed Article 737, paragraph (1) as well as ignoring the reason behind the expected amendment to Article 749, paragraph (1).

*New view?*

The school of thought which acknowledges the validity of the FIOST clause continues to be strong in the new regime. The point this paper would like to present is that this school of thought might be even stronger after the amendment to ICOGSA. There seem to be two lines of thought under this new regime too.

The first view should assume that both Article 3, paragraph (1) of ICOGSA and the proposed Article 737, paragraph (1) do provide a rule that the carrier shall undertake cargo handling. In this sense, it recognises the imbricate of their purposes to the extent of loading and stowage. Furthermore, this assumes that these rules on the division of functions may be changed by agreement. Whilst this freedom of contract is expected to be codified in the

proposed Article 11, paragraph (1) of ICOGSA in relation to the proposed Article 737, paragraph (1), this view interprets Article 3, paragraph (1) in that it does not prohibit the amendment to this non-mandatory rule by agreement.

The other line should not assume the overlap of the purposes between the two relevant provisions, in that the division of functions is expected to be codified in the Commercial Code only and Article 3, paragraph (1) of ICOGSA deals with the standard of performance of the carrier's services. The extent of the carrier's service is non-mandatorily given in the Commercial Code, whereas the standard of its services to be performed under the Commercial Code or a separate agreement is mandatorily stipulated in ICOGSA. Furthermore, whilst the proposed Article 737, paragraph (1) touches upon loading and stowage only, the rest of cargo handling including discharge is also assumed to be a mere default rule because of the deletion of Article 752, paragraph (4) of the Commercial Code.

This latter view is perhaps more likely than not to become persuasive so that the school of thought which admits its validity seems to be strengthened. In the present regime, the rule of the division of functions is not clearly codified so that Article 3, paragraph (1) may have been interpreted to cover this point, which therefore becomes the source of the doubt of the validity of the FIOST clause in connection to Article 15, paragraph (1) of ICOGSA. However, in the new regime, the rule of the division of functions is expected to be covered by the proposed Article 737, paragraph (1) and therefore it seems no longer necessary to confer this role to Article 3, paragraph (1) of ICOGSA.

**Conclusion**

As mentioned earlier, the lawmakers have not intended to change the conventional interpretation of Article 3, paragraph (1) of ICOGSA and therefore uncertainties shall remain. Nevertheless, it seems more likely than not that the majority's view, i.e. Article 3, paragraph (1) does not prohibit the FIOST agreement will become more persuasive in the new regime.

## III. Potential new issues in relation the FIOST clause

As mentioned at the beginning of this paper, there have been no substantial discussions in Japan on (i) the conditions of its validity, (ii) the carrier's cargo liability in the FIOST situation and (iii) the carrier's liability for unseaworthiness caused by the stevedore's bad stowage. If its validity is likely to be more certain, Japanese shipping lawyers appear to understand the necessity to start discussions on these issues. The below is a brief comment on these potential conundrums.

*The conditions of validity of the FIOST clause*

It has been suggested in England that clear words are required to transfer the carrier's contractual duties to load, stow and discharge the cargo to the cargo interest.[12] In the case of *The Jordan II*, the presiding Judge said: '[t]he natural meaning of the word "Free" is at no cost … It is not suggested that it has any wider customary meaning and appearing as it does in the freight clause I can see no reason why it should be given any wider meaning in this contract, particularly as cl. 17 says "Free of expense".'[13] This statement is understandable in the sense that exception to a general rule has to be clear and certain. The issue here should be whether the parties' intention to transfer the cargo handling responsibility is always and automatically declined if only the word "Free" is used. Is it permissible to refer to exchanges or documents between the shipowner/carrier and the charterer in order to ascertain their intention? Furthermore, even if their intention is so clarified in this process, may the carrier submit this against the B/L holder?

*Situations where the carrier assumes cargo liability although FIOST is agreed*

In a situation where the stevedore's bad stowage plan causes the cargo damage, is there any chance that the carrier owes liability to the B/L holder? It seems useful to establish two case scenarios.

One is where there is carrier's "significant intervention", i.e. the carrier intervenes in the stevedore's operation or discretion. Under English law, the carrier is likely to be liable for the cargo damage so caused by its intervention albeit the FIOST clause.[14] How should this kind of situation be resolved in Japan?

The other is where there is no carrier's "significant intervention". In this circumstance, the carrier is not obliged to handle the cargo because of the FIOST clause so that it does not assume liability in respect of the damage to cargo caused by the bad stowage. The B/L holder, nevertheless, may claim damages against the carrier alleging that it should have assisted the stevedores in order to prevent the cargo damage which would not have otherwise occurred. This kind of claim should be rejected because it is in conflict with the FIOST clause, but the difficulty lies in determining the legal basis upon which this

[12] The Jordan II [2003] 2 Lloyd's Rep. 87 at [9] and [14] per Tuckey L.J.
[13] See also *Subiaco (Singapore) Ptd. Ltd v Baker Hughes Singapore* [2010] SGHC 265.
[14] This "significant intervention" principle established by *Court Line v Canadian Transport* [1940] AC 934 has been applied to the situation where the consensual allocation of contractual duties should be revised. The recent B/L claim case is *the Eems Solar* [2013] 2 Lloyd's Rep. 487 (denied).

rejection should take place. This type of claim would be brought in tort and therefore it is not in principle subject to the FIOST clause. Furthermore, as the carrier relies upon the FIOST clause, Article IV bis, rule 1 of the Hague-Visby Rules[15] is unlikely to be invoked.

These two scenarios, which will eventually occur less infrequently, have not been discussed extensively in Japan. If the maritime law reform put an end to this validity issue, Japanese shipping lawyers would then face these legal conundrums.

*Whether the carrier is exempted from unseaworthiness liability if it is caused by bad stowage*.

Bad stowage can render the ship unseaworthy. In a situation where bad stowage of the cargo may be attributed to the stevedores employed by the shipper and where the master supplies sufficient information to them in order to prevent the stowage from being rendered unseaworthy, there is a debate whether the carrier is still liable for unseaworthiness. One may argue that, when the Hague-Visby Rules mandatorily apply, the carrier's obligation to maintain the ship's seaworthiness is so fundamental that it cannot be transferred to the cargo interests by the FIOST clause.[16] On the other hand, however, the opposite view seems also to be reasonable in the sense that, since the stevedores can undertake stowage to prevent unseaworthiness when sufficient information is provided by the ship, there is a reasonable *factual* ground that the cargo side should and could assume this liability, based upon the agreement on the division of functions.[17]

In turn, in Japan, the prevailing position is that the obligation to maintain seaworthiness is unique to the carrier and therefore it can neither be delegated nor transferred to somebody else. However, this issue does not seem to have been raised by the academics in this context. If the abovementioned opposite view cannot be considered wholly unreasonable, the conventional notion that this obligation was not transferable is susceptible to reexamination.

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[15] 'The defence and limits of liability provided for in these Rules shall apply in any action against the carrier in respect of loss or damage to goods covered by a contract of carriage whether the action be founded in contract or tort."

[16] *The Jordan II* [2004] UKHL 49 at [19] per Lord Steyn: '[I]t is obvious that the obligation to make the ship seaworthy under article III, r. 1, is a fundamental obligation which the owner cannot transfer to another. The Rules imposes an inescapable personal obligation … On the other hand, article III, r. 2, provides for functions some of which (although very important) are of a less fundamental order e.g. loading, stowage and discharge of the cargo.'

[17] *The Eems Solar* [2013] 2 Lloyd's Rep. 487 (obiter). See also *Compania Sud Americana v MS ER Hamburg* [2006] 2 Lloyd's Rep. 66.

## IV. Conclusion

Loading, stowage and discharging cargo are, in practice, joint operations of the cargo interests and the shipowner.[18] It is also not uncommon that the stevedores are appointed by the cargo interests. Therefore, the allocation of responsibilities and risks involved in the cargo operations between the parties are not crystal clear. The FIOST clause seeks to clarify this allocation and in this sense it is a very important B/L clause. This clause is not however a panacea. It is still necessary to look at the carrier's own involvement or intervention carefully so as to ascertain the position on liability. This should be the real and practical issue concerning the FIOST clause. However, this issue has not yet been widely discussed in Japan because, it seems, the main and only issue is its validity under ICOGSA, where academics have not sought to depart from the mere interpretation of the words of ICOGSA and the Hague Rules. Accordingly, it has been widely thought that the carrier's liability for the malpractice of the stevedores is determined within the mere interpretation of the words of the ICOGSA. The practitioners appear to have been skeptical of this notion, and therefore they may have been reluctant to settle disputes relying upon this clause. If its validity is likely to become more persuasive in the revised ICOGSA, it is hoped that the new conundrums are more extensively discussed and practical guidance is presented to the shipping industry.

[18] *Pyrene v Scindia Navigation* [1954] 1 Lloyd's Rep. 321, 329 col.1: 'The carrier is practically bound to play some part in the loading and discharging.' See also Bernard Eder, et al, *Scrutton on Charterparties and Bills of Lading* (22nd edn, Sweet and Maxwell 2011) at 158 and Sir Guenter Treitel and F.M.B. Reynolds, *Carver on Bills of Lading* (3rd edn, Sweet & Maxwell 2012) at [9-123].

# TOMAC Arbitration Award (Case no. 2015013/2015016)

***What can sellers claim where buyers don't take over the vessel under NIPPONSALE 1993?***

*Takashi Hongo**

## SUMMARY

This case is a dispute concerning a ship sales contract in an amended NIPPONSALE 1993 form. As the buyer did not take over the vessel and refused payment of her price even after the due date, the seller commenced and proceeded with arbitration. The seller sought full payment of the contractual price and receipt of the vessel while the seller maintained her without selling her to a third party. Whilst the tribunal, after all, held that the buyer breached the contract and failed to perform the obligations under the contract, the tribunal ordered the buyer to pay to the seller the contractual price of the vessel minus her objective value as of the date when the buyer declared its intention not to take over the vessel. Furthermore, the tribunal stated that it was the seller who should maintain the vessel at its own risk and cost after the buyer, for whatsoever reason, expressed that it would not to take over her.

## BACKGROUND

On 26th August 2015, the seller (Claimant) entered into a variant of the standard NIPPONSALE 1993 contract (the contract) with the buyer (Respondent) for the sale of a Ro-Ro vessel (the vessel), which had been laid up at Incheon Port, Korea since January 2014, more than a year and a half. Prior to the execution of the contract, on 17th June 2015, the buyer sent out surveyors to Incheon and inspected her at Incheon Port.

The contract and its addendums had the following clauses:

(1) The purchase price of the vessel shall be USD 4,165,000. (Cl. 1)
(2) The buyer shall pay to the seller 15% of the purchase price, USD 634,750, within 5 banking days from the date of the signing of the contract. (Cl. 16)
(3) The buyer shall pay to the seller, the balance 85% of the purchase price, USD 3,540,250, immediately after the notice of readiness for delivery is tendered by the seller, against the seller's presentation to the seller's bank of the protocol of delivery

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and acceptance of the vessel duly signed by the authorized representatives of the seller and the buyer. (Cl. 16)

(4) The seller shall deliver the vessel to the buyer safely afloat at a safe berth or at a safely accessible anchorage in a safe port or dockyard in the Seto Inland Sea area to be designated by the buyer. (Addendum no. 2)

(5) When the vessel is deemed ready for delivery, the seller shall tender to the buyer a notice of readiness for delivery. The buyer shall take over the vessel within 3 banking days from the day of the receipt of such notice inclusive. (Cl. 7)

(6) In the event of the buyer not taking delivery of the vessel within the period, the buyer shall pay to the seller the sum of USD 5,000 per day as liquidated damages, but such detention shall not exceed 10 days. (Cl. 7)

(7) The vessel has been accepted by the buyer as a result of its inspection of the vessel carried out at Incheon on 17th June 2015 and the buyer has waived examination of her K.R class records up to dismissal from the class. Therefore, the deal is outright without further inspection by the buyer before delivery of the vessel except of diver's inspection. (Cl. 17)

(8) The vessel shall be delivered to the buyer substantially in the same condition as when inspected by the buyer at Incheon on 17th June 2015 but wear and tear excepted. The burden of proof as to any difference in condition between the time of the buyer's inspection and the time of delivery shall always rest with the buyer. (Cl. 18)

(9) Japanese law shall be applied to the contract. (Cl. 15)

The vessel departed Incheon for delivery on 20th January 2015 and sailed to Kure, Japan with four superintendents onboard appointed by the buyer. During the voyage, her maximum speed was said to be around 14 knots. On 23rd October, she arrived at Kure, where the buyer had designated as place of delivery.

However, in a conference between the seller and the buyer held at Kure on 24th October 2015, the buyer ascertained that the vessel had failed to sail faster than 18 knots during the voyage and that it was not certain whether her thruster and stabilizer worked properly or not. On the other hand, the seller argued that the buyer had purchased the vessel on an "as-is, where-is" basis and that the contract had no warranty concerning her speed and the condition of her machinery.

The seller, on the same date, signed a notice of readiness for delivery (the "NOR") and tendered it to the buyer. The buyer, however, refused to sign it and did not take delivery of the vessel, not paying to the seller the remaining purchase price of the vessel, while only 15% of it had been already paid to the seller as deposit.

Furthermore, on 11th November 2015, the buyer sent to the seller a letter to notify cancellation of the contract on the grounds of *mistake*[1], *fraud*[2], *breach of seller's warranty against defect*[3].

On 16th November 2015, the seller referred the dispute to arbitration before TOMAC, claiming payment of the remaining purchase price of the vessel and all the costs incurred by the seller to maintain the vessel after bringing her from Incheon to Kure. The seller claimed the vessel's receipt by the buyer as well. Contrarily, in the arbitration proceeding, the buyer filed a counterclaim, demanding the seller return the deposit, 15% of the purchase price, which had been already paid to the seller.

All through the arbitration proceeding, the seller demanded full payment of the vessel's price and all the costs incurred by the seller, mainly arising from her maintenance. Until the arbitration award was rendered, the seller anchored and maintained the vessel near Kure, the original place of delivery, not selling her to a third party.

## Arbitration Award

The tribunal rendered an arbitration award on 7th July 2016, ordering Respondent (the buyer) to pay to Claimant (the seller) USD 1,511,734 with legal interest of 6% per annum. However, the tribunal dismissed the Claimant's claim with respect to Respondent's receipt of the vessel. Respondent's counterclaim was also dismissed. The following is a summary of this arbitration award.

*Issue of the case*

The issues of the dispute are as follows:

(A) Was it a condition of the contract that the vessel could sail faster than 18 knots?

(B) Was the condition of the vessel as of 24th October 2015, when the NOR was tendered, substantially different from that as of 17th June 2015, when the inspection was held? : Was the NOR invalid accordingly?

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[1] Article 95 of the Civil Code of Japan provides: "Manifestation of intention has no effect when there is a mistake in any element of the juristic act in question."

[2] Article 96, Paragraph 1 of the Civil Code provides: "Manifestation of intention which is induced by any fraud or duress may be rescinded."

[3] Article 570 of the Civil Code provides that if there is any latent defect in the subject matter of a sale and the buyer does not know the same and cannot achieve the purpose of the contract on account thereof, the buyer may cancel the contract.

*Issue 1: Vessel's speed*

As Respondent admits, the contract had no clause concerning the vessel's speed. Respondent says that ordinary sales contracts of second-hand vessels do not have a clause about the vessel's speed. The tribunal, however, assumes that items not provided in a sales contract shall not be basically interpreted as a condition of the contract. Sales contracts of second-hand vessels do not usually refer to the vessels' speed because it is natural for second-hand vessels not to be capable of sailing at her rated speed as she gets older. Thus, speed is not usually guaranteed in sales contracts of second-hand vessels. If a buyer requires the vessel's speed to be guaranteed, her speed needs to be expressly stipulated in such contract. A contract not referring to the vessel's speed shall be, setting aside the motives of the parties, construed that her speed was not a relevant element of the contract.

Respondent also argues that the ship's particulars noted the vessel's speed therein and that the seller orally guaranteed her speed to the buyer. However, the vessel's speed described in the ship's particulars does not amount to guarantee of her speed at the time of the inspection; it is construed as her trial maximum speed when she was originally built or the rated speed of the engine. In the meantime, no evidence was submitted to the tribunal by Respondent to show Claimant had orally guaranteed her speed to Respondent.

The tribunal, therefore, dismisses the Respondent's assertion that the seller guaranteed or warranted that the vessel could sail faster than 18 knots.

*Issue 2: Variance of the vessel's condition*

Respondent asserts that the vessel's condition as of 24th October 2015, when the NOR was tendered, was substantially different from that as of 17th June 2015, when the Respondent's inspection was carried out. Respondent says that she was remarkably different from what she was at the time of the inspection on 17th June 2015 in the following points: (1) the bow thruster was not in operating condition, (2) the machinery and equipment, including the main engine, were heavily deteriorated due to insufficient maintenance by Claimant, (3) a huge amount of marine growth was attached to the bottom, as well as over the sea chest, (4) the vessel's maximum speed was 12 knots.

Respondent shall bear the burden of proof with respect to variance of the vessel's condition between the inspection time and delivery time (Cl.18). In order to meet this burden of proof, Respondent shall prove her condition as of 17th June 2015, when the inspection was carried out. Nevertheless, Respondent failed to submit evidence sufficient to show her

condition at that time.

The vessel was built in April 1989, being 26 years old when the contract was executed. Since her previous owner went bankrupt due to the sinking accident of M.V. Sewol in April 2014, the Korean court sold her at a judicial auction. Claimant purchased the vessel for KRW 2,840,000,000 (USD 2,590,000, approximately) on 4th March 2015, obtaining her ownership. The vessel's class certificate became invalid in April 2015 and her last dry-dock was done in April 2013. Knowing all of these facts, Respondent entered into the contract on 26th August 2015: Respondent made a decision to purchase a 26-year old ship which had been laid up at Incheon Port for more than one year with sufficient knowledge of such circumstances.

Clearly, Respondent initially planned to dry-dock the vessel, remove the marine growth, overhaul her engine, repair the machinery and repaint the outer shell, after purchasing her. In effect, according to Respondent, these works would cost JPY 160,000,000 approximately. Thus, the tribunal cannot deny the possibility that the vessel could have been utilized as a ferryboat if Respondent had dry-docked and maintained her properly.

Having regarded these circumstances, the tribunal concludes that Respondent failed to meet the burden of proof with respect to the substantial difference of the vessel's condition between the inspection time and the delivery time. As mentioned above, the vessel's speed does not amount to a condition of the contract. Additionally, it belongs to common knowledge in the shipping business that it is easy to remove the marine growth and repaint the bottom of a ship after dry-docking. Furthermore, since the vessel sailed all the way to Japan with temporal navigation permission, as well as with coverage by P&I Club and hull & machinery insurance, the tribunal cannot agree to the Respondent's assertion that the vessel was no longer in a condition to be utilized as a ship even after proper maintenance. The Respondent's assertion to this point, therefore, is dismissed.

As a result of the inspection at Incheon Port on 17th June 2015, Claimant and Respondent mutually agreed that the vessel should be delivered to Respondent as the subject matter of the contract, as provided in the preamble and Clause 17 of the contract. That is, the vessel was to be sold on an "as-is, where-is" basis and Respondent shall take her delivery in the condition as of the date. Nevertheless, as mentioned above, Respondent failed to prove variance of her condition between the same date and 24th October 2015, the delivery time. Besides, no damage that could affect J.G. Regulation was found even by the underwater inspection carried out according to Clause 19 of the contract. Thus, the tribunal concludes that that Respondent wrongfully refused taking delivery of the vessel.

*Respondent's other assertions*

Respondent asserts that the contract is rescindable on the grounds of fraud, mistake, breach of seller's warranty against defects, abuse of power, offense to public order and morals, etc. As mentioned above, Claimant neither guaranteed nor warranted to Respondent that the vessel's speed was 18 knots or faster. The vessel's condition at the time of the delivery was not substantially different from that at the time of the inspection. Thus the tribunal holds that none of the Respondent's arguments is justifiable and dismisses the Respondent's assertions.

*Conclusion*

Given the reasons above, the Claimant's claim with respect to the purchase price of USD 3,540,250 should be upheld. Nevertheless, the rest of the Claimant's claim shall be dismissed and the following deduction should be made to the purchase price claim of the Claimant.

Claimant tendered the NOR to Respondent on 24th October 2015, Saturday. The NOR was valid as described above, so Respondent was obliged to take delivery of the vessel on or before 28th October, 3 banking days after the NOR tender. Respondent, however, refused to take her delivery and canceled the contract on 11th November 2015 on the grounds of fraud, etc. That is, Respondent expressly made a rejection for taking her delivery on the date.

Regardless of cancellation of the contract, the ownership over the vessel is not transferred to Respondent unless Claimant delivers her to Respondent. The rights and obligations concerning her delivery are "*in personam*", not "*in rem*". Respondent did not raise *defense for simultaneous performance*[4] to demand delivery of the vessel. The tribunal opines that, in cases of delivery of ships, where a buyer refuses to take delivery, the seller's obligations and the buyer's rights concerning her delivery disappear, irrespective of the grounds of the buyer's such refusal.

Unless a buyer voluntarily takes delivery of a vessel, there is no legal way to enforce the vessel's delivery. It is also impossible under the current legal system for the seller to deposit the vessel of the subject matter to a deposit office. Thus, the tribunal opines that, in

[4] Article 533 of the Civil Code provides: "A party to a bilateral contract may refuse to perform his/her own obligation until the other party tenders the performance of his/her obligation; provided, however, that this shall not apply if the obligation of the other party is not yet due."

cases where a buyer refuses to take delivery of a vessel, once the buyer's such refusal is made clear, the seller's obligations of her delivery disappears. Instead, the seller shall bear duty to promptly dispose of the vessel in order to mitigate the loss by selling her to a third party, using her by itself or in other ways. This duty of mitigation is derived from the principle of good faith. Therefore, at the time when the buyer expressly refuses taking delivery of a vessel, the seller's damade is confined to the due purchase price, minus her appraisal value at the time, plus damage which were inevitably incurred by the seller due to the buyer's such refusal.

Clause 14 of the contract provides that, should the buyer fail to fulfill the contract, the seller has the right to cancel it, in which case the deposit shall be forfeited to the seller, and that if the deposit does not cover the seller's loss, the seller is entitled to claim further compensation from the buyer. In this case, if Claimant had canceled the contract, it could have forfeited the deposit and claimed further compensation where the deposit did not fully cover the Claimant's loss. Consequently, the Claimant's loss is estimated as the gap between the contract price and the vessel's appraisal value, that is, the sales price in cases where the vessel is sold to a third party. Thus, there is no difference in amount between the claim in damages by canceling the contract and the claim in debt by not canceling the contract, because the damages are the gap between the contract price and the appraisal value of the vessel in either case. Only in cases where the seller's damages are smaller than the deposit, it is favorable for the seller to forfeit the deposit by canceling the contract. Otherwise, there is no difference between the both cases.

From the viewpoints described above, this tribunal dismisses the Claimant's claim with respect to the vessel's being taken over by Respondent. The tribunal holds that the vessel's actual value as of 11th November 2015, when Respondent's refusal of taking her delivery was determined, was as admitted by the vessel's appraisal[5]. Neither party made objection to the appraisal.

In addition to the unpaid purchase price under the contract, Claimant also claims USD 185,835.70 of the maintenance cost of the vessel, incurred by Respondent after 29th October 2015, when Respondent's obligation to receive the vessel arose; P&I call, fee for extension of the flag registration, crew wages, superintendent fee, transportation fee, in-port shifting charge, anchorage fee, agent fee, and so forth. The tribunal dismissed the claim for such costs arising on and after 12th November 2015 since Claimant bore these

[5] In the arbitration proceeding, the tribunal made a decision to conduct appraisal of the vessel's value as of 11th November 2015. The appointed appraiser, on 22nd June 2016, evaluated her value at the time as USD 2,200,000.

costs because of its breach of duty of mitigation.

The tribunal upholds the vessel's maintenance costs that were incurred by Claimant from 29th October 2015 to 11th November. As liquidated damages of USD 5,000 per day were agreed in the contract for the 10 days from 29th October 2015 to 7th November, the same rate should be applied to the damages for the 4 days from 8th November to 11th. Thus it is reasonable to acknowledge the Claimant's damages of USD 70,000 for the 14 days.

Tribunal also upholds the Claimant's claim of USD 1,484 for the costs of familiarization from Incheon to Kure by the Respondent's representatives.

Therefore, the tribunal upholds USD 3,540,250, the remaining purchase price, minus USD 2,200,000, the vessel's appraisal value as of 11th November 2015, when Respondent expressly refused taking delivery of the vessel, plus USD 71,484, maintenance costs of the vessel and the costs for the familiarization, as well as the legal interest of 6% per annum thereon from 11th November 2015 to complement of the payment. Tribunal dismisses the rest of the Claimant's claim.

## Comment

Whilst the contract in this case included no clause referring to the vessel's speed, Respondent refused to perform the contractual obligations, asserting that Respondent was entitled to rescind the contract because of lack of the vessel's speed. So-called parol evidence rule, which is derived from common law, is not accepted in Japanese law and the contract of the matter had no entire agreement clause. Thus, at least theoretically, one party to the contract was able to assert an implied agreement to the other party.

However, generally, sellers and buyers of vessels engage in thorough negotiations before execution of a contract. In the course of such negotiations, both parties usually try to reflect in the draft contract what they have agreed upon, as accurately as possible. Similarly, both parties avoid what is not agreed upon being included in a contract. Consequently, even if standard forms such as NIPPONSALE or Norwegian Saleform, are applied, sales contracts are amended and varied from their original form to a large extent. Taking into account such general course of negotiations, an implied warranty in a contract could be recognized only in exceptional cases, irrespective of the entire agreement clause. As no exceptional circumstances seem to have existed in this case, it is justifiable for the tribunal to reject Respondent's assertion concerning the implied warranty of the vessel's speed.

Respondent also asserted in the arbitration that the vessel's condition at the time of the delivery was substantially different from the time of the inspection. The contract, however, provided that the burden of proof as to any difference in condition between the time of the buyer's inspection and the time of delivery should always rest with the buyer (Respondent). To meet this burden of proof, Respondent needed to evidence, at least, the former condition of the vessel (the condition at the time of the inspection). Nevertheless, Respondent submitted almost no evidence to show this point. It is no wonder that the tribunal rejected the Respondent's assertion to this respect.

Given the reasons above, the tribunal concluded it was unlawful for Respondent to have refused taking delivery of the vessel. If it were all for the arbitration award, the award would not be noteworthy. However, the tribunal explicated a peculiar thought in the conclusion part of the award.

Generally, where a buyer refuses taking delivery of the vessel, the seller would probably seek another buyer, and after selling the vessel to him, the seller would claim damages to the initial buyer. However, in this case, Claimant maintained the vessel all through the arbitration proceeding without selling her to a third party, demanding Respondent take delivery of the vessel and to pay the contract price in full, as agreed in the contract.

Nevertheless, the tribunal established a principle that, in cases of delivery of vessels, where a buyer expressly refused to take delivery of the vessel, the seller's obligations and the buyer's rights concerning her delivery disappear, irrespective of the grounds of the buyer's such refusal. The tribunal, further, brought a concept of mitigation. Consequently, the sum to be paid by Respondent to Claimant was reduced by the appraisal value of the vessel. The Claimant's claim with respect to the vessel's taking-over to Respondent was also rejected.

Whilst the tribunal might have attempted to settle the case peacefully, its arguments above look quite controversial, at least, with respect to the following points.

(1) *While Claimant pursued payment of the contract price, not damages or compensation, the tribunal brought a concept of "mitigation", which belongs to claim in damages.*

Although the tribunal applied duty of mitigation in this case, claim of contract price (claim in debt) is distinguished from claim in damages under

Japanese law. The former is a claim based on Article 555 of the Civil Code[6] while the latter is a claim based on Article 415[7]. These two types of claims vary in requirement and effect, but the tribunal appears to have overlooked the difference.

Meanwhile, even in English law, claim in debt and claim in damages are distinguished[8] and it is said that the issue of mitigation is relevant to a claim in damages but not to a claim in debt[9,10] . Thus, the tribunal's argument above is hardly justifiable even from the standpoint of English law.

*(2) The tribunal applied doctrine of mitigation in a peculiar way under both Japanese law and English law.*

Whilst the contract in this case provided for Japanese law as the governing law, the tribunal brought a concept of "mitigation", which is derived from common law. Although there is controversy regarding the duty of mitigation, it is not still a legal principle widely accepted under Japanese law. This arbitration award is unique as it fully acknowledged the principle of mitigation in a case which is governed by Japanese law. Having said that, one cannot be too careful to deem that mitigation is generally applied in cases where Japanese law governs.

Meanwhile, Lord Hodson in the case of *White & Carter (Councils) Ltd v McGregor*[11] stated, "When the assistance of the court is not required the innocent party can choose whether he will accept repudiation and sue for damages for anticipatory breach or await the date of performance by the guilty party." Unlike this arbitration award, doctrine of mitigation under English law does not encompass the innocent party's duty to terminate the contract.

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[6] Article 555 of the Civil Code provides: "A sale shall become effective when one of the parties promises to transfer a certain real rights to the other party and the other party promises to pay the purchase money for it."

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

[8] UK Sales of Goods Act 1979 defines "action for price" in Section 49 whilst damage for non-acceptance is provided in Section 50. The latter section states, "…the measure of damages is prima facie to be ascertained by the difference between the contract price and the market or current price …" (Paragraph 3) although the former section dose not have a corresponding provision.

[9] e.g. *White & Carter (Councils) Ltd v McGregor* [1961] UKHL 5.

[10] In the recent English case of *D'Amico Shipping Italia SPA v Endofa DMCC & Anor (2016)* , the Court was required to consider if the freight under a charter party was payable as a debt or as damages, in relation to application of the issue of mitigation.

[11] *See supra note* 9.

*(3) Enforcement of delivery of a vessel is enforceable under Japanese law.*

> Although the tribunal describes that there is no legal way to enforce the vessle's delivery, such enforcement is, in effect, possible by the method of indirect compulsory execution under Article 172 of the Civil Execution Act[12]: the court orders the buyer to pay to the seller money of a certain amount that is found to be reasonable for securing performance of the obligation, according to the period of the delay.

The principle set out by the tribunal in this case might be influential, not only in legal matters but also in the practices of NIPPONSALE. The tribunal stated that, where the buyer expressly refused to take delivery of the ship, the seller's obligations and the buyer's rights concerning her delivery disappear, *irrespective of the grounds of the buyer's such refusal*. Generally, once a contract is executed between a buyer and a seller, both parties are bound to the contract and not allowed to disregard and evade the contract unless(i) the innocent party seeks its cancellation and receive compensation from the party who breached the contact or(ii)both parties consent to its cancellation. However, the tribunal in this case allowed the buyer to disregard and evade the contract without any justifiable reason or the seller's consent, only by paying to the seller the contract price minus the vessel's appraisal value (plus inevitable costs incurred by the seller).

In this case, the subject matter was a ferryboat. Generally, each ferryboat has its own characteristics and peculiarities, so competitive principles based on market mechanisms are not likely to function significantly in the ferry market. Thus one can still expect a substantial gap between the contract price in each deal and the objective appraisal value of the ship: in this case the contract price was USD 4,165,000, as opposed to the appraisal value of USD 2,200,000. However, when it comes to bulkers or tankers, as the market principle functions more actively, such gap is supposed to be marginal. Consequently, the buyer will be able to cancel the contract at any time by the time delivery is completed, only paying to the seller a small sum of money, even without justifiable reason or the buyer's consent. It follows that a buyer might be able to, relatively easily, seek a better vessel on the market even after executing a sales contract with a seller.

[12] Article 172 of the Civil Execution Act provides: "Compulsory execution for an obligation of action or inaction for which it is not possible to carry out the compulsory execution set forth in paragraph (1) of the preceding Article shall be carried out by the method in which the execution court orders the obligor to pay to the obligee money of a certain amount that is found to be reasonable for securing performance of the obligation, according to the period of the delay or immediately if the obligor fails to perform the obligation within a certain period that is found to be reasonable."

On the other hand, the seller is not in theory or in practice allowed to walk away from a contract so easily. The seller should be strictly bound by a contract, not being entitled to cancel it without a justifiable reason. Even if a seller happens to encounter a better potential buyer after executing a sales contract, it is quite risky for the seller to cancel the contract because the seller cannot anticipate how much the initial buyer may claim damages.

Premised on the fact that this arbitration award is applied, NIPPONSALE 1993 would set favorable circumstances for a buyer to leave open an opportunity to walk away from an undesirable contract even after its execution. Contrarily, sellers who wish to use NIPPONSALE 1993 should take measures to prevent buyers from canceling the contract suddenly before delivery of a vessel. There may be an option to insert a clause to provide for relatively huge amounts for liquidated damages against a buyer's unjustifiable cancellation so as to disincentivize the buyer to cancel the contract.

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