WaveLength

JSE Bulletin No. 63
March 2018

CONTENTS

Published by The Japan Shipping Exchange, Inc.
Wajun Building
Koishikawa 2-22-2
Bunkyo-ku
Tokyo 112-0002
Japan

ISSN 0448-8741

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

Multiple Proceedings for Limitation of Shipowners' Liability

*Mitsuhiro Toda**

1. Introduction

We now have two major international conventions for Limitation of Shipowners' Liability, that is, 1976 LLMC and 1996 Protocol. Liability under the 2015 convention (hereinafter 1996/2015 Convention) has been increased by 1.51 times the amount of the 1996 Protocol. Membership under the 1976 Convention was a little larger than 1996 /2015 Convention. In Far East, Japan is a member state of 1996 / 2015 Convention. Aside from Japan, no other state in Far East Asia has ratified or acceded to the 1996/2015 Convention.

In Japan, we have around 2 or 3 cases concerning shipowners' limitation proceedings every year. In most cases, commencement of the shipowners' limitation means the final solution of all maritime claims arising from a single marine casualty such as collision, grounding, sinking or fire of the ship. However, in some cases, commencement of the shipowners' limitation proceedings are not the end of the disputes arising from one marine accident.

In one ship collision case, there were two limitation proceedings; one in Japan and the other in Korea where the domestic law has been legislated to introduce the same system as 1976 Convention although Korea has yet to ratify or acceded to 1976 Convention.

A second case involved three limitation proceedings commenced simultaneously in Japan by each shipowner of three vessels which were involved in a two ship collision on one occasion which took place successively.

Lastly, there was a third case where the limitation proceedings were commenced and finished in Japan, but afterwards, an ordinary damages lawsuit was brought outside of Japan in Thailand where there is no system of the limitation of shipowners' liability.

These cases are rare and unique in telling us what the real meaning of the limitation of

* Mitsuhiro Toda, Maritime Lawyer, Law Offices of Toda & Co., Japan
- Working as a maritime lawyer based in Tokyo, Japan since1974 mainly handling maritime casualty cases such as collision, fire, grounding, etc.
- Professional Membership to The Tokyo Bar Association as full member as a lawyer, The Japan Shipping Exchange, Inc. (JSE) as an arbitrator and arbitration commission member and Singapore Chamber of Maritime Arbitration as an individual member.

liability is.

2. First Case / Two Limitation Funds in Korea and Japan

2-1. There was a collision of the Hong Kong registered cargo boat "FU PING YUAN" (2,645 G/T) and the Panamanian registered chemical tanker "CS CRANE" (7,675 G/T) which occurred on June 15, 2010 at the Port of Inchon, Korea. As a result of the collision, the "FU PING YUAN" sank resulting in vast oil pollution. The owners of the "FU PING YUAN" sustained serious losses in respect of the loss of the ship, loss of earnings, wreck removal costs, clean-up costs for the oil pollution and compensation paid to the fishermen. Cargoes loaded on board the sunken "FU PING YUAN" became total loss. The cargo interests demanded security from the "CS CRANE" and they successfully obtained the Letter of Undertaking issued by the hull underwriters of the "CS CRANE" with Korean jurisdiction. The owners of the "CS CRANE" commenced limitation proceedings in Korea with all of the cargo interests filing their claims in the limitation proceedings in Korea. Owners of the "FU PING YUAN" did not file their claims in the limitation court in Korea. Instead, they arrested the "CS CRANE" in Japan on August 10, 2010 by virtue of a maritime lien. The shipowners of the "CS CRANE" commenced limitation proceedings on August 17, 2010 constituting the limitation fund of about US $5 million in Japan although they have also constituted the limitation fund of around US $2 million in Korea. Therefore the owners of the "CS CRANE" constituted the two limitation funds; one in Japan to release the ship from the arrest; and the other in Korea to avoid an arrest there by the cargo interests.

2-2. As you will see, the limitation amount under Japanese law was about 2.5 times of the limitation amount under Korean law at that time. That is why the owners of the "FU PING YUAN" did not participate in the limitation proceedings in Korea but chose the Japanese jurisdiction arresting the "CS CRANE". In Japan, it has been established that limitation proceedings should be prosecuted as per Japanese law, that is, 1996 Convention. The Japanese court usually applies "lex loci delicti", the law where the collision occurred in respect of liability and quantum of claims themselves; in this case, Korean law. However, for the limitation of liability, the Japanese court only applies Japanese law as "lex fori" since it is taken that limitation of shipowners' liability is the procedural law and therefore only Japanese law should apply (Judgment of the Sendai High Court of September 19, 1994).

2-3. The cargo interests of the "FU PING YUAN" filed their claims against the limitation

fund in Japan in addition to filing their claims against the limitation fund in Korea. The owners of the "CS CRANE" submitted an objection to the filing of the claims by the cargo interests, arguing that their claims should be struck out from the limitation proceedings in Japan since they agreed to the Korean jurisdiction by accepting the security issued by the hull underwriters of the "CS CRANE" and filed their claims against the limitation fund in Korea. The owners of the "CS CRANE" further filed their indemnity claims in respect of the cargo claims against them insisting that they can represent the interests of the cargoes on board the "FU PING YUAN" (by subrogation) since they put up the limitation fund in Korea. However, the Japanese court dismissed the indemnity claims of the "CS CRANE" and instead accepted the claims of the cargo interests (Decision of the Nagoya District Court of March 29, 2012).

2-4. The reasons for the above decision are as follows:

1) Under the Japanese Limitation Act, a person who shall be forced to make a payment to settle certain claims subject to limitation outside of Japan can lodge its potential indemnity claims against the limitation fund in Japan (see Art. 12 (4) of LLMC). However, if the original claimant files its claims against the limitation fund in Japan, then the potential indemnity claimant cannot file such claims against the limitation fund. In this case, the cargo interests submitted their own claims against the limitation fund both in Japan and in Korea. Therefore, the shipowners of the "CS CRANE" are not eligible to file the potential indemnity claims.

2) The constitution of the limitation fund in Korea does not mean that the shipowners of the "CS CRANE" have already paid for the cargo claims since each cargo claimant did not yet receive the distribution from the limitation fund. Until the cargo interests receive the distribution of the limitation fund, they are allowed to participate in Japanese limitation proceedings.

2-5. To the above ruling, the owners of the "CS CRANE" raised an objection. However, the case was settled by a compromise settlement agreement in which the owners of the "CS CRANE" agreed to pay the almost full amount of the claims of the cargoes, of course, to the extent of its collision liability.

2-6. As you will see, the Japanese courts apply the Japanese limitation law only disregarding the governing law of the claims itself as the procedural law of the limitation proceedings. Furthermore, the Japanese courts accept an application for

commencement of limitation proceedings even if other limitation proceedings are pending in another country except in cases where the limitation fund was constituted in a member state to the international convention which Japan has ratified or acceded to. Otherwise, the Japanese courts commence limitation proceedings provided that the Japanese jurisdiction can be established as per the Limitation Act. The Limitation Act provides that limitation proceedings can be commenced where the applicant has its principal business address in Japan, the ship involved in the marine accident is registered in Japan, the ship is arrested in Japan, the shipowner is sued in Japan by the claimants who sustain loss or damage arising out of the accident caused by the ship or the accident occurs in Japanese territorial waters, or the responsible ship calls at a Japanese port first after the accident.

2-7. For the above reason, we sometimes have cases to establish the Japanese jurisdiction arresting the responsible ship or her sister ship where the marine accident took place in states which are not members to the 1996/2015 Convention. For example, we arrested vessels in Japan in connection with ship's collisions which took place in Singapore which is a member state of 1976 Convention. After the arrest, the shipowners of the arrested ship agreed or had to agree to application of 1996/2015 Convention to release the vessels.

3. Second Case – Multiple Collision Case in Japan

3-1. On March 5, 2008, there were two collisions between three ships at Akashi Strait in the Inland Sea of Japan. The first collision occurred between the coastal cargo ship of the "EISEI MARU NO.5" (496 G/T) and the tanker of the "OCEAN PHENIX" (3,204 G/T). Because of this first collision, the "OCEAN PHENIX" collided with the "GOLD LEADER"(1,466 G/T) just after the first collision with the "EISEI MARU NO.5". As a result of the second collision, the "GOLD LEADER" sank and 4 out of 9 crewmembers were killed. The site of the two collisions was at the centre of the narrow channel off a big city of Kobe. Oil spilt from the sunken "GOLD LEADER" polluted the sea of the collision site. Liability between the three vessels was agreed to be 5:4:1 for the "EISEI MARU NO.5", the "OCEAN PHENIX" and the "GOLD LEADER". Each shipowner of three ships lodged their own claims against one another. The "GOLD LEADER" was later refloated and removed by the tax payers' money.

3-2. The three vessel owners commenced respective limitation proceedings separately in the same court of the Kobe District Court. Three limitation funds were constituted

with US $1.7 million for the "EISEI MARU NO.5", US $2.6 million for the "OCEAN PHENIX" and US $1.8 million for the "GOLD LEADER", around US $6 million in total for the total claims of about US $60 million. The court consolidated all three limitation proceedings. The question arose on whether each shipowner who constituted its own limitation fund could file their claims of the amount of each limitation fund against two other limitation funds constituted by the other two vessels involved in the multiple collision. The court took negative views on this issue because if it were allowed, then the shipowner who sought limitation of its liability constituting the limitation fund may limit its liability for the lesser sum than the limitation amount. If he is allowed to lodge his claims of his own limitation fund against two other limitation funds, that would be contradictory to the spirit of the limitation of liability with the limitation fund. The limitation law does not allow a shipowner to limit its liability for the sum below the limitation amount computed as per the limitation act.

3-3. In this case, claims of enormous amounts were lodged against the limitation fund. Specifically, about US $39 million by fishing cooperatives for loss of fishing due to the oil pollution and about US $15 million by Local Municipalities for clean-up operation including oil removal from the sunken ship. The assessment of those claims and whether the Local Municipalities' claims could be accepted as the claims subject to limitation were highly debated in addition to the above issue. Ultimately all parties agreed to make an overall settlement of the distribution of the three limitation funds by a compromise settlement agreement as per the recommendation of the court, which was honest in confessing that it was too difficult for the court to deliver the right decision because the issues were so complicated and contained matters unfamiliar to the judges. It was expected to take several more years to settle the case if no settlement agreement had been reached.

4. Third Case / Collision in Thailand / Japanese Limitation Proceedings

4-1. This is a very interesting case concerning a collision that occurred at Siam Seaport, Thailand on August 2, 2011. The cargo ship "UNISON VIGOR" (7,375 G/T, Panamanian Flag) moored at the berth was hit by the "OCEAN FLAVOR" (7,727 G/T, Panamanian Flag) and sank on August 2, 2011. Thailand has no system of the shipowners' liability. Part of the cargo interests of the "UNISON VIGOR" demanded security giving warning to arrest the "OCEAN FLAVOR" shortly after the collision in Thailand. The hull underwriters of the "OCEAN FLAVOR" provided the cargo interests with the Letter of Undertaking with Thai law to apply and Thai jurisdiction

where no limitation is applicable.

4-2. The "OCEAN FLAVOR" was flying a Panamanian flag but beneficial owners are a Japanese corporation. The owners of the "OCEAN FLAVOR" applied for limitation proceedings in Japan. The Japanese court accepted the said application and commenced limitation proceedings in Japan on October 28, 2011. The owners of the "OCEAN FLAVOR" constituted the limitation fund in the sum of about US $5 million by way of the underwriters' guarantee. The shipowners of the "UNISON VIGOR" and the majority of the cargo interests of the "UNISON VIGOR" filed their own claims against the limitation fund in Japan and took distribution of the limitation funds at about 10% of the claim amount. Afterwards, the cargo interests who have received the distribution of the limitation funds brought another litigation in Thailand to seek payment for the remaining amount of their claims after deduction of the distribution from the Japanese limitation fund.

4-3. The Thai court delivered a very interesting judgement on March 29, 2017 as follows:

The Thai court endorsed the results of the Japanese limitation proceedings in which the plaintiff cargo interests participated and received the distribution of the limitation fund although the final distribution was made by the mutual agreement to make a shortcut of the payment procedures as per the distribution procedures. The Thai court dismissed the claims of the plaintiff cargo interests in respect of the main claims for loss of the cargoes since the consequence of the Japanese limitation proceedings should be accepted because the cargo interests have Japanese nationality. However, the court did not dismiss all of the claims of the plaintiff cargo interests for the reason that the salvage claims and G/A contribution claims are excluded from the claims subject to the limitation of Liability under the Japanese Limitation Act.

4-4. This is perhaps a misunderstanding of the clause of LLMC. The LLMC excludes claims for salvage or G/A contribution from the claims subject to limitation. However, salvage claims mean claims by the salvor and G/A contribution claims mean claims from G/A adjusters. The shipowners' claims for those items after the shipowners have paid to the salvors or G/A adjusters become the similar claims to the claims for total loss of the ship and those indemnity claims for salvage or G/A contribution should be claims subject to limitation.

4-5. This is the first case which Thai court accepted the effect of the Japanese limitation proceedings ever, making this is a very interesting case. As you will see, if you have

claims arising out of an accident which occurred in a state where no limitation of the shipowners' liability is admitted, you may find another forum to seek limitation of shipowners' liability. The limitation of shipowners' liability is not a theoretical system but a byproduct stemming from political motivation and history which have aimed at protecting the shipping industries to keep the world sea trade and encourage shipping companies and seafarers (e.g., Marsden and Gault, Collisions at Sea, page 699).

5. The First Issue

As you will see from the above exceptional cases on multiple proceedings for the Limitation of Shipowners' Liability, we have to review the following issues to sort out this complicated situation:

5-1. Are the claimants who participated in one limitation proceedings allowed to participate in other limitation proceedings?

LLMC Article 13 provides as follows:

1. Where a limitation fund has been constituted in accordance with Article 11, any person having made a claim against the fund shall be barred from exercising any right in respect of such claim against any other assets of a person by or on behalf of whom the fund has been constituted.

2. After a limitation fund has been constituted in accordance with Article 11, any ship or other property, belonging to a person on behalf of whom the fund has been constituted, which has been arrested or attached within the jurisdiction of a State Party for a claim which may be raised against the fund, or any security given, may be released by order of the Court or other competent authority of such State.

5-2. According to this article, it seems that the convention does not allow the claimants to participate in multiple proceedings for limitation at the same time. However, the article applies to the case where the limitation fund has been constituted in a member state. Therefore, if the limitation fund is constituted in a non-member state, this article does not apply. For example, in the first case above, the limitation fund was constituted in Korea, but Korea was not the member to 1996 Protocol. Therefore, as far as the Japanese limitation proceedings is concerned, this article does not apply.

5-3. However, in view of the above context, it can be argued that cargo claimants who participated in the Korean limitation proceedings should not be allowed to participate in the Japanese limitation proceedings. As mentioned above, the Korean limitation amount was about 40% of the Japanese limitation amount of US $5 million at that time (now about 27%). If cargo claimants can be satisfied in full with the distribution from the Korean limitation proceedings, then they should not be allowed to participate in the Japanese limitation proceedings. However, if they are not satisfied 100%, then it is possible to argue that they should be allowed to participate in the Japanese limitation proceedings even though they participated in the Korean limitation proceedings.

5-4. In this respect, the Japanese court ruled that cargo claimants can participate in the Japanese limitation proceedings until they are paid by the distribution of the limitation fund in Korea. Some may think that claimants should be entitled to take any actions including participation in multiple limitation proceedings until they are paid in full. While some may think that any claimants should be given only one chance to choose which limitation proceedings they should participate in and if one limitation proceeding is chosen, then he must be bound by that proceeding and he is not allowed to participate in another limitation proceeding. In this respect, we have no established views.

5-5. I think that any claimants should be allowed to participate in limitation proceedings where the limitation amount is the largest based upon the 1996/2015 LLMC. Then all claimants including those who participated in other limitation proceedings could conveniently settle all relevant claims arising from one marine accident with one limitation proceeding with the largest limitation amount at one time absorbing the other limitation proceedings with smaller limitation amounts.

5-6. However, this does not apply to the case where claimants participated in the limitation proceedings and received the distribution from the fund and then brought ordinary civil claims in another state where no limitation system is in place. In such case, it might be said that the claimants who chose participation in limitation proceedings and received distribution from the fund shall be deemed to waive the right to pursue any other legal actions seeking full recovery with no limitation at all.

6. The Second Issue

6-1. Whether is each shipowner entitled to participate in the limitation proceedings

commenced by the other ships involved in the collision or multiple collision?

This matter is different from the above matter which is the problem of the multiple limitation proceedings commenced in different states (international multiple proceedings). What I am talking about now is the multiple domestic proceedings for limitation such as in the third case above.

6-2. Article 12.2 of LLMC provides that:

"If, before the fund is distributed, the person liable, or his insurer, has settled a claim against the fund such person shall, up to the amount he has paid, acquire by subrogation the rights which the person so compensated would have enjoyed under this Convention."

6-3. The Japanese court in the first case ruled that the shipowners of the "CS CRANE" may be allowed to rely on this article only after the cargo claimants have received the distribution from the limitation fund in Korea. However, I am doubtful of this ruling. The above article of subrogation does not apply to the shipowners who sought limitation of liability on their behalf as well as the other shipowners involved in the collision or multiple collision. I think that subrogation cannot be acquired by the shipowners who constituted the limitation fund to limit their liability in respect of the amount which was distributed to the respective claimants who participated in their limitation proceedings. Any sums paid to the claimants from the limitation fund shall not be deemed as payment of the debts or claims by the shipowners who constituted the limitation fund giving rise to a "subrogation".

6-4. The Japanese Limitation Act only provides that the shipowners who constituted the limitation fund are exempted from all liability for any claims arising out of the accident once the claimants have received the distribution of the limitation fund (exactly speaking, the claimants are put in a position to be entitled to receive the distribution).

6-5. However, in collision cases, if one shipowner has a right to claim his losses, for example; loss of or damage to his ship or other properties after set-off of each other's claims including indemnity claims in respect of third party's claims for which all vessels are responsible as joint tort-feasors exceeding his own proportionate liability for the third parties claims, then he may have direct claims for his own losses and his indemnity claims exceeding his own proportionate liability according to

apportionment of liability for the collision against the other colliding ship. These direct claims against the other shipowners are the direct right different from the right incurred by subrogation. These direct claims against the other ship involved in the collision can be filed against the limitation fund of the other ship involved in a collision or multiple collision.

7. These issues concerning multiple limitation proceedings have not been deeply discussed and reviewed among maritime lawyers so far. We have very few court precedents on these issues as well. Therefore, I do hope that maritime lawyers all over the world discuss these matters and deepen common understanding to find a reasonable solution of this matter in the future.

The Ocean Victory – Was it simply an abnormal occurrence?

*Akiyoshi Ikeyama**

Introduction

On 10 May 2017 the Supreme Court of the United Kingdom pronounced a remarkable judgment[1] that the total loss casualty of the M/V "Ocean Victory" on 24 October 2006 at Kashima, Japan, was attributable to an "abnormal occurrence" within the definition of safe port undertaking in the time charter party governed by English law and therefore her time charterers were not liable to her owners or bareboat charterers for her loss and associated costs.

This judgment endorsed its preceding judgment by the Court of Appeal[2] which had reversed its further preceding judgment at first instance by the High Court (Teare J. at Commercial Court)[3] and is perhaps one of the most important judgments about the interpretation or application of contractual safe port undertaking in the charter party in this century, in particular the concept of "abnormal occurrence" within the classic definition of "safe port", which exempts the charterers from their liability under English law[4]. The judgment held, in so far as the critical combination of two events which caused the casualty, *i.e*. (i) the danger at Kashima Fairway due to strong waves when the Vessel was leaving the port and (ii) the danger at Raw Materials Quay where she had berthed due to long waves, was rare, such combination and thus the casualty was abnormal, even if each of these two events could respectively be regarded as arising from the characteristics of the port. In other words it said the abnormality does not necessarily require that the cause of the casualty was irrelevant to the characteristics of the port. As the preceding judgments under the courts below had attracted much attention from the shipping communities worldwide, both legally and commercially, so this highest court judgment had the same impact.

It is not the purpose of this paper, however, to add another comment on the interpretation

* LLB (Tokyo), LLM (UCL/London); Attorney-at-law, Abe & Sakata LPC, Tokyo Bar Association; Visiting Researcher, Institute of Maritime Law, Waseda University, Tokyo; Maritime Arbitrator, Japan Shipping Exchange, Inc.

1 [2017] UKSC 35

2 [2015] EWCA Civ 16, [2015] 1 Lloyd's Rep. 381

3 [2013] EWHC 2199 (Comm), [2014] 1 Lloyd's Rep. 59

4 "A port will not be safe unless, in the relevant period of time, the particular ship can reach it, use it and return from it without, *in the absence of some abnormal occurrence*, being exposed to danger which cannot be avoided by good navigation and seamanship", per Seller LJ at *Leeds Shipping* v. *Société Française Bunge (The Eastern City)* [1958] 2 Lloyd's Rep. 127 at 131 (emphasis in *italic* added by the author)

or application of "abnormal occurrence" under English law. I am neither an English solicitor nor barrister. This bulletin would not also be an appropriate place for such comment. The writer, a Japanese lawyer, rather believes that it would in fact be regretful for most Japanese shipping interests, if this case, or this casualty exactly speaking, will *only* be remembered in the future as a casualty taking place in a Japanese port which had fallen into the dangerous conditions for a large size ocean-going vessel (Capesize) calling there, albeit temporarily and quite as a rare case, and thus regarded as an "abnormal occurrence". It is particularly so because there had been different analyses of the cause of this casualty in two lines of inquiries or litigation processes in the country where the accident did take place before the trial Judge at first instance in London (Teare J.) made his findings and his findings have become the binding basis of all arguments at upper courts there. One purpose of this paper is to record and introduce the summary of such different analyses in Japan mainly for non-Japanese readers of this unique bulletin, with the hope that many people will agree that there can be multiple findings and analyses of the cause of a casualty that may well lead to totally different resolutions of disputes between the relevant parties. Another is to present a thankfully hypothetical but very difficult case of concurrent litigations in two jurisdictions the results of which are contradictory each other.

Basic Timelines of the Casualty

Before discussing various analyses of the cause, we need to know the basic facts of the casualty. The following is a partial extract from the opening paragraphs of the Court of Appeal judgment with minimum editorial changes:

> The Ocean Victory was a Capesize bulk carrier which went aground at the port of Kashima in Japan on 24th October 2006; she subsequently broke up and became a total loss in December of that year. … On 12th or 13th September 2006 (depending upon the time zone), the charterers ordered the vessel to Saldanha Bay in South Africa to load a cargo of iron ore for carriage to Kashima in Japan. She arrived at Kashima on 20th October and berthed at the Raw Materials Quay. She began discharging her cargo but that had to stop on 23rd October due to strong winds and heavy rain. Thereafter the situation rapidly deteriorated; there was a considerable swell (as a result of a phenomenon known as long waves) affecting the vessel's berth at the Raw Materials Quay and high winds rising to Force 9 on the Beaufort Scale. In circumstances which we [the Court of Appeal] will have to examine, on 24th October the Master decided to leave the berth for open water, but lost control of the vessel while leaving the port and the vessel was driven back onto the breakwater wall, and subsequently became a total loss.

Some more information may need to be added:
The contractual chain was from the registered owners to the bareboat charterers (in the same group) and to the head time charterers in China, and then to the sub time charterers in Japan, who were the operator of the Vessel. As recorded in the judgments, she was employed for a voyage to carry iron ore from South Africa to Japan for the cargo receivers in Kashima.
The Master decided to leave the berth around 1000 in the morning at the suggestion (the meaning of which was much debated though) of the sub charterer's local master mariner representative. Arrangements for departure such as pilot, tugs and signals at noon were made but cancelled shortly before noon by the decision of the pilot because of temporary severe deterioration of the weather at that time. Re-arrangements were made and the Vessel departed around 1425, though the Master stated in London litigation that he had not been told this re-arrangement in advance and misunderstood that he was ordered to leave.
The place where the Vessel collided with the breakwater was in the northern end of a passage called Kashima Fairway, the only way-out from the Raw Materials Quay to the open sea. The first contact with the breakwater took place around 1519. The track of her route from the berth to there is illustrated in a chart in the judgment of Yokohama Marine Accident Inquiry Agency explained below. See the attached chart.

Governmental Inquiries in Japan

Immediately after the casualty, two lines of governmental investigations were put into operation in Japan. One was criminal investigation by the Japan Coast Guard. It was basically to pursue criminal liability of relevant individuals, if any. The details of such investigation for this casualty are not in public but nobody appears to have been prosecuted in the end[5].
Another was administrative inquiry proceeding by the then District Marine Accident Inquiry Agency (MAIA) in accordance with Act on Marine Accident Inquiry. Generally speaking, this proceeding had dual purposes; one was to investigate the cause of accident; another was to make disciplinary action against a negligent Japanese license holder, if appropriate[6]. District MAIA set up a tribunal consisted of 1 or 3 judge(s) to make the decision; Officers from Marine Accident Investigators' Office (MAIO) acted as prosecutor or plaintiff; an allegedly negligent Japanese license holder (typically master of a Japanese

[5] "Investigation of Maritime Crimes in 2006 (Final Data)", Press Release by the Japan Coast Guard on 14 March 2007

[6] MAIA has been re-organized with the new name of Marine Accident Inquiry Tribunal (MAIT) by amendments of relevant Acts in 2008. The primary function of investigating the cause of the accident is now undertaken by another organization called Japan Transport Safety Board (JTSB) and MAIT focuses on disciplinary actions. The relevant proceeding of this casualty was under the law before these amendments.

ship caused the accident), called Examinee, was the accused or defendant individual; and a designated person or corporation as concerned regarding a marine accident in question ("DPC") had a unique status of quasi-defendant who was to receive recommendation to prevent future accidents, if appropriate. The hearings by District MAIA were open to public and an Examinee or DPC could be represented by defense counsels called Marine Counsellors, who were either lawyers or master mariners. The final decision by District MAIA was also open to public, and subject to review first by High MAIA in Tokyo and then by the judicial court, if appealed by an Examinee. But a DPC could not make an appeal.

In this casualty, the Master of the Vessel did not have the Japanese license and thus no Examinee was called. Instead Yokohama District MAIO designated the Master of the Vessel (Panamanian license holder) and the sub time charterers' local master mariner representative in Kashima as DPCs on 28 March 2007.

After a couple of hearings[7], Yokohama District MAIA handed down its judgment on 11 March 2008[8]. It concluded that the casualty was caused by the fact that the Master failed to make sufficient analysis of weather information and consider an option to take refuge at open sea when a developing low pressure system was approaching and did not take an immediate measure to take refuge from rough weather when the storm warning at sea (maximum wind speed at 50knots) for the nearby area was issued at 0900 JST by Yokohama Navtex[9]. After analyzing the weather conditions and various forecasts preceding to the storm warning at 0900, MAIA considered that the Master should have started to consider an option to leave the quay as early as at 0600 when he received the preceding gale warning and should have made a decision to leave the quay as early as at 0900 when he could know upgraded warning, *i.e.* the storm warning, without waiting for the suggestion by the sub time charterers' local representative. Yokohama District MAIA issued a recommendation to the Master.

The sub time charterers' local representative at the hearings criticized the navigation by the Master after departure and argued that his negligent navigation *was* the cause of the casualty, but the judgment replied that it was impossible to judge whether navigation at the relevant time was good or bad as it was difficult to analyze the complex situation at the

---

[7] Both the Master and the local representative were represented by their respective defense counsels. But the Master never appeared before the tribunal in person eventually, though his statements before Yokohama District MAIO were presented as evidence.

[8] This was once accessible at http://www.maia.or.jp/pdf/19yh020.pdf but it appears to have gone.

[9] Navtex (navigation telex) is international automated broadcast service for delivery of navigational and meteorological warnings and forecasts, as well as urgent maritime safety information to ships at sea. The relevant information is receivable by a special telecommunication device for receiving them. The source of such information is weather forecasting authorities of relevant coastal countries – the Japan Meteorological Agency (JMA) in case of Japan.

way-out from Kashima Fairway when she became uncontrollable. As there existed no Examinee in this proceeding, the appeal to High MAIA (second instance proceeding) and then to the judicial court could not be and was not made.

Multiple Civil Litigations in Japan

After the judgment of Yokohama District MAIA, there have been multiple civil litigations in Tokyo District Court. Interestingly, it was started by the Japanese Government. The Government, being the owner of the southern breakwater at Kashima damaged by the Vessel due to collision, commenced an action against the bareboat charterers of the Vessel in September 2009 to claim damages by vicarious liability for tort committed by the Master. They at first wanted to rely on the Yokohama District MAIA judgment, though they were not legally binding. The sub time charterer then also sued the bareboat charterer of the Vessel in February 2010 to claim damages by tort (and by reason of unjust enrichment) in respect of loss of bunkers on board, being their property at the relevant time. In response, the assignee underwriters of the owners of the Vessel (the owners' side) sued the Japanese Government in April 2010 to claim damages for loss of the Vessel on the ground that the loss was caused by the defect in the placement and administration of Kashima port by the Government under State Redress Act. In contrast with London litigation, the owners' side's argument about defects of Kashima did not focus on the "critical combination" of (i) the danger at Kashima Fairway due to strong wind and (ii) the danger at Raw Materials Quay due to long waves but merely set out various physical features of the port in general terms. Former two actions were consolidated but the third action by the owners' side was not consolidated and proceeded alone.

Tokyo District Court at first instance rendered their judgement on the first two actions on 20 June 2013[10], shortly before the first instance judgment in London by Teare J. on 30 July in the same year. The Court effectively overturned the conclusion of Yokohama District MAIA and rejected the Master's negligence in his delayed decision to leave the berth but instead found his negligence in another aspect. It found that the casualty was caused by the loss of maneuverability of the Vessel due to prolonged continuous hard rudder negligently taken by the Master at critical several minutes near the way-out from Kashima Fairway and eventual substantial loss of her speed, in breach of an established principle of navigation in rough weather that finely adjusted small angle rudders should be successively adopted to maintain speed (which was of vital importance in that situation) and timely respond to ever changing effects by wind and waves. According to the judgment, there was no good reason for the Master to deviate from this established principle at that time.

[10] (2016) 1418 *Hanrei Times* 305

Appeal to Tokyo High Court (appellate court) was made but dismissed on 17 July 2014. Tokyo High Court approved the findings of the first instance court[11]. Further appeal to the Supreme Court was made but again dismissed on 6 March 2015. The Supreme Court held this is not an appropriate case to allow appeal under the procedural rules and refused to revisit the merits[12].

As to the third action commenced by the owners' side against the Government under State Redress Act, in which they alleged various defective characteristics of the port (but not the critical combination advanced in London), did not reach the stage of judgment. Reportedly the owners' side withdrew the action in August 2013, shortly after the first instance judgment in London in the previous month.

Possible Backgrounds of Contradictory Findings

When the first instance judgment of Tokyo District Court was given in June 2013, the sub time charterers, not surprisingly, tried to draw it to the attention of Teare J. The Judge mentioned it in postscript paragraphs of his judgment. But he refused to change the conclusion he had reached after reviewing evidence before him, namely, the prolonged continuous hard rudder by the Master could not be criticized since the Master had had the fear of being driven onto the breakwater and/or the shore on the opposite. He rather held that the cause of the accident was basically caused by (i) the danger for a Capesize vessel at the way-out from Kashima Fairway at the time where the wind at Beaufort 9 was observed on one hand, and (ii) the danger for her to stay at Raw Materials Quay due to long waves on the other hand, and eventual unsafety of the port at that time represented by combination of these two dangers. As to the former danger, he found that it even required some luck, beyond good navigational skill for a Capesize ship to sail out through the way-out from Kashima Fairway at that time. As to the difference of findings from Tokyo findings, he said his conclusion was based on extensive factual and expert evidence and examinations of the Master and experts before him, none of whom gave evidence in Tokyo.

It appears to me that the findings of Teare J. were most importantly relying on the basic finding that the way-out from Kashima Fairway had been, already in general terms, "dangerous" for a Capesize vessel when the wind at Beaufort 9 was observed, before perusing the appropriateness of the Master's specific maneuvering at the relevant time.

[11] Under the Civil Code of Procedure ("CCP") in Japan, there is no restriction for reasons to appeal to the High Court. The parties are allowed to submit further pleadings and evidence.

[12] Under CCP, appeal to the Supreme Court may be allowed only in limited circumstances, *e.g.* where there is an important issue in the construction of statutes and regulations. A mistake in findings of facts cannot *per se* be a ground for appeal.

This was deduced from opinions by expert mariners before him (who may not have much experience of navigating in Kashima). Under such basis, the Judge probably considered the allegedly mistaken navigation by the Master, even if any, should be accepted in so far as he had some excuses for not complying with the established navigation principle in rough weather.

In contrast, Tokyo judgment put more weight on evidence by different masters. It was revealed from the owners' side evidence that the masters of two sister ships of the owners were both had critical opinions to the Master's navigation of prolonged continuous hard rudder in breach of the established navigation principle in rough weather. Surely it must be a grave matter that the Master's own colleagues did criticize his navigation. As to the expert evidence, a senior local pilot in Kashima, former master mariner of ocean-going vessels, among others, gave written evidence and his testimony in Yokohama District MAIA was relied on in Tokyo too. He did not agree that Kashima Fairway at that time was dangerous but said the Master's navigation in breach of established principle was rather regretted. In other words Tokyo judgments must have accepted that the conditions of Kashima Fairway at that time was not so dangerous as to require more than good navigational skill. The judgment admitted, in so far as the Master had navigated in accordance with the principle of successive small angle rudders and stopped hard rudder earlier to maintain speed, the Vessel would have passed out the way-out to the open sea safely — and it found his unjustifiable prolonged continuous hard rudder leading to the loss of vital element (speed) *was* the cause.

As Teare J. pointed out, the Master did not appear in Tokyo proceeding, as well as in Yokohama District MAIA, though his statements were included in written evidence. In Japan, his personal absence with representation by lawyers only might have had certain implicit impacts. In London in contrast, he eventually appeared in London Courtroom's TV screen from China before the Judge as well as before all interested parties, after several years' absence.

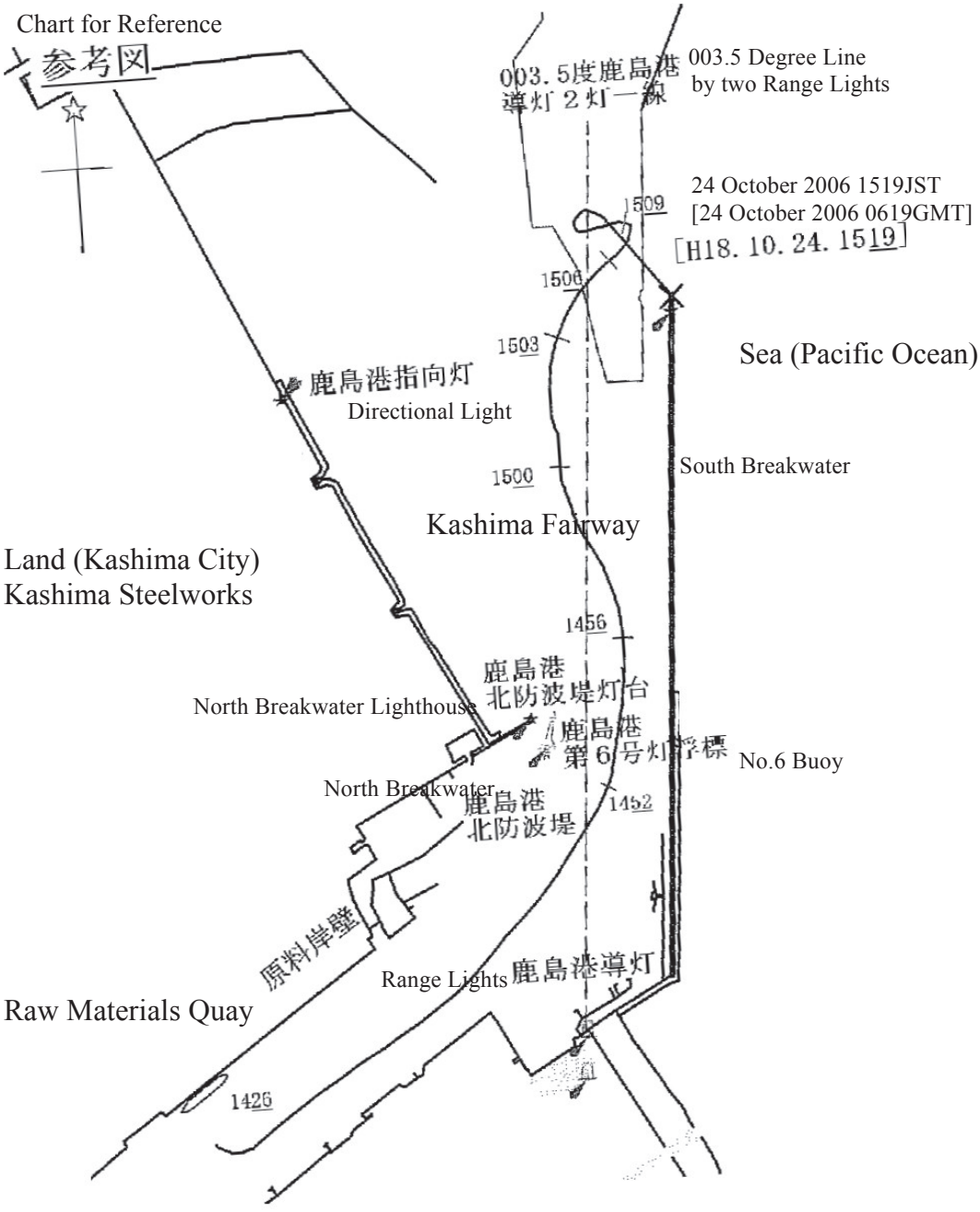
Another point to note may be that the sub charterers at first instance in London were obliged to pursue both the negligent navigation by the Master as the cause and the abnormal occurrence in safe port undertakings. They may not be logically in sharp conflict, but it may certainly have looked inconsistent to advance these two at the same time. Is it a mistaken guess that the second line of arguments might have become more persuasive, possibly ironically, since the first line of arguments was forced to abandon at a lower level?

Conclusion

Of course it is neither appropriate nor productive to discuss which was correct or more

persuasive. Different courts or judges may well reach different judgments in the same set of facts explained by technically different evidence, in particular, different expert opinions giving different evaluations in the same facts. Having said that, it is to be noted that, should the English Court have eventually reached a different conclusion, *i.e*. if the time charterers had been held liable for the bareboat charterers because of the unsafety of the port, that would have been difficult to reconcile with another conclusion from the Japanese judgments that the casualty was attributable to the negligence of the user of the same port. Under the current legal scheme, there is no certain way to ensure the avoidance of such an undesirable situation, unless all the disputes worldwide are to be litigated in one forum. Nor anyone can present a superb prescription to solve this difficult situation should it really have taken place. The only hope of the author is therefore that this case, or this casualty, will not merely be remembered to be an abnormal occurrence in Kashima according to English law perspective, but also be remembered to be a normal negligent navigation case according to another authentic and fully considered decision in the forum where the accident did take place.

Source: Judgment of Yokohama District MAIA on 11 March 2008



Rules for International Jurisdiction Related to Maritime Matters in Japan.

*Makoto Matsumiya**

1. Introduction

A partial amendment of Code of Civil Procedure (the "Code") on rules of international jurisdiction came into force on 1st April, 2012[1]. Before the amendment, there was not any statutes on international jurisdiction in Japan, the rules of which had been developed by the courts. There are two Supreme Court judgments – the Malaysian airline case[2] and the Family case[3] – which have established the general test, namely, that whether the Japanese court can exercise international jurisdiction over a dispute in question is basically determined subject to the rules of national jurisdiction, unless there are special circumstances in which courts should deny international jurisdiction in Japan.

However, the application of the test given by the court was unpredictable and unstable, and there has been a demand for express rules for specific types of claims to be stipulated. The new Code therefore has different special jurisdictional rules depending upon the types of actions, the structure of which is similar to Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast) OJ 20 December 2012, L351/1 ("the Recast Regulation")[4].

Although this paper cannot introduce all of the amendments due to space limitations, it will outline the major new provisions related to maritime cases. It will also introduce other special provisions with respect to maritime jurisdiction and a recent case where one of the main issues was jurisdiction over an action relating to compensation for the costs of removal of a stranded vessel[5].

---

* Ph.D. (Physics), LL.M. (Maritime Law), Partner, Higashimachi, LPC (Imabari Office).

1 Japanese Law Translation - Code of Civil Procedure < http://www.japaneselawtranslation.go.jp/law/detail/?id=2834&vm=&re=02> accessed 18 February 2018.

2 35 Minshu No 7, 1224 (Sup. Ct., October 16, 1981).

3 51 Minshu No.10, 4055 (Sup. Ct., November 11, 1997).

4 Available at <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32012R1215 > accessed 18 February 2018.

5 As for the details of jurisdictional rules for collision cases, see Tadahiro Matsuda, 'Reflections of the Amendment of the Code of Civil Procedure on the Maritime Collision Cases in Japan', (2013) 58 Wavelength 1.

2. Outline of the Amendment

The amended part of the code consists of a hierarchy of jurisdictional rules. First, rules for exclusive jurisdiction in Article 3-10 are paramount. The Japanese courts have jurisdiction over cases with specified subject matters which are stipulated in Japanese law, irrespective of the defendant's domicile.

Secondly, there are particular jurisdictional rules which apply to consumers and employees[6]. These rules were introduced to protect parties in a weaker position.

The third level of the hierarchy is the submission of the defendant to a court by appearance in the court to argue the merits of the case[7]. In this case, the Japanese court has jurisdiction over that court in any case other than one falling under Article 3-10. On the other hand, if the Japanese court has jurisdiction over a case falling under Article 3-10, then it has to decline its jurisdiction based on the submission of the defendant to the court by appearance in the court.

Fourthly, where there is a jurisdiction agreement, the court chosen by the agreement has jurisdiction under Article 3-7. This article provides that 'Parties may establish, by agreement, the country in which they are permitted to file an action with the courts'. Article 3-7 therefore applies to both agreements that set out an exclusive and non-exclusive jurisdiction.

Where the Japanese court is chosen by an exclusive jurisdiction agreement, it has to take jurisdiction under Article 3-9 of the Code. The Japanese court may, on the other hand, dismiss the whole or part of an action without prejudice if it finds that there are special circumstances because of which, if the Japanese courts were to conduct a trial and reach a judicial decision in the action, it would be inequitable to either party or prevent a fair and speedy trial, in consideration of the nature of the case, the degree of burden that the defendant would have to bear in responding to the action, the location of evidence, and other circumstances where it can take jurisdiction based on general and special jurisdictional rules other than an exclusive jurisdiction agreement.

Finally, the general rule is that the Japanese court has jurisdiction where the defendant is domiciled in Japan, and special rules are set out for different types of actions as seen in the next section. These rules are on the equivalent level, and the claimant can choose whichever he wants freely.

To summarize, in order to file an action in Japanese court, one should check the following steps:

---

[6] Article 3-4 of the Code.

[7] Article 3-8 of the Code.

(1) If the action falls within a matter of exclusive jurisdiction under Article 3-10, one cannot take further steps, and the Japanese court will have jurisdiction.
(2) If the case involves consumers or employees, then the Japanese court will have jurisdiction under the rules for consumers or employees under Article 3-4 of the Code.
(3) If the defendant intends to submit to the jurisdiction of the Japanese court, the Japanese court will take jurisdiction unless the action is one of exclusive jurisdiction laid down in Japanese law under 3-8 of the Code.
(4) If there is an exclusive jurisdiction agreement between the parties in favour of the Japanese court, the Japanese court has no choice but to hear the case subject to Article 3-7 and 3-9 of the Code. However, if the jurisdiction agreement is not an exclusive one, Japanese court will basically take jurisdiction but has discretion to decline its jurisdiction .
(5) If the defendant is domiciled in Japan, the Japanese court will take jurisdiction and can hear the case.
(6) If the action meets the requirements of special jurisdictional rules set out Article 3-3, then the Japanese court can take jurisdiction even if the defendant is not domiciled in Japan.

This article will not look at the general rule of jurisdiction, i.e., the defendant domiciled in Japan can be sued in the Japanese court, in detail. It will rather focus on special jurisdictional rules set out in Article 3-3 in the following section, since Article 3-3 contains specified rules for maritime related action, and they are crucial for maritime interests to bring proceedings in Japan.

3. Major Rules for Special Jurisdiction

This section will summarize the overview of Article 3-3 of the Code. It provides that an action set forth in one of the items of the section may be filed with the Japanese courts in the case specified in each item. Items that appear to be relevant to maritime matters are as follows:

a. An action on a claim for performance of a contractual obligation and other claims regarding a contractual obligation (Article 3-3 (i))

Article 3-3 (i) provides special jurisdictional rules for an action relating to a contractual obligation among actions regarding property rights. The meaning of ‘An action relating to a contractual obligation’ encompasses an action on a claim for performance of a contractual obligation; on a claim involving benevolent intervention in another's affairs that has been done, or unjust enrichment that has arisen, in connection with a contractual

obligation; on a claim for damages due to non-performance of a contractual obligation; or on any other claim involving a contractual obligation. It should be noted that there are other special rules for employment contracts and consumer contracts[8].

b. An action on a property right (Article 3-3 (iii))

Article 3-3 (iii) allows the Japanese court to take jurisdiction over an action on a property right if the subject matter of the claim is located within Japan, or if the action is a claim for the payment of monies, and the seizable property of the defendant is located within Japan (except when the value of such property is extremely low). It is sufficient that the seizable property is located within Japan at the commencement of proceedings. The Japanese court may exercise jurisdiction even if it is subsequently lost.

c. An action against a person with an office or a business office (Article 3-3 (iv))

According to Article 3-3 (iv), the Japanese court takes jurisdiction over an action against a person who has an office or business office located within Japan. The claim must, however, be in connection with the business conducted at that person's office or business office. The reason for the scope of the claim being limited is that the claimant may bring an action in the Japanese court concerning business conducted in other country that does not involve the office or business office in Japan but is merely related to the practice area of said office or business office. A Panamanian company that has a business office in Japan and conducted a transaction with another foreign company may therefore be sued in Japan if the office in Japan was involved with the transaction.

d. An action based on a ship claim or any claim secured by a ship (Article 3-3 (vi))

Article 3-3 (vi) sets out rules for an action based on a ship claim[9], or any claim secured by a ship, and provides that the Japanese courts have jurisdiction if the ship is located within Japan for the said action.

Article 3-3 (iii) can apply, instead of Article3-3 (vi), where the defendant is the owner of the vessel and it is located in Japan. However, one can only invoke Article 3-3 (vi) where the defendant is a third party (e.g. charterer) other than the owner.

Where the claimant arrests the vessel based on a maritime lien in Japan, the owner or disponent owner will file a petition for an order of provisional disposition for the purpose of navigation of the vessel on the merits of a declaration of absence of such ship claim or commence proceedings asking for a declaration of absence of such ship claim at the

[8] Article 3-4 of the Code.

[9] A "ship claim" includes a claim set out in Article 842 of the Commercial Code and that against unregistered ship secured by pledge.

same time as said petition. Japanese courts will have jurisdiction over such petitions because of Article 3-3 (vi).

Some argue that if Japanese courts have jurisdiction over actions related to property rights where the assets are located in Japan, the creditor may also bring proceedings against the debtor in the third country where the debtor is domiciled, and the debtor will have to respond to them, which lays undue burden on the debtor. However, this is not the case with a ship claim and other claims secured by a ship.

For these reasons, Article 3-3 (vi) allows the Japanese courts to have jurisdiction over an action based on a ship claim or any claim secured by a ship if it is located within Japan. It can be said that Article 3-3 (vi) is a unique provision in comparison with the Recast Regulation, which does not have special jurisdictional rules for matters related to a maritime claim.

e. An action for a tort (Article 3-3 (viii))

Article 3-3 (viii) gives jurisdiction to the Japanese court over an action for a tort filed with the court if the place where the tort occurred is within Japan (except when the consequences of a wrongful act committed in a foreign country have arisen within Japan but it would not ordinarily have been possible to foresee those consequences arising within Japan). The meaning of the place where the tort occurred is not clear, but it is interpreted as including both places where a harmful event has occurred and damage or loss has been caused. As for torts relating to accidents at sea, there is a special provision as seen next.

f. An action for damages due to the collision of a ship or any other accident at sea

The Japanese courts exercise jurisdiction over an action related to damages for collisions or other accidents at sea where the first place in which the ship that suffered loss or damage has arrived is located in Japan, by virtue of Article 3-3 (ix).

The claimant may bring proceedings in Japan where collisions or other accidents at sea take place in Japanese territorial waters under Article 3.3 (viii). In contrast, Article 3.3 (viii) does not apply where a collision or any other accident at sea takes place on the high seas.

However, even if collisions or other accidents on the sea take place in the high seas, it is convenient to decide the case in the country in which the first place the ship that suffered loss or damage has arrived is located, since most evidence could be available there.

For these reasons, Article 3-3 (iv) allows the Japanese courts to have jurisdiction over an action related to damages for collisions or other accidents on the sea where the first place in which the ship that suffered loss or damage has arrived is located in Japan.

g. An action related to a maritime rescue (Article 3-3 (x))

Maritime rescue generally takes place under a Lloyd's Open Form which includes an arbitration clause, and the dispute over maritime rescue is referred to London arbitration[10]. However, there might be maritime rescues without any such arrangements. It is therefore necessary to set out jurisdictional rules for maritime rescue. Article 3-3 (x) provides that if the place where a maritime rescue took place or the first place where the salvaged ship docked is within Japan, the Japanese court takes jurisdiction over an action related to the maritime rescue, considering the convenience of collecting and examining evidence.

4. Act on Liability for Oil Pollution Damage

The Act on Liability for Oil Pollution Damage (the "Act")[11] is the domestic enactment of the International Convention on Civil Liability for Oil Pollution Damage ("the CLC")[12]. Article 14 (1) of the CLC provides that

> Where an incident has caused pollution damage in the territory, including the territorial sea or an area referred to in Article II, of one or more Contracting States, or preventive measures have been taken to prevent or minimize pollution damage in such territory including the territorial sea or area, actions for compensation may only be brought in the Courts of any such Contracting State or States.

According to this provision, the claimant may only sue the owner or insurer in the court of the country in which pollution damage has occurred[13]. Article 14 (2) of the CLC then provides that:

> Each Contracting State shall ensure that its Courts possess the necessary jurisdiction to entertain such actions for compensation.

This provision obliges contracting states to prescribe domestic laws to make sure that the claimant can bring an action for compensation in the court of the country where pollution damage occurred. Article 11 of the Act therefore provides that:

> As for the lawsuit against the Tanker Owner pursuant to the provisions of paragraph 1 or paragraph 2 of Article 3, if a court with jurisdiction is not

[10] Colin De La Rue, Charles B Anderson, '*Shipping and the Environment* '(Informa, 2nd ed., 2009) p.895.

[11] Japanese Law Translation -Act on Liability for Oil Pollution Damage <http://www.japaneselawtranslation.go.jp/law/detail/?id=64&vm=&re=02 > accessed 18 February 2018.

[12] International Convention on Civil Liability for Oil Pollution Damage. Brussels, 29 November 1969, entry into force 19 June 1975, 973 UNTS 3. As amended by the Protocol to the International Convention on Civil Liability for Oil Pollution Damage. 1969, London, 19 November 1976, entry into force 8 April 1981, 1225 UNTS 356. The Protocol of 1992 to amend the International Convention on Civil Liability for Oil Pollution Damage of 29 November 1969. London, 27 November 1992, entry into force 30 May 1996, 1956 UNTS 255.

[13] One can sue the insurer directly by virtue of Article VII (8) of the CLC.

prescribed by other acts, the lawsuit shall belong to the court of the venue that the Supreme Court provides.

Article 11 allows the Japanese court to take jurisdiction when pollution damage occurred in the territory of Japan. In this sense, the Act does not add any new jurisdictional rules to the CLC.

However, the Act also covers oil pollution damage from a General Ship[14] as opposed to the CLC which limits its application to oil tankers. In addition, it provides that a General Ship with Japanese nationality shall not be engaged on international voyages (meaning the voyages between a port in Japan and a port in a region other than Japan) unless they make a Contract on Insurance or Other Financial Security for General Ship Oil Pollution Damage. A question may arise as to whether it is possible to sue the insurer directly for compensation in Japan even where damage other than that caused oil pollution at sea takes place from a General Ship. There was a recent judgment which dealt with this issue. It will be introduced below.

5. A Recent Case on Jurisdiction Over an Action Relating to Oil Pollution Damage from a General Ship

There was a recent judgment on jurisdiction over an action relating to damage caused by a grounded ship in Japan and the validity of direct action against the insurer without any express provision[15].

a. Facts

The claimant is a fishing cooperative. The first defendant is a regional government body established in Hong Kong that operates a marine transport business. The second defendant is a Russian insurance company. The first and second defendants entered into an insurance contract on 20 October 2010 for the navigation insurance (“the Insurance Contract”) of a dredger owned by the first defendant (“the Vessel”). The Insurance Contract had an arbitration agreement that stated, “all disputes that arise based on this contract shall be governed by Russian law and resolved through arbitration by the maritime arbitration committee of the Russian Chamber of Commerce.” (“the Arbitration Agreement”)

On 24 October, the Vessel was towed by a tug from Tokuyama and bound for China. During the voyage, the tow rope was severed due to bad weather and the Vessel drifted until it grounded on the coast of Miyazaki (“the Incident”). The Vessel was not removed and was left where it grounded until the time of the judgment.

[14] ‘General Ship’ means the ship for the carriage by sea of freight and other articles except passengers and Oil in bulk (Article 2 (iv-2)).

[15] Miyazaki District Court 23 January 2015.

The claimant had fishing rights in the area where the Vessel was grounded. The claimant sought the payment of 398 million yen plus for the cost of removal of the Vessel and damages for delay against the first defendant; further, against the second defendant it sought to exercise the subrogated right of the first defendant against the second defendant under the Insurance Contract and the payment of 398 million yen and damages for delay. The claimant also argued as a secondary ground that Article 15 (1) of the Act applied by analogy, which allowed it to claim directly against the second defendant for the payment of 398 million yen and damages for delay.

b. Judgment

As the first defendant did not enter an appearance in the matter, the court awarded a default judgment to the claimant in its claim against the first defendant.

Next, regarding the claimant's claim of subrogated right against the second defendant, the court found that Russian law governed the Insurance Contract and upheld the second defendant's defence under the Arbitration Agreement that there was an agreement for arbitration in Russia. The claimant argued that the Japanese court had jurisdiction over the tort committed by the second defendant, as the tort committed by the second defendant was within Japan, and the resultant damage occurred in Japan, but the court did not accept the argument[16].

The notable point of dispute in this case was the jurisdiction over the direct claim against the second defendant insurance company based on applying Article 15 (1) of the Act by analogy, and whether such analogy was applicable. Article 15 (1) provides that:

> When the liability for damages of the Tanker Owner occurred pursuant to the provision of paragraph 1 or paragraph 2 of Article 3, the victim may claim the payment of damages against the Insurer, provided, however, this shall not apply if the damage was caused knowingly by the Tanker Owner.

Note that Article 15(1) entitle the victim to sue the Insurer for the payment of damages only when loss or damage is caused from a tanker and does not refer to a general ship.

First, the court ruled that the claimant's direct claim was based on applying Article 15 (1) of the Act by analogy, and in that case, the Japanese court had jurisdiction over the claim. The court's reasons were that the Act was the domestic enactment of the CLC", that Article 9 (1) of the CLC provides that a claim can be brought in the courts of the signatory state only in circumstances where damage occurs within the territory of that signatory state, that the damage that arose in the Incident occurred within Japanese territory, and that both Japan and Russia are signatories to the CLC.

However, although the court found that the Japanese courts had jurisdiction, it rejected the

[16] The claimant submitted some other arguments that the action filed by the claimant falls within some of the items in Article 3-3 of the Code, but the court also rejected these claimant's arguments.

argument that Article 15 (1) of the Act applied by analogy. The reason for this was that the CLC only applies to tankers, and if a direct claim against an insurance company was upheld in relation to the grounding of a regular vessel not defined in the CLC, then a counter-suit would have to be filed in the Japanese courts that goes beyond the scope that was intended by the signatory states to the CLC.

6. Conclusion

The claimant argued that the Japanese court must take jurisdiction since the claim against the second defendant was based on the tort claim against the first defendant. However, the court rejected the claimant's arguments on the grounds that the Insurance Contract included the arbitration agreement which chose the arbitral seat in Russia. The reason why the claimant can sue the second defendant directly is that he steps into the first defendant's shoes and is placed in the same position as the first defendant. It is therefore agreeable that the court rejected the claimant's arguments because of the arbitration agreement in the Insurance Contract.

As for the application of Article 15 (1) of the Act by analogy, the court upheld the claimant's argument that if the action is filed based on the application of Article 15 (1) of the Act by analogy, the Japanese court will have jurisdiction in the same manner as Article 15 (1) applies to damage caused by oil pollution.

However, whether the Japanese court has jurisdiction is solely determined by the CLC, and there is no room to take the interpretation of Article 15(1) of the Act into consideration. The CLC does not apply to damage from a ship other than tanker[17]. Oil pollution damage caused by a ship other than a tanker is covered by the International Convention on Civil Liability for Bunker Oil Pollution Damage (the "Bunker Convention")[18], which also sets out the direct action of the victim against the insurer[19]. There is, however, no international legal instrument of civil liability for general damage other than oil pollution damage from a general ship. It is therefore no legal basis that the Japanese court takes jurisdiction over an action on a claim of the cost of removal of the Vessel.

Although the court declined that Article 15(1) of the Act applies to general damage other than oil pollution damage, it should be said that the findings regarding jurisdiction over an action on a direct claim against the insurer was erroneous.

[17] Article I (1), I (6) and II (a) of the CLC.

[18] The International Convention on Civil Liability for Bunker Oil Pollution Damage, London, 23 March 2001, entry into force 21 November 2008, 402 UNTS 71.

[19] Article 7 (10) of the Bunker Convention.

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