# THE BULLETIN OF
# THE JAPAN SHIPPING EXCHANGE, INC.

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CONTENTS

# PREFACE

The Japan Shipping Exchange, Inc., was established in 1921, and it has since then conducted, as its major business, arbitrations and mediations in such maritime matters as Charterparty, Bill of Lading, Contract of Affreightment, shipbuilding, shiprepair, shipsale, etc. It has also been active in drafting various standard forms of contract in order to prevent possible disputes arising in execution of these contracts and contributes to the smooth and effective development of maritime dealings. The Exchange also functions as an organ for evaluation of ships. Further its services as an investigation and information media in the maritime transactions are highly appreciated.

All awards given in the arbitral tribunal of the Exchange are accompanied with detailed reasons, and their publication is deemed to be most useful in fostering better maritime customs and usages, in addition to establishment of justice and fairness of their judgement. Most of the arbitral awards are prepared in Japanese language, and made public mostly in Japanese texts. In view of the fact, that the Japanese maritime businesses have long adopted many ways of customs and usages of international dealings because of its destiny of being deeply involved in the international business communities, the arbitral awards are made on the basis of such international customs and usages, and are sometimes made public in English version.

The Bulletin of the Japan Shipping Exchange, Inc. No. 1 through No. 8, were published from 1964 to 1973 in which English translations of some of the selected arbitral awards were printed in answer to strong requirement of the international business and academic circles. Publication of the Bulletin had been suspended for long partly because some parties hesitated to get the relative awards made public, and partly because of the increased work on the part of the office personnel at the Secretariat, with increased arbitral tribunals for cases which naturally caused extravagant paperwork, answering the ever increasing applications for arbitration.

We are pleased to announce that the annual publication of the Bulletin is now resumed with this volume, No. 9, and hope that this will serve the readers' needs and solve problems which might have been left open to questions.

# I

# REPORTS OF MARITIME ARBITRATIONS

**In re a Dispute Arising from a**
**Time Charterparty of m. v. Green Lake**

CLAIMANTS . . . . . .Charterers (Tokyo)

RESPONDENTS. . . . . Shipowners (Taipei)

Time charterparty — Whether charterers are entitled to cancel the charter by reason of unseaworthiness — Full hire not paid by charterers — whether withdrawal was wrongful.

Claimants' case is as follows:

(1) On 31st August, 1973, Claimants concluded a Time Charterparty (hereinafter as "the Charter") with Respondents under the agreement that m.v. Green Lake (3,955.33 gross tons and owned by Respondents, hereinafter referred to as "the vessel") should be hired in time charter for 12 months from the delivery of her. The charter provided inter alia:

> . . . and fully loaded capable of steaming about 10.5 knots in good weather and smooth water on a consumption of . . . about 6.5 tons oil-fuel . . .

Owners to provide.

> 3. The Owners to . . . maintain her in a thoroughly efficient state in hull and machinery during service.

Charterers to provide.

> 4. . . . The Vessel to . . . be fitted with winches, derricks, wheels and ordinary runners capable of handing lifts up to 5 tons.

Hire

> 6. The Charterers to pay as hire: Japanese Yen Twelve Million Four Hundred Two Thousand (¥12,402,000.—) per calendar month, commencing in accordance with clause 1 until her re-delivery to the Owners.

Payment

> Payment of hire to be made in cash, in Japanese Yen

without discount, every month in advance. In default of payment the Owners to have the right of withdrawing the Vessel from the service of the Charterers without noting any protest . . .

Re-delivery.

7. The Vessel to be re-delivered on the expiration of the Charter in the same good order as when delivered to the Charterers (fair wear and tear excepted) at an ice-free port in the Charterers, option in one safe port of Indonesia/ Japan range . . .

Suspension of Hire, etc.

11. (A) In the event of drydocking or other necessary measures to maintain the efficiency of the Vessel, deficiency of men or Owners' stores, breakdown of machinery, damage to hull or other accident, either hindering or preventing the working of the vessel and continuing for more than twelve (12) consecutive hours, no hire to be paid in respect of any time lost thereby during the period in which the Vessel is unable to perform the service immediately required. Any hire paid in advance to be adjusted accordingly.

33. It is understood that the vessel has two sets of 5 tons and two sets of 10 tons cargo gear.

The hire and the term of the Charter were revised as follows in accordance with the Adendum of the Charter dated 18th February, 1974.

1) Effective retroactive to January 25th, 1974, the hire has been adjusted to US$52,500.00 (U.S. DOLLARS FIFTY TWO THOUSAND FIVE HUNDRED) per calendar month, inclusive of crew overtime.

2) The term of charter has been extended for three (3) months, to about December 25th, 1974.

(2) In spite of the warranty given by Respondents that the Vessel was fully loaded capable of steaming about a speed of 10.5 knots in good weather and smooth water and fitted with two sets of 5 tons and two sets of 10 tons cargo gear, the Vessel was so low steaming as 8.5 knots and her cargo gears actually did not prove such capacity as guaranteed as above. In addition, deterioration of the Vessel always left her in very dangerous conditions for navigation, growing decrease in her loading and eventually resulted in ever increasing operating costs.

Repeated requests made by Claimants for improvement of those defects were regrettably met with no response by Respondents, only having caused a series of the accidents, viz., in March, 1974, the Vessel, just before entering Aparri, the Philippines, had got holds made through corrosion around the top of the ballast tank, resulting in the ballast water leaking into the holds, and July of 1974, the Vessel, soon after sailing out of the Kagoshima Bay, had serious leakage of sea water around the chain locker.

From these circumstances, it is clear that Respondents failed to meet their obligations regarding seaworthiness of the Vessel as agreed in Clause 3 of the Charter and that Claimants undoubtedly had the right to cancel the Charter. Claimants thereupon had their representative Mr. Sugata, a director thereof, make, on 9th July, 1974, a verbal proposal at Taipei, Taiwan to Mr. Tsai, President of Respondents, that Claimants were prepared to carry the cargo, cement clinker, on board to Singapore after repairing works, and thence to carry another cargo of manganese ore from Kuantan, Malaysia to Inchon, South Korea, and further Claimants wanted Respondents to bind another party for hire of the Vessel or to operate the Vessel by Respondents themselves, as the Vessel would be redelivered to Respondents around 18th August, 1974, when the cargo of manganese ore was completely discharged at Inchon. Mr. Tsai answered, expressing their accepting of the proposal of Claimants, and said that they would immediately take action either in finding a new charterer or obtaining another cargo for the Vessel. The details were negotiated by exchange of telexes thereafter, but before satisfactory negotiation being done, the due date of the hire came. Claimants thereupon

remitted on 25th August, 1974, the amount of hire covering the period from 25th July to 18th August, 1974, less the sum for off-hire and others previously advised of to Respondents. The reason why Claimants paid of the sum of the hire covering only the period up to 18th August was naturally due to the fact that there existed a fundamental agreement between the parties that the Charter was to expire on or around 18th August, 1974, as described heretofore.

Respondents advised Claimants of one-sided cancellation of the Charter, withdrawing the Vessel at 3.15 p.m. of 1st August, 1974 disregarding Claimants' efforts for an amicable settlement of this matter. In addition, Respondents made the Vessel sailed out, through an instruction to the Master, from Singapore to Port Kelang, Malaysia, at 4.45 p.m. of 1st August, 1974, in order to carry the cargo of a third party other than Claimants, without any legal ground for cancellation of the Charter.

4. Claimants claim from Respondents the sum of Yen 23,615,052 for the loss caused by Respondents one-sided cancellation of the Charter as written as above.

Respondents pleaded as follows:—

Respondents deny Claimants' claim that Respondents failed to meet their obligation regarding the warranty of seaworthiness of the Vessel in Clause 3 of the Charter.

Respondents admit that Mr. Sugata and Mr. Tsai had a talking at Taipei on 9th July, 1974, but Claimants did not make any of such a proposal as Claimants stated in their claim. Claimants wanted in their proposal to cancel the Charter only owing to sluggish demands on the depressed market in general and deficiency of cargo, but never said that the Vessel was not seaworthy. Mr. Tsai did not give such an answer as Claimants mentioned, but only replied that Respondents could not give an agreement to the words of Claimants at that stage.

On 19th July, 1974, Claimants, however, telexed to the Charterer stating that they would one-sidedly cancel the Charter after the discharge of

the cargo at Inchon, and later, they advised Respondents that Claimants intended to negotiate with Respondents further about this matter. Claimants further advised on 23th July, 1974, that they would pay the hire on their own counting of the sum of off-hire on their arbitrary shortened period of hire from 25th July up to 18th August, 1974.

Moreover, on 25th July, Claimants advised Respondents by telex that they would remit to Respondents a sum of US$10,355.14 and declared cancellation of the Charter. Respondents objected, on 25th July, to this one-sided and irrational declaration of cancelling the Charter. But, Claimants kept insisting on their own claims, and the negotiation broke down.

On 29th and 30th July, Respondents informed Claimants that Respondents would agree to the cancellation of the Charter if Claimants accepted the Respondents' claim against Claimants, to pay a sum of US$31,833.33 by noon of that day.

According to Clause 6 of the Charter, Claimants shall pay in cash to Respondents the sum of Yen 12,402,000 in advance every month from the beginning of the Charter until the day of redelivery of the Vessel. (According to the written agreement of 18th February, 1974, the hire was revised to US$52,500 per month.) This clause further stipulates that in default of payment the owners to have the right of withdrawing the vessel from the service of the charterer without noting any protest. Claimants, however, paid on 25th July, only the sum of US$10,355.14 which is equal to the hire of six days, though they should pay Respondents the sum of US$52,500 as above. As these are to constitute a breach of Clause 6, Respondents could withdraw the Vessel promptly. But Respondents, who wished to settle the matter amicably, tried to come to a mutually satisfactory solution thereof, by negotiation. On 1st August, seeing, however, that Claimants did nothing but considering their own convenience, indicating nothing about their will to settle the matter amicably. Respondents at last informed Claimants of cancelling the Charter and withdrawing the Vessel. Therefore, Respondents are not in a position to concede the Claimants claim for the refund of a part of the hire and a compensation for damages.

Arbitrators, upon due consideration of the allegations of both parties, find as follows:—

(1) There is no dispute between Claimants and Respondents on the fact that the parties contracted the Charter on 31st August, 1973, and that Respondents withdrew the Vessel from Claimants' service after informing Claimants of this withdrawal in the afternoon of 1st September, 1974.
(2) Claimants' claims are that on 9th July, 1974, Claimants proposed the cancellation of the Charter owing to Respondents' breach of the Charter against Clause 3, which stipulates Owners' warranty of seaworthiness of the Vessel, that Respondents withdrew the Vessel on 1st August, 1974, although they agreed basically that the Vessel would be redelivered around 18th August, 1974, and that Respondents should pay to Claimants a compensation for the damages caused by the said withdrawal and a part of the hire which was overpaid. On the other hand, Respondents' plea are that Respondents never agreed to the cancellation of the Charter Claimants mentioned, and that Respondents withdrew the Vessel in accordance with the Clause 6 of the Charter, for on 25th July, 1974, the due date of the hire, Claimants paid only a part of the hire for a month.

First of all, as for Claimants' claim of the mutual agreement on the cancellation of the Charter, it is found that Claimants proposed the cancellation of this Charter on 9th July, 1974, and that the parties thence negotiated conditions of cancellation, but no proof is obtained for mutual agreement having been arrived at. Moreover, Claimants insisted on the right of cancelling the Charter owing to Respondents' breach of the warranty of seaworthiness of the Vessel based on the Clause 3 of the Charter. As for the corrosion of the bulkheads of the second thank and the third, it is found that Respondents asked for Claimants' approval to repair them at the next docking, but that Claimants did not refuse this request and continued to use the Vessel. As for the leakage which happened in March of 1974, it was soon repaired, and so was the leakage which happened in July, 1974, so that the Vessel recovered her seaworthiness. Now the stipulation of the said Clause 3

does not impose on the owners an abusolute obligation to the vessel in a seaworthy condition during the voyage, but an obligation to take all reasonable and necessary steps to restore the efficiency of the vessel when the hull, engine and equipment of the vessel are not in full activity. This Clause is generally interpreted that the charterers are not entitled to cancell the charter party concerned by reason of the seaworthiness, unless the vessel is so seriously unseaworthy that the detects can not be repaired in a reasonable time. As far as the said corrosion of the bulkheads and the leakage are concerned, it cannot be said that Respondents neglected the said obligation or the Vessel was so seriously unseaworthy as mentioned above. It follows that Claimants cannot cancell the Charter by reason of Respondents' breach against Clause 3 of the Charter.

(3) According to the provisions of Clause 6 of the Charter, it is clear that the charterers shall pay the hire in advance for each month without discount and that when the charterer neglects the payment, the owners have the right of withdrawing the vessel from the charterers' service without making a demand for payment of the hire.

As for those provisions, it is generally interpreted that the charterers shall pay the hire for each month in advance on the due date deducting off-hire and that of ordinary disbursments for the vessel's account, if any. It is also interpreted that not only in the case that the hire is not paid at all, but in the case that it is paid partly, the owners are entitled to withdraw the vessel concerned from the service of the charterers.

As regards the sum of US$10,355.14 which Claimants remitted to Respondents as the hire on 25th July, 1974, it is clear from the evidence that this is the sum of US$40,665.17, the hire from 25th July till 18th August, 1974, less US$30,310.13, the off-hire and other disbursement.

As for the said payment of the hire, Claimants claimed that they paid the hire up to 18th August according to the foundamental agreement that the Charter would expire on that day. As already described, however, it cannot be admitted that the parties had such a fundamental agreement. Therefore, it

must be held that the payment Claimants made is against the said Clause 6.

It follows that it is proper that Respondents claimed the payment of hire and then withdrew the Vessel from the service of Claimants, and that Claimants' claim of the compensation for damages cannot be approved.

(4) Claimants claim to get refund of the hire of US$34,047.37 from 10 a.m. on 30th July, 1974, till 12:30 p.m. on 18th August, 1974, for the Vessel was able to sail out of Singapore at 10:00 a.m. on 30th July, 1974. According to the telex which shows the details of the negotiation between the parties, considering the fact that Respondents informed Claimants that Respondents would accept the cancellation if Claimants paid the sum of US$31,833.33 up to noon of 30th July, Respondents could not withdraw the Vessel till noon of 30th July, but could do so anytime after that, and the Charter is approved to expire at noon of that day. Now, as it is generally interpreted that when the owners withdraw the vessel concerned according to such stipulations as Clause 6 above, the owners cannot charge the Charterers the hire of the period after the withdrawal, so that it is proper in this case that Claimants shall bear the hire till noon of 30th July. (Respondents' counter claims and the award were omitted in this report.)

Given in Tokyo, on 16th October, 1975.

**Summary of Arbitral Award in a Dispute Arising from Contract for the Sale of S. S. World Kim**

Given on October 6, 1972

[Outline]

(1) A shipowner in Hongkong of Liberian flag called Alliance Tankers Incorporated (hereinafter referred to as Claimants) entered into a contract (hereinafter referred to as the Contract) on October 14, 1970 using the Sales Contract Form, (code name "NIPPONSALE" 1965), published by the Japan Shipping Exchange, Inc., to purchase a steamer, World Kim (a tanker of 11,845 gross tons) (hereinafter referred to as the Vessel) from the First Line Company Limited of Seoul, Korea.

This Contract has the following provision under its Article 15;

15: Sellers shall deliver the Vessel to Buyers at Hongkong on or about 23rd October 1970 with Lloyd's Class maintained and in Charter Free condition. Sellers shall prove to Buyers that the Vessel at the time of delivery is free from Charter and Sellers shall be fully responsible if and when claims arise and lodged by her Charterers.

(2) The sales transactions between the parties were fulfilled as contracted, and completed upon payment of the price on October 27, 1970.

(3) Claimants who are the buyers renamed the ship to Hongkong Crusade and started repairings at Hong Kong, and at the same time offered the Vessel for a time charter through brokers. They nearly fixed with a firm, the Kuwait National Petroleum, a time charter for 2 years (at US$4.85 per deadweight ton per month for the first year, and US$4.75 for the second year, the deadweight tonnage being the new deadweight tonnage after the repair.)

On the other hand, the P. T. Caltex Pacific Indonesia (hereinafter referred to as Caltex) at the time of repairings of the Vessel filed a suit with Hong Kong High Court, claming that the Vessel had been under the time charter with Caltex, and made a claim for payment of liabilities under the time charter bearing the date of August 16, 1968 between Caltex and

Respondents on the Vessel (hereinafter referred to as the Former Charter Party), against the Vessel, Claimants and Respondents as the parties to the case.

Claimants negotiated with Caltex and decided to get the remainder of the Former Charter Party duly executed in order to avoid possible seizure of the Vessel. That is, they agreed, on Caltex's request, to amend the Former Charter Party by adding Article 3 (1) in which the Vessel was to be chartered at US$4.04 per deadweight ton based on the deadweight tonnage of 17,510 tons, a tonnage prior to the repairings for one year of the remainder of the Former Charter Party; (2) the Former Charter Party was to be extended from the date of expiration thereof to the period corresponding to the period during which the Vessel was on off-hire (approximately 325 days) at the rate of US$2.41 per ton per day on the former deadweight tonnage; (3) and the liabilities incurred by Respondents in favour of Caltex under the Former Charter Party for fuels, and overpayment of charterage, etc. amounting to US$30,000 would be paid by Claimants on behalf of and for account of Respondents. Thus, the Vessel was released and delivered to Caltex by Claimants at Dumai on January 12, 1971, after completion of repairings.

(4) Claimants thereupon requested with Respondents payment of US$694,201.42 for damages suffered by them because Respondents sold the Vessel without causing the Vessel to be Charter Free. The said sum is the difference between the expected sum from the time charter for the Vessel hired by the Kuwait National Petroleum Corporation for the ensuing 12 months and the extension corresponding to the period of off hire and the charterage expected to be actually received from Caltex.

(5) On the other hand, Respondents pleaded that at the time they were negotiating the sale of the Vessel and when the Vessel was under a time charter with Caltex, they had decided to rename Almak to World Hope which was substantially the same in every item as the Vessel which they would buy from a Taiwanese owner and offer as a substitute for the remainder of the said time charter, since the repair work for the periodical inspection for

October, 1970 was expected to incur an enormous amount.

For this reason, Respondents had asked Claimants not to offer the Vessel for charter until all the repairings was completed, because mutually satisfactory agreement was not yet likely to be arrived at between Caltex and Respondents about the offer of a substitute ship. To this request of Respondents Claimants agreed. Claimants, however, broke this gentlemen's agreement and offered the Vessel on the market the day following the conclusion of the Contract, thus revealing to Caltex that Respondents sold the Vessel to Claimants without obtaining agreement from Caltex and jeopardized their plan of offering World Hope as a substitute. This led to the sale of World Hope at a price equivalent to that of scraps after laying up the ship.

(6) With the above development of the case, Respondents then rejected Claimants' request, and on the contrary Respondents demanded payment by Claimants of US$747,987.55 for damages calculated and based on the assumption that World Hope was hired instead of the present Vessel.

(7) Claimants, on the other hand, demanded Respondents to pay US$30,000, the disbursement they made to Caltex on behalf of and for account of Respondents, under the Former Charter Party, as the price of fuels and over payment of charterage,

(8) Claimants further claimed against Respondents for payment of US$1,346.20 as the fee for formal registration of the Vessel in the name of Respondents when the formal Contract was concluded, because Respondents had kept the Vessel operating for two years under the provisional registration in Panama, and then transferred the registration to Claimants' name, and

(9) For payment of US$18,129.72 as the demurrage from the period during which the Vessel was laid up in Hong Kong wairing for the signing of the addendum to the Former Charter Party from the time the repairings completed until the time the Vessel left Hong Kong for delivery to Caltex, i.e. from December 31, 1970, 17:00 to January 7, 1971, 20:00, and for payment of US$3,537.37 for the fuels, thus the amount Claimants claimed from Respondents totalling to US$747,214.71.

(10) Arbitrators found the payment of US$408,932.64 as justified out of the amount claimed by Claimants based on the award excerpted below, and dismissed the demands of Respondents as being without grounds.

Arbitrators were Messrs. A. Amanuma, K. Itagaki and K. Kikuchi.

[Reasons for Award]

There is no dispute between the parties concerned in respect of conclusion of the Sales Contract on October 14, 1970.

I- (1)

The present dispute arises from the fact that, whereas Claimants nearly fixed toward the end of October, 1970, the charter party for the present Vessel delivered to Claimants under the present Contract with the Kuwait National Petroleum Corporation, Caltex filed a suit with Hong Kong High Court on December 17 of the same year against the present Vessel, Claimants and Respondents on the ground of breach of Article 41 (Change in Ownership) of the Former Charter Party for the present Vessel concluded between Caltex and Respondents on August 16, 1968, and Claimants succeeded the Former Charter Party, fearing the seizure of the Vessel, thereby incurring unexpected damages.

(2) According to Article 15 of the present Contract, it is clearly stipulated that (1) the Vessel is to be delivered in Charter Free conditions, and that (2) Respondents who are Sellers should prove to Buyers that the Vessel at the time of delivery is free from Charter and Sellers should be fully responsible if and when Claims arose and lodged by her charterers. Therefore, the point of issue in this dispute is whether Respondents had delivered the Vessel to Claimants in a charter free condition.

(3) As a result of interrogation of both parties concerning the development of the case in the light of the documents submitted, it was verified that the Vessel was delivered in Hong Kong on October, 25, 1970, that the payment effected on 27th of the same month, and that Respondents delivered the Vessel to Claimants without referring to the condition of the

Vessel as regards the Charter, while Claimants paid the price after being granted of a loan by their bankers with an all night negotiations following the bank's initial rejection because the Vessel was not Charter Free and based on the gentlemen's agreement that Claimants would be responsible toward the bank.

(4) What is noted among the above facts is that the Bank first refused the loan because the Vessel was not Charter Free. The stipulation (2) in the latter half of Article 15 of the Contract expressly provides that Respondents will be responsible for all damages incurred to Claimants in the suit brought by Caltex even when Claimants had been aware of the non-Charter Free condition as they had accepted the Vessel. Therefore, the fact that their application for a loan was rejected does not create any disadvantages to Claimants. Since the provision of the latter half of Article 15 of the Contract binds Respondents more than necessary, whether or not Respondents had violated the provision in the first half of the said Article of maintaining the Vessel in Charter Free conditions should be examined thoroughly and closely. As it is usually inconceivable that Respondents had neglected this provision which was specifically agreed to by Respondents and Claimants, it should be reviewed that whether the Vessel was actually Charter Free, or if Caltex had agreed to a substitute, and the Vessel was substantially Charter Free, causing Claimants actually least possible inconvenience.

(5)-(1) Respondents emphasize that there was a "basic understanding" reached between them and Caltex that the Vessel might be sold and an excellent vessel of the same type might be substituted when they had agreed to a further extension of 12 months in addition to that corresponding to a period of off-hire of the Former Charter Party dated August 4, 1970 (Article 2, Addendum to the Former Charter Party), and that they deemed it unnecessary to obtain "advance approval of the charterer" as provided in Article 41 of the Former Charter Party.

From this allegation it is clear that the Vessel was delivered to Caltex in non-Charter Free condition with alleged satisfaction. However, Respondents pleaded that there was a documentary evidence or an witness to prove this

"basic understanding". While Respondents were given reasonable intervals to produce such an evidence or a witness, Respondents had more than several times asked for extensions which led to an apprehension on the part of Arbitration Tribunal for an unreasonably longer delay. On August 10, 1972 the final Arbitrators' request was made of Respondents for the above and a Statement was submitted on August 18 of the same year. As the Statement contained mere repetition of what had been stated, presenting no new matters, it had to be decided that Respondents, even if any further time given, had no means of proving their grounds.

-(2) Arbitrators by the authority vested by their office asked Mr. Shusaku Terui of the Tokyo Freighting Co., who acted as brokers for Respondents and negotiated with the Sea Broker, a shipping broker, for Caltex and obtained relevent materials and telexes from the Tokyo Freighting. It was found out that the following telex messages were exchanged on July 14, 1970 between Tokyo Freighting Co. for Respondents and the Sea Broker for Caltex.

> - GUIDANCE OWNERS WISH TO MAKE BIG REPAIR ON WORLD KIM IN SEPT/OCT MEANWHILE OWNERS INTENDING TO PURCHASE SIMILAR TYPE OF TANKER IN NEAR FUTURE. THIS IS WHY THEY WISH TO PUT THE WORDINGS SIMILAR SUBSTITUTE. PLS ADV WITH CHARTERERS COUNTER ....., to which the Sea Broker replied by telex on the same date, stating that "SUBSTITUTION CLAUSE WORKABLE."

Since no further telex exchanges seem to have been made, it is presumed that the room for future consideration was left for the substitution clause.

-(3) Respondents further claim that they had requested Claimants not to place the Vessel on the market for charter until the repair work of the Vessel was completed, because a lengthy negotiation was expected with Caltex to have them agree to the substitution of the Vessel under the Former Charter Party. Respondents further claim that Claimants agreed to this request, thereby concluding a gentlemen's agreement between

the parties, and that Respondents had negotiated with Caltex for their acceptance as a substitute for the Vessel World Hope (formerly Almak) which Respondents had purchased and improved to become a vessel much more excellent economically than the Vessel. Claimants and Respondents argue, however, that Claimants had jeopardized the negotiation for substitution because Claimants had offered the Vessel on the market on the day following the conclusion of the Contract, contrary to the above gentlemen's agreement.

On the other hand, Claimants argue that they do not recognize the said gentlemen's agreement and even if the said agreement had any relation with the Contract. Article 41 of the former Charter Party was in no way revoked, since there existed no substitution clause as reviewed in the preceding section, thus whether Caltex would accept World Hope as the substitute for the Vessel and agree to its sale did entirely depend on Caltex. In this respect, it is found out by the authority vested by their office that the telex message dated November 6, 1970 sent by the Sea Broker to the Tokyo Feighting Co. concerns World Hope, reading as follows;

> "CHARTERERS UNDERSTAND ALMAK WAS . . . . . SOLD TO TAIWAN SHIPBREAKERS FOR SCRAPPING ONLY REPEAT SCRAPPING ONLY AND CHARTERERS FURTHER UNDERSTAND SALE CONTRACT WITH BREAKERS CONTAINED STIPULATION THAT VESSEL COULD NOT UNDER ANY CIRCUMSTANCE THEREAFTER ENGAGE IN OIL TRADING STOP UNDER CIRCUMSTANCES CHARTERERS CANNOT ENTERTAIN ALMAK OFFER AT THIS TIME DUE OBVIOUS COMPLICATIONS RELATIVE TRADING STATUS THIS VESSEL STOP"

Articles 11 and 12 of the Contract dated November 6, 1970 concerning the sale of Almak (Exhibit No. A-Q) proves that the above telex describes the situation correctly. Furthermore Claimants explained that World Hope was discharged, on the condition of her scrapping, of its charter party by Mobil Oil, USA, before expiration thereof.

It is easily imagined that Caltex, being one of the international petroleum Majors along with Mobil Oil, would not charter a ship with such a

history, in view of business integrity, and it is understood to be a problem of more fundamental nature than a breach of gentlemen's agreement or obstruction by Claimants in obtaining Panama flag of the said ship.

(6) From the examination of the above facts, it is unavoidably decided that Respondents had not obtained Caltex's agreement to the sale of the Vessel under Article 41 of the Former Charter Party, which being a major premise disregarded, and adhered to the offer of World Hope, a ship of a story, as the substitute for this Vessel without any "fundamental understanding" regarding such offer of a substitute for the Vessel, and delivered the Vessel without getting the present Vessel in Charter Free Condition as stipulated in Article 15 of the Contract. It is therefore deemed that Respondents are responsible to Claimants by the provision of the latter half of Article 15 of the present Contract.

(7) Mention should be made that it is beyond understanding of Arbitrators that, because Claimants should have had doubts as to the charter conditions of this Vessel before or at least at the time when the payment was effected for the present Vessel, Claimants have accepted the present Vessel without any confirmation of the Vessel's situation. Claimants' lack of such a confirmation no less contributes to this disputes. Claimants should have taken necessary measures to remove any possibilities of disputes since the Vessel had been suspected not to be Charter Free. Thus, Claimants who failed to have taken any measures had causes to be criticized in the course of business practice.

**II On the Amount Claimed by Claimants**

(a) Difference in charterages

Claimants had estimated the charterage for the first and the second years respectively as US$4.85 and US$4.75, submitting as the evidence "Weekly Charter Fixtures Reported" published by Maritime Research Company (Exhibit A E-1). These, however, were not quite decisive, as is obvious from their description that the Charter with the Kuwait National Petroleum Corporation was "nearly fixed". Exhibit No. A-D, a document

presented as a written evidence of the transaction at the stage of inquiry and quotation, describes both the charters and charterage still open.

Charterages described as reasonable by Claimants were reviewed. The market at that time was admittedly steady, but agreed charterages fluctuated. Therefore, charterages of US$4.04 for 12 months of the first year and of US$2.41 for 325 days off-hire period of the second year making up for the remainder of the Former Charter Party are reviewed.

The figure of US$4.04 of the first year seems somewhat lower than the prices prevailing then on the market; but because of the aforementioned points for which Claimants are held responsible and because the charterage for Royal Ivory (17,291 D/W) charged by Claimants in the middle of July, 1970, was US$4.015, the charterage of US$4.04 is deemed to be reasonable.

As for US$2.41 of the second year, it was a special rate agreed because of the lengthy off-hire period extending for 325 days during the Former Charter Party. Even though Claimants suceeded the Former Charter Party, a rate which was far below the then prevailing market price was forced on them because of the breach of contract by Respondents. Therefore, the charterage of US$4.04 which is the same as that of the first year is held reasonable after the market conditions, etc. have been renewed.

Difference between the charterages will be;

(1) First year, for 12 months
(18,309 D/W - 17,510 D/W) x US$4.04 x 12 months
= US$38,735.52

(2) Second year, for 325 days for the off-hire period to be extended under Article 3 of addendum to the Former Charter Party

(a) 18,309 D/W x US$4.04 x 10.666 months
= US$788,946.52

(b) 17,510 D/W x US$2.41 x 10.666 months
= US$450,095.60

(a) - (b) = US$338,850.92

Sub-total: US$377,586.44

(b) US$30,000. Disbursement by Caltex, the charterer under the Former Charter Party, on behalf of Respondents for fuels and overpayment of charterage.

Claimants claim the above amount as they have paid them on behalf of Respondents, but Respondents claim that the charterage is rightly due to them up to 15:00 of October 3, 1970, and the difference should be deducted from the over payment. Since the memorandum between Caltex and the Vessel's captain (Exhibit A R-3) confirms the time the Vessel had been returned to Respondents for repairs at Barickpapan was 14:40, September 27, 1970, any period thereafter should be deemed as the period of off-hire. Therefore, Respondents' above assertions are dismissed. Having perused the documentary evidences including the disbursement concerned submitted by Claimants, the above amount is deemed as being reasonable.

(c) Fee of US$1,346.20 for registering the Vessel under Panama flag.

This amount is admitted based on Respondents' recognition.

(d) US$18,129.72. Demurrage for the Vessel from 17:00 December 31, 1970 to 20:00, January 7, 1971.

Since the above period is deemed to be included in the off-hire period of 325 days of (a), the amount is not recognized.

(e) US$3,537.37. Fuel costs during the demurrage between 17:00, December 31, 1970 to 20:00, January 7, 1971.

This item may be understood as having been incurred to Claimants as a result of the breach of Respondents of the Former Charter Party, but it is not well grounded to decide that the expense during the said period arose solely from the breach of Respondents of the Former Charter Party.

On the above mentioned grounds and others, the claim of US$408,932.64 is admitted as being with grounds from out of the amount of US$747,214.71 claimed by Claimants.

**III On the Amount Claimed by Respondents**

It is understood that the sum demanded by Respondents to Claimants is the damage incurred by Respondents because of various obstructions on

the part of Claimants, as Caltex did not accept World Hope which they had purchased and intended to use as a substitute for the present Vessel under the Former Charter Party.

As discussed in detail in Section I, however, in order that World Hope be substituted for the present Vessel, there must either be a substitution clause agreed between Respondents and Caltex, or Caltex had given an advance approval under Article 41 of the Former Charter Party irrespective of existence of gentlemen's agreement between the parties.

Since there has been neither of the above, World Hope is deemed unavoidably as having had no relations whatsoever with the present Contract nor with the Former Charter Party.

Therefore, the whole amount claimed by Respondents is dismissed.

## IV Cost of Arbitration

Omitted.

Having considered statements of the parties, claims and examination of the parties concerned, careful review of the case was made and the award given as per the text.

[Comment]

Article 15 of the Sales Contract for the Vessel emphasizes that the Vessel should be delivered in charter free conditions because the Contract was concluded while the Vessel had still been under the charter by Caltex, and because Claimants, the Buyers, should be free of any troubles arising from incomplete rescission of the Former Charter Party.

Since Respondents had delivered the Vessel to Claimants in a non-charter free conditions which amounted to a violation of Article 15, damages incurred to Claimants should naturally be compensated, and this is not a particularly difficult case.

The problem lies in that the charterer of the Vessel under the Former Charter Party, Caltex, had filed a suit for damage with Hong Kong High Court

naming the Vessel and Claimants in addition to Respondents as the parties to the case, whereas the blame seems to have been with Respondents, the owner of the Vessel, for their breach of Contract by which the owner sold the Vessel to the Claimants.

This arises from the system of *Action in rem* under the Anglo Saxon Laws which does not exist under Japanese laws wherein the Vessel is also counted as the subject matter of responsibility. Because of Caltex's claims against this Vessel, Claimants were apprehensive of the seizure even if the ownership was transferred to Claimants and the Vessel renamed, since the Vessel was the same ship as the World Kim under the Former Charter Party, and had the Former Charter Party assigned to them in spite of a new and more advantageous charter party which they had nearly fixed with Kuwait National Petroleum Company. This case may be cited as an example to learn the significance of *Action in rem.*

The parties to this arbitration were both alien corporations. The Japan Shipping Exchange, Inc. accepts and conducts arbitrations for parties of any nationalities so long as they agree to an arbitration by the Japan Shipping Exchange, Inc. Although the cases of seeking arbitrations in a country to which either one of the parties belong is far more greater in number, there are also examples that the parties seek arbitrations in a third country, relying on justice and fairness more than expected in arbitration. There are other cases besides the above where the Japan Shipping Exchange, Inc. has been selected as arbitrators by the parties having nationalities other than the Japanese.

**Summary of Arbitral Award in a Dispute Arising from a Shipbuilding Contract for Ship S540 at Shipyard Y**

Given on September 20, 1975

[Outline]

On May 31, 1973, a shipbuilding contract (hereinafter referred to as "the Shipbuilding Contract") for building a 11,800 ton steel cargo ship (the (Yard) Hull No. S540, hereinafter referred to as "the Ship") for a price of ¥869,000,000 was concluded between Claimants (Contractor) and Respondents (Shipbuilder). Due to the general inflationary trend and particularly to "the oil crisis" started in October 1973, proposals were made by the Respondents, the Shipbuilder, for change of the price in the Shipbuilding Contract, and the disputes caused between the parties concerning cancellation of the Contract.

The claims and the counterclaimes made by the parties are summarized below.

(Claimants):

After "the oil crisis", the shipbuilding price was increased by ¥40,000,000 to ¥909,000,000 on December 7, 1973 by a request of Respondents. Whereas Respondents made further request for an increase in the said price by ¥200,000,000 on February 17, 1974, and again, on April 18 of the same year another increase of ¥400,000,000 on the ground of the rising costs of the materials, the Claimants, the Contractor, though initially rejected these requests, and later offered an increase of ¥160,000,000 on May 10 of the same year, 1974, so as to accelerate the construction work as they urgently needed the Ship. Respondents however insisted on the additional amount of ¥400,000,000 and expressed their intent to cancel the Shipbuilding Contract on 20th of the same month. Claimants then withdrew their offer of ¥160,000,000 increase and called upon Respondents to start the ship construction work as originally agreed upon.

Respondent deposited the sum of ¥100,000,000 with the Osaka

Bureau of Legal Affairs on 10th of the same month, of the year, May, 1974 calling it the refund in the double amount of the earnest money to bind the Shipping Contract which they had received from the Claimants. The Claimants thereupon had to place an order for a new shipbuilding with another shipyard, but couldn't find a shipyard with available shipway or building berth which could urgently build a Ship of the same type as the Ship on the Contract. Accordingly, they had to ask Shipyard A who promised a building and delivery, within a comparatively short period of time, of a ship of 10,000 ton type (hereinafter referred to as the Hull No. S599), at a price of ¥1,500,000,000.

Claimants hereby claim the payment of ¥1,507,642,986 against the damages caused to Claimants by the failure of Respondents in execution of the Shipbuilding Contract; the payment comprising the difference ¥591,000,000 in the price of the Hull No. S599 and the Hull No. S599, the payment of ¥914,070,384 for the profit expected and missed by the difference in deadweight tons of the two ships, and the payment of ¥2,572,602, the interest on the amount the Claimants had already paid as a part of the shipbuilding price, totalling to the prescribed amount, ¥1,507,642,986.

(Respondents)

The increase of ¥40,000,000 of December, 1973, proposed by Respondents, was to make up for the losses incurred by Respondents in the building of the Hulls, No. S533 and 535 delivered to Claimants, but for convenience' sake, it took the form of an increase in the newbuilding price of the present Ship.

The Shipbuilding Contract provides in Article 22 to the effect that Respondents can ask for consultation for increase of shipbuilding price when it becomes impossible for Respondents to build the Ship at the price contracted because of an extraordinary rise in the material costs. Claimants

refused Respondents' repeated requests for increase without consultation with Respondents, upon which Respondents are entitled to terminate the Shipbuilding Contract under Article 22.

Assuming that the Shipbuilding Contract could not be terminated on the cause of Article 22, changes in the situation unforeseen at the time the Contract was concluded would no longer maintain the Contract in force because of the principle of the change in situation.*(clausula rebus sic stantibus)* Thus Respondents can terminate the Contract in the face of Claimants' non-compliance with Respondents' repeated requests.

When concluding this Shipbuilding Contract, the parties did not determine whether the present Ship was to be built as a tie-in ship, a trust ship or a house ship, and it was agreed that a provisional contract would be entered first in order to secure the shipway or building berth, and the formal contract would be concluded later. Accordingly, the Shipbuilding Contract in this case is a provisional contract and ¥50,000,000 already paid and received had a nature of an earnest money, and therefore Respondents are entitled to repay Claimants the amount double the above amount and terminate the Shipbuilding Contract even if the termination based on the reasons mentioned before was found without grounds.

The indication by Respondents for terminating the Contract is effective and Respondents are not responsible to pay for the damages.

Arbitrators, (Messrs. T. Kojima, R. Imamura and T. Miyazawa), upon examining the pleadings of both parties gave the following Award.

1: Respondents should pay Claimants the sum of ¥340,166,602

2: Respondents' other claims are dismissed.

Excerpt from the Findings of the Arbitrators in this case is given below (no exhibits shown).

(Reasons for Awards)

I: There is no dispute between the parties concerned in respect of conclusion of the Shipbuilding Contract on May 31, 1973, of Respondents' expression in writing on May 20, 1974, of their intent to terminate this Contract, and of the deposit made by Respondents in an amount of

¥100,000,000 with Osaka Bureau of Legal Affairs on June 10 of the same year. There is further no dispute between the parties concerned in respect of the requests made by Respondents to Claimants for the increases of ¥200,000,000 on February 17, 1974 and again of ¥400,000,000 on April 18 of the same year.

II: The parties exchanged a Memorandum (Exhibit No. A3) on December 7, 1973 in the presence of B in which Claimants asserted that the shipbuilding price for the Ship was increased by ¥40,000,000, and Respondents denied this assertion. Since the Memorandum recites "¥40,000,000 is increased for Type 12, Standard Ship, on Contract by C, Hull No. S540" there is no other choice but to admit that an agreement for increasing the shipbuilding price of the Ship by ¥40,000,000 was reached between the parties. The counter-argument of Respondents, therefore, is not admissible.

III: The present dispute arises from the termination of the Shipbuilding Contract by Respondents, and Claimants assert invalidity of this termination whereas Respondents claim the said termination is valid and that Respondents are not responsible for any damages arising therefrom.

IV: Expression by Respondents of their intent to terminate this Contract is first reviewed in its validity and lawfulness.

(1) Respondents assert that Article 22 of the Shipbuilding Contract is a provision reserving the right of the Shipbuilder to amend the shipbuilding price in case the commodity prices and other economic situations change excessively, and the right to terminate the Contract when the Contractor does not comply with this request for amendmentment of the shipbuilding price. On the other hand, Claimants assert that, although Article 22 calls the attention of the parties to the principle of the change in situation, the rise of commodity price during the period of 1973 through 1974 cannot be considered the change of a scope to which this principle of the change of

situation applies. In the light of the judgements rendered in the past cases, this principle was applied only to the instances where the commodity prices rose extravagantly by tens to hundreds times. Therefore, they argue that termination under this Article by Respondents is a breach of Contract.

Reviewing pleadings of both parties, the language of the said Article 22 is understood to read that "after the conclusion of the Contract and before the delivery of the Ship, if there arises any situation which requires the change in the shipbuilding price as provided in Article 5 by the excessive changes in the commodity prices and other economic affairs", the Shipbuilder can request the Contractor (or the Contractor can request the Shipbuilder) for a consultation for amending the shipbuilding price. The language, however, does not clearly state whether one party can terminate the Contract in a case where such a consultation proves fruitless.

It should be understood however that it is not recognizable for the parties to terminate the Shipbuilding Contract under Article 22 even in the case consultation ends unsatisfactory, since Article 22 does not contain the language that the parties are entitled to terminate the Contract in case of unsuccessful consultation, and since Article 17 of the Shipbuilding Contract lists up the causes for termination of the Contract rather limitedly by cases. The so-called principle of the change of situation recognizes a right to terminate contracts under a specific condition, but the Article in question contains no language to admit the right to terminate the contracts as aforementioned. It is therefore not acceptable as a provision wherein the said principle of change in situation has been stated expressly. Then, the relation between this Article and the principle of change in situation is such that the present Article does not exclude the said principle, but provides for either one of the parties to request the other for consulation to amend the price, even in the instances where the principle of the change in situation does not need to be applied. It is reasonable to understand that Article 26 of the Shipbuilding Contract providing for "when there is a dispute between the parties concerning this Contract" should be relied on and the arbitration (arbitration ordering the amendment of the ship prices, etc.) by the Japan

Shipping Exchange, Inc. be sought for.

Accordingly, Respondents' termination of the Shipbuilding Contract under Article 22 is not recognized.

(2) Respondents, then, assert that the Shipbuilding Contract may be terminated by the so-called principle of the change in situation. Therefore, we shall review if there was any such situation in or about May, 1974 when Respondents expressed their willingness to terminate the Shipbuilding Contract.

Respondents assert that ¥400,000,000 on request of April 18, 1974, was the increase in the manufacturing costs without any profits, and this increase, even when granted, would not accrue any profits to them, but that they would be still at a loss. Having perused the Estimate (Exhibit No. B8) submitted by Respondents at the said time and having asked Respondents to explain the situation, Arbitrators found that the estimate was reached basing their calculation on the percentage of the rise in the various materials for shipbuilding and in the personnel costs made public in the literatures available then, and that the figures were not calculated concretely based on the amount of increases given by their sub-contractors in respect of individual materials and machineries needed in the building of the Ship. Further, the arbitrators found no ground to give credibility to the amounts quoted for the rises.

Assuming, however, that this advance of ¥400,000,000 was admitted, this is equivalent to about 44% rise compared with the amended shipbuilding cost of ¥909,000,000 (Exhibit No. A3) reached by adding ¥40,000,000 increase to the shipbuilding price agreed at the signing of the Contract. In the shipbuilding contracts such as the present one, of a commercial base, where the cost may be set arbitrarily and which has a speculative nature to a degree, it is not possible to decide that there existed a situation to which so-called change in situation principle could be applied. Respondents also assert that Claimants did not make sufficient efforts to meet their obligation to consult under Article 22, but such an assertion of Respondents cannot be considered

reasonable when considering the facts that Claimants conceded once and allowed the increase of ¥160,000,000 and that there was hardly any other examples allowing this much increase.

Therefore, it is found that Respondents cannot terminate the Shipbuilding Contract by pleading the principle of change in situation. The present dispute was started by the shipbuilder's termination of the contract; however if Respondents were allowed to apply the change of situation principle as they assert, then at the present stage where the shipbuilding costs has radically dropped compared with the high prices during the boom, of the shipbuilding this would allow the shipowners to freely terminate the contract and therefore would pose a threat to the grand principle of an obligation to honor the contracts. This therefore is not at all recognized.

(3) Respondents are further asserting that the Shipbuilding Contract is a provisional contract and therefore it is not a formal contract. Therefore, the bill of ¥50,000,000 delivered and received at the conclusion of the provisional contract is an earnest money to bind the contract for possible cancellation and the present Contract can be terminated by returning double the amount. This point is now considered.

(a) The ground for Respondents' assertion that the Shipbuilding Contract is a provisional contract is that at the time of the conclusion thereof, it had not been decided whether the Ship was to be built as a tie-in ship, a trust ship or a house ship, and if the Ship was to be a tie-in ship or the trust ship, then the party to the contract would naturally be a third party and it was agreed therefore to conclude the formal contract when the mode of shipbuilding was finalized. They argue that, the present Shipbuilding Contract was substantially a provisional contract, which assertion was proven by the fact that it was decided later that the present Ship would be a tie-in ship and C was to become the party to the Contract. However, when the fact is taken into consideration that the Shipbuilding Contract was prepared by using a so-called standard form of shipbuilding contract, without containing

any language to mean that it was a provisional contract, but, instead, containing all the required factors for the formal contract such as the type of ship, the date of delivery, the shipbuilding price and the mode of payment, then there is no ground to interpret this Contract as being provisional. Respondents claim that the past shipbuilding contracts concluded with Claimants, such as that for D Maru, were in the similar form. However, when perusing the contract for D Maru which used the similar form, one finds that it is clearly titled as "Provisional Shipbuilding Contract", and it provides for the manner of payment for shipbuilding as "the payment conditions by the financing by the trading company will be discussed at a later date" (Exhibit No. A28). In fact, a formal contract as the Deed of Contract for Shipbuilding (Exhibit A29) was entered at a later date.

Thus, the sequence followed in the case of D Maru was that a provisional shipbuilding contract was concluded initially and then a formal contract was concluded. Whereas the Shipbuilding Contract under review here does not appear from its title, contents and appearance to be a provisional contract to precede the formal contract at a later date. Therefore, the allegations of Respondents that the Shipbuilding Contract is a provisional contract cannot be regarded as having grounds.

(b) Respondents further claim that, of the payment for the first installment paid by Claimants, the bill for ¥50,000,000 is an earnest money against cancellation. As the Respondents rightly assert whether the money or the bill delivered at the time the contract is concluded is an earnest money, a deposit or a part of the payment is a matter to be judged after having considered all the background situations prevailing at the time the contract was entered and the practice of the trade, and not necessarily to be bound by the language of the contract alone.

But the Shipbuilding Contract contains no language to the effect that this was an earnest money, and even when all the situations are considered, there is still no reason to believe that the bill for

¥50,000,000 was indeed an earnest money to bind the contract against cancellation, nor has it been proven that it was actually an earnest money. Respondents cited judicial precedents such as that of the Second Dept. of Civil Section at the former Supreme Court dated November 3, 1921 (page 1888, Vol. 27 of Records of Supreme Court) and that of Fifth Dept. of Civil Section of the former Supreme Court dated July 19, 1932 (page 1552, Vol. 11) asserting that when in doubt the payment should be considered as an earnest money against cancellation and not a part of payment. The former recognized the money in question as an earnest money because the memorandum merely described as "¥100 received as a money on account of the agreed total amount of the payment", which was later recognized as an earnest money on the cause of other documents. The latter case dealt with a contract which described the sum of ¥500 as an earnest money and the dispute was whether this was an earnest money against cancellation or not. Both precedents are considered not applicable to the present case, nor are all other precedents quoted by Respondents.

Accordingly, the bill of ¥50,000,000 is not recognized as having been given as an earnest money to bind the contract against cancellation and termination of the Contract by Respondents by returning double the said sum cannot be regarded as valid and effective.

(4) Accordingly, expression of Respondents' intent to terminate the Shipbuilding Contract cannot be deemed legal nor valid for any of the reasons given.

V: As discussed above, expression of Respondents' intent to terminate the Shipbuilding Contract dated May 20, 1975 is invalid, and Respondents have failed to fulfil the Shipbuilding Contract; and since their failure has not been proven to have the reasons not attributable to Respondents, they must pay for the damages suffered by Claimants.

VI: Now, damages incurred by Claimants are reviewed.

(1) Claimants claim the difference ¥591,000,000 of the shipbuilding price ¥1,500,000,000 for the ship No. S599 and the price ¥909,000,000 for the present Ship, and the expected profit ¥914,070,384 missed by them due to the difference in deadweight tons of the said two ships. Whether the ship No. S599 can be regarded as a substitute for the present Ship now under review.

Claimants claim that although the ship No. S599 was built as a so-called tie-in ship because of their convenience in financing the building fund, Claimants are not the party in name to the shipbuilding contract or charter party, and the ship was purchased and operated by an overseas corporation established for convenience by Claimants, they in fact have been the owner of the ship No. S599 from the beginning for whom the ship was built. The Claimants therefore claim that the ship S599 is a substitute for the present Ship and state what has been stated in Section IV of Claimants' counterstatement.

However, having perused all the evidences submitted by Claimants and explanations made by them,

(a) it is not clearly established that Claimants fully control E by holding shares; (b) there is no explanation of how Claimants would absorb E's profits and what measures Claimants would take in the case E shows losses; (c) no written explanation was submitted regarding the 10 year bare-boat charter with a purchase provision between F and E.

In spite of the request made by Arbitrators for explanations, Claimants cannot be regarded as having proven the facts that the Hull No. S599 substantially and completely belongs to Claimants and that all the profits and losses concerning the Hull No. S599 belong to Claimants, and therefore, the Hull No. S599 cannot be regarded as a so-called substitute for the No. S540.

The confirmation for the time charter (Exhibit No. A13) issued and produced by G to Claimants does not describe the charterage, nor stipulates any penalties for failure to perform obligations, and therefore the Contract

cannot be considered as a provisionary contract for a time charter party. It should be regarded as an indication on the part of the charterer toward the shipowner the former's willingness to charter. Since the subject vessel of the charter is limited to the Ship built by Respondents, it is understood that the Shipbuilding Contract was terminated. Therefore, the Hull No. S599 contracted to Shipbuilder A cannot be regarded as having been made out of the necessity for transporting the cargo already accepted for transport.

It is not recognized that the difference in the ship prices of the Hull No. S599 and the Hull No. S540, and the missed profits arising from the difference in deadweight tons be regarded as the damage incurred by Claimants in the failure of delivery of the Hull No. S540. Even considering all the other situations clarified in the arbitration consideration, the above conclusion is deemed to be reasonable.

(2) That Claimants' assertions for the damages based on the Hull No. S599 being substitute for the Ship No. S540 is detailed above. That Claimants based his claim on the damage caused by the Respondent's failure to perform the Contract is clear from the outline of this assertion and the responces made by the attorney for Claimants at the hearing held on December 9, 1974. Arbitrators consider it reasonable to restore Claimants' status property-wise or the profits which Claimants would have had at the time the tribunal was terminated (September 8, 1975) if the Respondents had not been in default of their obligations. In the light of the above, the damages of the present case are considered.

(a) If the present Ship had been built and delivered as provided under the Shipbuilding Contract, Claimants would still be in possesion of the said Ship of high value, assuming that the current price of the present Ship exceeds the building cost. Accordingly, Claimants could claim as their damages, the difference between the current price and the building price. Arbitrators in their official capacity calculated the price of the Ship effective at the time the tribunal was concluded, assuming that the Ship would have been ready for delivery by the end of December, 1974, and taking into account other matters such as the

market conditions, etc., and obtained the sum of ¥1,200,000,000. Therefore, Respondents should pay the difference, ¥291,000,000, of the said sum and the building price of the Ship, ¥909,000,000.

(b) There is no doubt that the present Ship would have been time chartered by G (Exhibit A13) if the Ship had been built as contracted, and Claimants would have gained a profit which is equal to the difference between the charterage paid by G and the Ship's cost. In this case, the charter by G would have begun at the end of December, 1974 and the charterparty would have been concluded in November or December of the same year, so that it is reasonable to set the initial charterage for the first year at US$10.50 per 1 deadweight ton per month in view of the charterage for the coastal ships effective at that time. Assuming the annual rate of operation for the present Ship is 96%, and the exchange rate as ¥260 = $1.00 as asserted by Claimants, then the income arising from the charterage would be ¥399,651,000/year. As to the cost of shipping, it is assumed that the cost of crew would be ¥138,000,000 since the Ship would be manned by the Japanese crew as it did not run as a tie-in ship. Accepting the Claimants' claim for other costs (Exhibit A32) and legal interest, the annual cost of the Ship would become ¥254,760,000. Accordingly, the income from charterage that the Claimants would have received for 8 months from the end of December, 1974 to the time the tribunal were concluded would become ¥96,594,000. The Respondents must pay Claimants this sum.

(3) Of the bill of ¥50,000,000 delivered as a part of the first installment, Claimants claims 6% per annum interest from July 31, 1973 through to June 8, 1974. Since this claim is considered reasonable, Respondents must pay Claimants the sum of ¥2,572,602.

(4) All the other claims of Claimants are dismissed.

VII: Damages Claimants are allowed of becomes ¥390,166,602. Since Claimants have received ¥50,000,000 on June 19, 1974 from Respondents as a part of the said damage, the total to be paid by Respondents to Claimants will become ¥340,166,602.

(The rest omitted)

[Comment]

It is still vividly remembered that so-called "oil crisis" of October, 1973 and thereafter had caused a sharp upward turn in prices and shortage in supply of goods which extended even to consumer articles. In the shipbuilding contracts lasting several years from the time of signing to delivery of the vessels, particularly those for which the orders were accepted prior to the "oil crisis", shipbuilders were subjected to direct influences of rise in material prices and labor costs during that period, and many have requested the increase in prices to make up for deficits incurred. Against a background such as this, the present case was brought in issue between the parties, the Contractor and the Shipbuilder, with the latter making a request for the increase in price on the strength of the so-called principle of the change in situation, and termination of the Contract when the said request not complied with.

The principle of the change in situation was established in Japan toward the mid-20's, although Civil Code of Japan had, and has as yet, no provision concerning this principle, as the theory in law. The principle of the change in situation deals "mainly with a transaction which generates a relation of liability or obligation, and when the situation which formed the environment for the said legal transaction or act had changed, after the said transaction or act was rendered and before the effect thereof was completed or realized to a degree not foreseeable by a reason or reasons unattributable to the parties, but resulting in such an instance or instances where generation of the legal effect expected in the original significance or continuation thereof would be regarded unreasonable on the principle of 'faith and fairness *(Treu und Glauben)*' then the said legal effect or effects being changed on the principle

of 'faith and fairness' . . . . . " (Masaki Katsumoto, Principle of Change in Situation in the Civil Code, page 567). This principle was recognized in Japan by the Supreme Court at the end of the World War II. (c.f. Records of the Precedents at the Supreme Court, dated December 6, 1944; Civil, Vol. 23, No. 19, page 613). When the change of situation is such that binding of parties by the contract is deemed as excessively unreasonable, it was judged that the contract may be terminated by the reason of the change in situation. (Supreme Court, Second Petit Bench, March 24, 1956, Civil, Vol. 7, No. 3, page 741).

Requirements for application of the principle of change in situation are as follows:

(1) That the situation on which the contract was based has changed. For instance, after the purchase contract for a piece of property is concluded, the price control order for properties is enforced, and the object of the contract is no longer achieved (Record of precedents at Supreme Court, Civil, December 6, 1944, Vol. 23, No. 19, page 613); or after the purchase contract for a piece of property is concluded, the price soars up as much as hundred times because of inflation. (Record of Decisions, Kanazawa District Court, March 24, 1956, Civil, Vol. 7, No. 3, page 741);

(2) That the change in situation should not be such that parties foresaw or could foresee. Regarding the contracts concluded prior to the end of World War II, the post war inflation was considered "unforeseeable". (Ibid.) However, the inflation which occurred between June, 1966 and September, 1957 which was the period of performance for the reconcilation contract concluded in 1957 and the time when the intent for termination of the contract was expressed (September, 1957) was judged to have been "foreseeable";

(3) That the change in situation arose from the reasons not attributable to the parties;

(4) That as the result of the change in situation, the content of the initial contract is deemed as being extremely unreasonable from the principle of 'faith and fairness'. An example is a case when performance of an act and

counteract as the object of a contract generating a relation between an obligee and an obligor become no longer equivalent, due to inflation, etc.

There is a theory related to the contract to work for construction and or civil engineering which considers the rise in commodities prices following the "oil crisis" favourably, in admitting the principle of the change in situation. (cf. Igarashi, Review of the Principle of the Change in Situation; Law Classroom, No. 8, page 38.) But the present case held that, even accepting the incremented cost of shipbuilding as asserted by the shipbuilder, "this is only a rise corresponding to about 44% of the amended shipbuilding price of ¥909,000,000, and in the shipbuilding contracts based on commercial transactions such as this case where the prices may be set arbitrarily and which involves some degree of speculation, it is not possible to decide that a situation where so-called change in situation is applicable existed at that time".

Article 22 of the Shipbuilding Contract, [Change in Economic Situation], provides that one of the parties may request for consultation for amending the ship price, and it was construed that when the consultation ended unsuccessfully, then by the provision of Article 26 [Arbitration], an arbitration could be filed with the Japan Shipping Exchange Inc. for seeking an order for amendment of the contracted price.

In relation to this point, there was a precedent which recognized the amendment of the contract by the judge. (cf. Fukuoka High Court, Civil, Report, Vol. 23, No. 12, p. 2467, Dec. 9, 1964) That is in the purchase contract for real estate concluded in March, 1945, the purchase sum was ¥15,005. The purchaser took up domicile in the property involved with payment on account of ¥1,000. There arose disputes between the parties concerning the said purchase contract and time has passed without the registration of the ownership transfer of the said property to the buyer executed, the buyer then demanded the registration of such transfer in exchange of payment of the balance, ¥14,005 to the seller. The seller asserted the increase in price or the termination of the contract citing the principle of the change in situation. Fukuoka High Court held that the

situation has not changed to a degree where the object of the contract could not be achieved by the change in monetary value and therefore the termination of the contract was inadmissible, whereas to maintain the legal effect of the contract (obligations for purchase) would be excessively unfair, and it was deemed reasonable to optimumly increase the said obligation in view of the faith and fairness in transactions, and allowed the increase of the balance to ¥500,000. (The Supreme Court annulled this case when brought thereto in appeal, by another reason; hence no judgement regarding the suitableness and reasonableness of amending the contract at the Supreme Court. In case when consultation ends in failure, arbitration is recommended.

# II

# COURT PRECEDENTS WITH RESPECT TO ARBITRATION

**Decision of the Supreme Court dated July 15, 1975**
**Defect of Principal Contract and Effect of Arbitration Agreement**

[Facts]

The promoters for a joint stock company under preparation of incorporation (later Defendant, Appellee) concluded an agency contract with another company (later Plaintiff, Appellant) for the purpose of business in future to be done by the said joint stock company. When the said joint stock company was duly incorporated, the another company Plaintiff, did not perform the said Agency Contract in which arbitration clause was included. Defendant accordingly filed an application for arbitration in Tokyo based on the arbitration clause. While Plaintiff appointed arbitrators and filed statements, etc. in the arbitration procedures, they later brought an action claiming that the said Agency Contract did not exist, since it had been concluded with a nonexistent company as one of the parties, and therefore the arbitration procedures were not to be admitted.

[Points of Decision]

Although arbitration agreement is to be concluded as a collateral or a subsequent of the other clauses of a principal contract, its effect is to be judged independently apart from the principal contract unless otherwise specifically agreed upon between the parties, and any defect in the process of the conclusions of the principal contract does not have immediate effects on the arbitration agreement.

**Decision of the Supreme Court dated November 28, 1975**

Factors for Validating Agreement on the International Exclusive Jurisdiction Appointing the Court of a Foreign Country . . . Agreement of International

Exclusive Jurisdiction Based on Bill of Lading Cannot be Considered Invalid and Contrary to the Public Policy

[Facts]

The importer A in Japan purchased the packaged raw sugar from the exporter B in Brazil, and B as a shipper concluded a contract of carriage by sea with the carrier Y (Defendant, Appellee) having a principal office in Amsterdam and a place of business in Kobe, Japan. B had Bills of Lading issued and delivered by Y and handed them to A. The raw sugar was carried from the Port of Santos to the Port of Osaka by a vessel owned by Y, but upon delivery of the goods to A, many bags of the raw sugar were found in wet condition by sea water. The insurer X (Plaintiff, Apellant) in Japan had paid the insured amount to A, and as the subrogor of A's claims, brought an action against Y for the damages with the Kobe District Court having jurisdiction over the place of business of Y.

Whereupon Y asserted that the Kobe District Court had no jurisdiction over the case since the court in the city of Amsterdam had an exclusive jurisdiction because the said Bill of Lading had the Jurisdiction Clause stating that "Any action arising from this contract of carriage by sea shall be brought before the court in Amsterdam and . . . . . no other court shall have jurisdiction with regard to any other matter."

[Points of Decision]

(1) On the mode of agreement on the international jurisdiction

The Appellent asserts that the agreement on the international jurisdiction must be made in writing similarly as in a case of the agreement on jurisdiction as stipulated in Paragraph 2, Article 25 of the Code of Civil Procedures, but there is no statute governing the mode of agreement on jurisdiction in the international code of civil procedures, hence this should be determined according to the logical sequence while referring to the stipulations of the Code of Civil Procedures. Whereas when we consider that the intent of the said Article is nothing but to clarify the intentions of the

parties, that legislations of other countries do not necessarily require the agreement on jurisdiction to be made in writing, that in many cases Bills of Lading do not require the signature of the shippers, and also that all international transactions always require among others speedy performance, it is reasonable to understand that the agreement on international jurisdiction is sufficiently valid so long as the document prepared by at least one of the parties designates the court of a specific country explicitly and there exists an agreement between the parties and the content thereof is clear. It should not be understood that the proposal and the acceptance thereof should be made in a written document bearing the signatures of both parties.

(2) Factors for validating the agreement of jurisdiction in the international exclusive trials

Agreement on the international exclusive jurisdiction which excludes the right of the Japanese court in respect of an action and designates in Jurisdiction Clause a court of a specific country as the court of the first trial effective in principle under the international code of civil procedures, so long as the two factors are satisfied that (a) the said case is not subject to jurisdiction of this country Japan exclusively, and (b) the designated foreign court has jurisdiction over the said case under the laws of the said foreign country.

(3) Agreement on the international and exclusive jurisdiction and the public policy

The Agreement on the international and exclusive jurisdiction designating a court locating in the place where the general forum of the defendant exists as the court of the first trial with the exclusive jurisdiction should be, as a rule, recognized as reasonable and valid, when considering the universal rule that "the plaintiff adopts the court of the defendant" and the universal usage that, when the defendant, being an international carrier by sea, tries to limit the jurisdiction to a court of a specific country in respect of a dispute arising from their international transactions as his management policy worthy of protection, then the said agreement on the jurisdiction should be, in principle, recognized valid, unless the said agreement is

excessively unreasonable and contrary to the public policy.

Accordingly, Jurisdiction Clause for the present case which designated the court locating in the place where the general forum of the appellee is as the court having jurisdiction over the present case cannot be regarded as invalid and contrary to the public policy even when the points pointed out by the appellant are taken into consideration.

**Decision of the Osaka High Court dated October 28, 1977-**
**Scope of "Claims of the Master and other Mariners Arising from Contracts of Employment" to Become Object of the Maritime Lien over the Ship**

[Facts]

Procedures for an official auction of M.V. 'A Maru' were taken on the application made by the Mortgagee X (Plaintiff, Apellant) who held a mortgage on M.V. 'A Maru'. The master and other mariners Y (Defendants, Apellees), claimed that they had the maritime lien over the vessel because of the claims "arising from their contracts of employment" provided in Item 7, Article 842 of the Commercial Code, and that they were entitled to receive respective dividends. The Court admitted their claims wholly, whereupon X disputed the existence of respective claims as asserted by Y, and brought an action objecting to payment of respective dividends.

[Points of Decision]

The master and other mariners (hereinafter referred to as 'mariners') provided in Item 7 of Article 842 of the Commercial Code are understood to be those who man a specific vessel under the contract of employment and serve on a continuous basis in the maritime services during the said vessel's voyage or voyages, consisting of the vessel's human components. The reserve

mariners who cannot be regarded as composing the aforesaid vessel's human component are not included in the category of the aforesaid mariners. Although the master and the mariners who were on the paid vacation were not actually engaged in the work aboard the ship as was the case of the reserve mariners, but in view of the principle under which the paid vacation was instituted, these men are reasonably understood as being included in the mariners as defined in Item 7 of Article 842 and as being in a position to comprise the human components of a specific vessel.

Claims comprising the points of disputes between the parties are now considered.

Item 7 of Article 842 merely defines the maritime lien in respect of the master and mariners composing the human components of the said vessel as "the claims arising from their contracts of employment", and it does not limit the modes and processes how the marine lien arise. However, when we consider that Items 2, 3 and 8 of the said Article do impose limitations on how the Claims arise, and that Article 847 of the same Code which is also applicable to the present Item, on which reference will be made later, places a chronological limit on the protection, it is reasonable to understand that the law does not anticipate the limitations on how the maritime lien arise, particularly because the law says "claims . . . arising from the contracts of employment". Then, all the claims which arose from out of the contracts of employment in respect of the master and the mariners must be understood as the maritime lien.

Apellees demanded the payment of the claims as defined in Item 7 of the Article 842, "salaries, wages during the paid vacation, the retirement allowances and the year-end allowances, disembarkation expenses, etc."

Now, these claims are reviewed to determine whether they fall under the definition of aforesaid Item.

(a) Claims for salaries, the year-end allowance, and disembarkation expenses

That these claims fall under the scope of the present Item are obvious.

(b) Claims for wages during the paid vacation

According to the provision of Article 78 of the Mariners' Law and the evidences submitted to the court, the said claims are clearly due to the mariners corresponding to the number of unconsumed days of the paid vacation when there exists a situation such as the insolvency of the shipowners of M. V. 'A Maru'. If so, then these should be handled similarly as the direct consideration for the labour, and they are naturally the claims as defined in the Item 7.

(c) Claims for retirement allowance

These claims are to be understood as the salaries in consideration of the labour (but to be paid later), and therefore they were obviously the claims as defined in the said Article. Appellent claims, however, that the claims for the retirement allowance, which is a mode of deferred payment of salaries, gradually generate while the person is working with the company, and that because Article 847 of the Commercial Code defines that the lines mentioned in this Article lapse after a year from the date on which the liens arose, and therefore the portion of the retirement allowance due to them to be protected by the liens as provided by this Article are those calculated on the pro rata basis corresponding to the number of days they were on board the vessel during the one year preceding the insolvency out of the years that these appellents worked for the company.

Article 847 of the Commercial Code provides what the appellents point out correctly, but what the said provision intends it to prevent accumulation of the claims by imposing the chronological limits on the liens already arose. Therefore, interpreting this provision with such an intention for the purpose of applying the same as a means to limit the generation of the claims as asserted by the appellent is unreasonable. Claims for retirement allowance are undoubtedly the claims which arise at the time of retirements. Assertions of the appellents are thus found inproper and rejectable.

**THE JAPAN SHIPPING EXCHANGE, INC.**
(Nippon Kaium Shukaisho)
**PRINCIPAL OFFICE**
Mitsui Rokugo-kan, No. 8, Muromachi 2-chome,
Nihonbashi, Chuo-ku, Tokyo, Japan.
TELEX: 02222140 (SHIPEX)
CABLE ADDRESS: SHIPEXCHANGE
**KOBE OFFICE**
Meikai Bldg., 32, Akashi-machi, Ikuta-ku, Kobe, Japan.