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PREFACE

Since its inception in 1921, the Japan Shipping Exchange, Inc. has to this day contributed to facilitating maritime transactions and diffusing the commercial arbitration as the only permanent maritime arbitration institution and the pioneer among arbitration institutions in Japan.

Maritime arbitration is one of the most important activities of the Exchange, but equally important are drafting, revising and diffusing standard maritime contract forms which presently number 43. Mediation system for salvage remuneration comes next, followed by such activities as compilation and publication of books and information on maritime matters.

This series of booklets has been published for those interested mainly in arbitration and standard maritime contract forms. Issues No. 1 through No. 8 were published between 1964 and 1973. The last issue, No. 9, was published in May 1975 and this is No. 10. We hope to publish the issues annually with more substantial information.

The present issue is divided into Parts I and II; Chapters 1 to 5 in Part I contain speeches given by the Japanese representatives at the 6th International Congress of Maritime Arbitrators held in Monte Carlo, October 19 – 21, 1983. Chapter 6 introduces the speech given at the International Seminar on Commercial Arbitration organized by the Indian Council of Arbitration under the joint auspices of the Asian-African Legal Consultative Committee (AALCC) and the secretariat of UNCITRAL in New Delhi, March 12 – 14, 1984.

Part II introduces the Coal Charter Party drafted by the Documentary Committee of the Japan Shipping Exchange, Inc. in 1983. This form summarizes the deliberations held over two years by those concerned with coal trade and its maritime transportation — owners, charterers, shippers, shipbrokers, marine underwriters, etc. under the premise that the form be used by Japanese firms engaged in steel making, electricity and gas when they import coal from mines all over the world. We take pride in our unique method of holding elaborate discussions among the interested parties to reach a full under-

standing before establishing the standard forms. The outcome is naturally universal and reasonable, so much so that it can very well be used for transportation to countries other than Japan, and is expected to find extensive applications. The form was adopted at the meeting of the Documentary Council of The Baltic and International Maritime Conference held in November, 1983 in Copenhagen.

I-1. APPLICATION OF NEW YORK CONVENTION BY JAPANESE COURTS

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1. Introduction

The 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) was ratified by Japan on June 20, 1961. Prior to the ratification of the New York Convention Japan had ratified the 1923 Protocol on Arbitration Clauses drawn up at Geneva (Geneva Protocol) on June 4, 1928 and the 1927 Convention on the Execution of Foreign Arbitral Awards (Geneva Convention) on July 11, 1952.

Although more than twenty years have passed since the ratification of the New York Convention in 1961, there is seemingly only two Japanese courts' decisions which have applied the New York Convention upto this writing. Regarding the Geneva Convention some cases have been reported.

Under Article VII. 2 of the New York Convention, the Geneva Protocol and the Geneva Convention have ceased to have effect between Japan and the other Contracting States of the New York Convention.

However these cases regarding the Geneva Convention are suggesting Japanese courts' attitude in the application of the New York Convention.

This paper therefore reports the outline of the Japanese courts' decisions relating to the New York Convention and also predicts the likely application of the New York Convention by Japanese courts based on the courts' decisions relating to the Geneva Convention and the relevant prevailing opinion of commentators.

2. Legal Framework

Article 98 (2) of the Constitution of Japan provides *inter alia* that treaties concluded by Japan shall be faithfully observed. Article 73 of the Constitution requires that a treaty shall be ratified by the National Diet before or after being concluded by the Cabinet.

The prevailing opinion interprets these articles as giving an international or bilateral treaty on promulgation the validity of a domestic statute without the necessity of enacting any implementing legislation.[1)] The New York Convention therefore has no implementing legislation.

Chapter 8 (Articles 786 to 805) of the Code of Civil Procedure (C. C. P.; Law No. 29, 1890) provides for arbitration, but the C. C. P. contains no special provisions on arbitration agreements governed by foreign law and foreign arbitral awards. Moreover there is no special statute relating such arbitration agreements and foreign arbitral awards.

It is interpreted that an international convention prevails over domestic law where any inconsistency arises between the international convention and a domestic law.[2)] Accordingly it is submitted that the New York Convention prevails over the C. C. P. if there is any inconsistency between them.

It therefore is concluded that Japanese courts at first apply the New York Convention for such arbitration agreements and arbitral awards under the New York Convention and then apply supplementally the C. C. P. if necessary.

3. Arbitration Agreements and the New York Convention

Article II. 1 of the New York Convension stipulates that each Contracting State shall recognize arbitration agreements which meet certain requirements. It is not expressly confined to arbitration agreements governed by foreign law and could equally extend to arbitration agreements governed by Japanese law. The requirements for the recognition of an arbitration agreement are:

(i) that it be in writing;

(ii) that under it the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not; and

(iii) that it concerns a subject matter capable of settlement by arbitration.

Article II. 3 further stipulates that the court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement under the Convention, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

However the Convention is silent on the question of which law determines a defined legal relationship and the arbitrability of the subject matter, within Article II. 1, and the validity of the arbitration agreement under Article II. 3 of the Convention. There is no Japanese statutory provision in point but there are some decisions of Japanese courts relating to the question of the validity of arbitration agreements.

4. Judicial Decisions on the Validity of Arbitration Agreements

(a) Governing Law

The Yokohama District Court in its decision of May 30, 1980[3) held that the validity and form of an arbitration agreement under the Convention were governed by such law as was implied by the parties' designation of the main contract's governing law and of the place of arbitration and that the plaintiff's action in breach of the arbitration agreement should be dismissed at the request of the defendant.

The case involved a Japanese corporation who, as the plaintiff, claimed damages from the defendant (an American corporation) arising from the latter's unreasonable termination of an international exclusive sales agency contract ("the main contract"). An arbitration agreement was included in the main contract and the defendant sought an order compelling arbitration under Article II. 3 of the Convention. The arbitration agreement provided for arbitration in

New York City under the I.C.C. rules but did not designate its governing law. However the main contract itself provided that it was governed by the laws of the State of New York. At issue was whether the arbitration agreement contained in the main contract had been validly renewed when the main contract itself was renewed without writing.

The Yokohama District Court held that an arbitration agreement was governed by the parties' designated law under Article 7(1) of Hōrei (Statute on Private International Law) which stipulates that the intention of the parties shall determine which country's law will govern the creation and effect of a juristic act and the court recognized the validity of the renewal of arbitration agreement without writing under New York State law.

In addition to the above decision of the Yokohama District Court, there have been six other judicial decisions which discuss the governing law of an arbitration agreement. These were decided before Japan's ratification of the Convention. Five of the six decisions, except the oldest one of 1918, are in conformity with the Yokohama District Court's decision.

In the Tokyo District Court's decision of August 20, 1959[4] the plaintiff had requested the court to enforce a foreign arbitral award made in London but the defendant contended that the arbitration agreement was not valid. The court held that the validity of an arbitration agreement was subject to the governing law designated by the parties, under the Geneva Convention of 1927, and that the arbitration agreement designating London as the place of arbitration was an implied choice by the parties of English law as the governing law of the contract which included the arbitration agreement.

The Osaka District Court, in its decision of May 11, 1959[5] held that an arbitration agreement in a charter-party, which was incorporated into a bill of lading, and which designated London as the place of arbitration was valid under English law which was implicitly designated as the governing law by the parties to the charter-party. The case involved an assignee of the bill of lading (a Japanese corporation) who brought an action against the charterer (another Japanese corporation) which had issued the bill of lading seeking compensation

for damage caused to the cargo by the negligence of the charterer. The charterer contended that the action should be dismissed on account of the arbitration agreement in the charter-party which had been incorporated into the bill of lading. The court dismissed the action on account of the valid artbitration agreement.

In the Tokyo District Court's decision of January 25, 1958[6] the plaintiff (a Japanese corporation) had requested the court to appoint an arbitrator under Article 789 (2) of the C. C. P. since the defendant (an Australian corporation) had not appointed its arbitrator according to the arbitration agreement providing that the arbitrators should be appointed in Tokyo. It was argued that the arbitrations agreement had already ceased to be effective since the sales contract containing the arbitration agreement was terminated. The court found that the arbitration agreement was governed by Japanese law which was implied by the fact that the parties agreed to Tokyo as the place of arbitrator's appointment and the sales contract was made in Tokyo although there was no express agreement on the governing law of the arbitration agreement or the place of arbitration. The court therefore held that it had the power to appoint an arbitrator for the defendant under Article 789 (2) of the C. C. P. since the arbitration agreement was severable from the sales contract under Japanese law and was valid under Japanese law.

In the Tokyo District Court's decision of April 10, 1953[7] the plaintiff (a Panamanian shipowner) sued the defendant (a Japanese charterer) for damage caused by the defendant's non-performance of a charter-party. The defendant sought the dismissal of the action on account of an arbitration agreement in the charter-party. The arbitration agreement was valid under the United States *Federal Arbitration Act*[8] but was not effective under the Geneva Protocol of 1923 because the United States was not then a party. The questions which thus arose were whether such an arbitration agreement was valid under Japanese law and whether such an artbitration agreement had legal effect as a valid demurrer in Japanese courts. The court dismissed the action and held that the arbitration agreement was valid under Japanese law provided it was valid under

its governing law, and also that it had legal effect as a valid demurrer in Japanese courts. The court reasoned that arbitration was a dispute solving procedure predicated on the parties' agreement and that if the parties' agreement was respected there was no reason to discriminate between arbitration agreements governed by foreign law and those governed by Japanese law. The court also reasoned that the legal effect of an arbitration agreement as a valid demurrer in Japanese courts was decided under Japanese law (the *lex fori*) but not under the governing law of the arbitration agreement if it was foreign since civil procedure is always governed by the *lex fori*.

In the Tokyo Court of Appeal's decision of August 5, 1935[9)] an American insurance corporation commenced an action against its sole agent in Japan (a Japanese corporation) seeking payment of premiums collected by the agent. The defendant sought the dismissal of the action arguing that an arbitration agreement contained in the sole agency contract was still valid after the termination of the sole agency contract. The court dismissed the action and held that the arbitration agreement was governed by the parties' designated law, if it was certain, and if not then by the law of the place of acting. As the parties' intention was not certain in this case, Japanese law applied as the *lex loci actus*. The court also held that the arbitration agreement continued to be valid separately from the sole agency contract, under Japanese law, unless the parties had specifically agreed that the arbitration agreement was subject to the sole agency contract.

In the Great Court of Cassation's decision of April 15, 1918[10)] the plaintiff requested the court to enforce a domestic arbitral award rendered against the defendant (an English corporation) regarding the payment of the construction costs of a hotel. At issue was whether an arbitration agreement providing that the dispute should be settled by artbitration under English law was valid by Japanese law when the forum of the arbitration was Japan. The court held that although the arbitration agreement was governed by Japanese law (the *lex fori*) the arbitration agreement was valid under Japanese law because Article 794(2) of the C. C. P. allowed the parties to agree on the arbitration procedure and the

court construed the arbitration agreement as stipulating that the arbitration procedure was to be determined in accordance with the provisions of English law.

In conclusion it can be said that although the Great Court of Cassation determined in 1918 that an arbitration agreement was governed by Japanese law as the *lex fori* (even if the parties designated foreign law for the arbitration agreement), the Japanese courts have held without exception since 1935 that an arbitration agreement is governed by the law designated by the parties and not by Japanese law as the *lex fori*.

The prevailing opinion of commentators supports the abovementioned recent court decisions.[11] This attitude of Japanese courts suggests that Japanese courts will hold that not only the validity of an arbitration agreement under Article II. 3 of the Convention, but also the meaning of a defined legal relationship and the arbitrability of the subject matter of Article II. 1 of the Convention are also governed by the law which was designated by the parties under Japanese Private International Law (Article 7(1) of the Hōrei).

An exception to the above conclusion is the capacity of parties to make the arbitration agreement, which must be determined in accordance with the law of their respective nationality under Article 3(1) of the Hōrei.[12]

(b) **Severability of Arbitration Agreements**

The New York Convention does not contain explicit provisions concerning the severability of arbitration agreement from the main contract. However the severability of arbitration agreements is an important factor for the recognition of arbitration agreements under the New York Convention.

Although there is no statutory provision in point, the Supreme court made clear the severability of arbitration agreements in its decision of July 15, 1975.[13] In addition there are many lower courts decisions to the same effect.

In the Supreme Court case the plaintiff (a Japanese manufacturer) concluded a distributorship contract with the defendant (a New York corporation) and the distributorship contract contained an arbitration agreement providing that any dispute arising under the contract should be settled by arbitration in Tokyo

under the rules of the Japan Commercial Arbitration Association. The plaintiff brought an action for a declaration that the contract was not valid and that therefore the arbitration agreement was also invalid.

The Supreme Court affirmed the lower court's decision and held that:

> Even if an arbitration agreement was concluded in conjunction with the main contract, the effect of the arbitration agreement should be separated from the main contract and decided independently. Unless there is a special agreement between the parties, a defect in the formation of the main contract does not affect the validity of the arbitration agreement.

The above decision of the Supreme Court related to an arbitration agreement governed by Japanese law, but the Tokyo District Court took the same attitude in relation to an arbitration agreement governed by United States federal law in its decision of April 10, 1953.[14)]

In the latter case, the plaintiff (a Panamanian shipowner) alleged that the arbitration agreement contained in the charter-party had lost its validity upon the termination of the charter-party. The court held that the validity of the arbitration agreement was governed by the United States *Federal Arbitration Act* but determined the severability of the arbitration agreement from the charter-party by Japanese law (the *lex fori*).

(c) Recognition of Arbitration Agreements

The following conclusions can be drawn from the above review of Japanese judicial decisions and the related opinion of commentators:

(i) The validity of an arbitration agreement under the Convention is determined by the governing law of the arbitration agreement under the private international law of Japan.

(ii) The governing law of an arbitration agreement is the law which is expressly or implicitly designated by the parties (under Article 7(1) of the Hōrei); and if the parties' intention is not certain, then the law of the place of acting governs an arbitration agreement (under Article 7(2) of the Hōrei).

(iii) An arbitration agreement, which is valid under the Convention, is under Japanese law and upon the defendant's request, given legal effect as a valid demurrer to an action commenced in breach of the arbitration agreement.

Regarding the time limit for submitting a demurrer based on a valid arbitration agreement in a judicial proceeding, the Japanese courts have shown three different views.

Firstly, in the Tokyo District Court's decision of December 7, 1962[15)] the court held that such demurrer should be submitted before the defendant started to plead on the merits in the first oral hearing. This view was supported by the Osaka High Court in its dictum of the decision of February 20, 1974.[16)]

Secondly, in the Tokyo High Court's decision of February 27, 1975,[17)] the court held that such demurrer could be submitted after the defendant had started to plead on the merits but could not be submitted after there had been several hearings since he was then deemed to have waived the right to submit such demurrer.

Thirdly in the Tokyo District Court's decision of October 29, 1973,[18)] the court held that since there was no statutory provision on this matter such demurrer could be submitted after pleading on the merits and at the end of oral hearings unless such submission was made with the purpose of delaying the completion of the judicial proceedings or was against fair and equitable principles.

However the second and third views were expressed in the context of contracts made between building contractors and private persons for the construction of domestic dwellings.

It is likely that a different view might be taken in the case of contracts involving merchants and it is therefore submitted that in case of business transactions between merchants such demurrer should be submitted before the defendant starts to plead on the merits in the first hearing.

In this connection it is noted that the Osaka High Court held in its decision of February 20, 1974[19] that the defendant was not deemed to have waived the right to submit such demurrer even if he had not appeared in the court and an *ex parte* judgment was given against him.

(iv) Japanese courts have limited the application of the governing law of an arbitration agreement to its formation, validity and construction, and the severability of an arbitration agreement has been judged by Japanese courts under Japanese law.

(v) The four propositions above are based on Japanese judicial decisions which are supported by the prevailing opinion of commentators.

(vi) The prevailing opinion of commentators is that the capacity of parties to make an arbitration agreement is to be determined in accordance with the law of their respective nationality under Article 3(1) of Hōrei.

(vii) Since all court decisions related to the validity of arbitration agreements and did not discuss the meaning of a defined legal relationship and the arbitrability of the subject matter, it is still an open question whether Japanese courts will apply the governing law of an arbitration agreement to decide the remaining two points under the Convention. But it is quite likely that they will do so.

(d) Enforcement of Arbitration Agreements

Article II. 1 of the Convention requires Contracting States to recognize arbitration agreements and Article II. 3 requires a court when seized of a matter embraced within an arbitration agreement to refer the parties to arbitration at the request of one of the parties. Apart from the latter provision, however, the Convention is silent on the enforcement of arbitration agreements.

On the other hand the C. C. P. contains a provision relevant to the enforcement of arbitration agreements. Article 789(2) stipulates that where an arbitration agreement provides for the appointment of an arbitrator (or arbitrators) by each party and one party fails to appoint an arbitrator (or arbitrators) within seven days from the written notice of the appointment of an arbitrator(s) by the other party, then the latter can request a competent court to appoint

an arbitrator(s) for the party who has failed to make an appointment. However there is no statutory provision indicating whether article 789(2) of the C. C. P. applies to arbitration agreements governed by foreign law. But there is some judicial authority.

The Tokyo District Court held in its decision of January 25, 1958[20] that Article 789(2) of the C. C. P. was applicable to an arbitration agreement included in a sales contract between a Japanese corporation and an Australian corporation and providing that all disputes arising out of the contract should be referred to two arbitrators appointed in Tokyo, one by each party respectively. The decision was based on the reason that the arbitration agreement was governed by Japanese law which was implied by the fact that the parties agreed to Tokyo as the place of arbitrators' appointment and the sales contract was made in Tokyo, although there was no express agreement on the governing law of the arbitration agreement itself nor on the place of arbitration.

It therefore is submitted that Japanese courts will appoint arbitrator(s) for the recalcitrant party in order to enforce an arbitration agreement if the arbitration agreement is governed by Japanese law and Japan is designated as the place of the arbitrator's appointment or as the place of arbitration and Article 789(2) of the C. C. P. is applicable. When a Japanese court appoints arbitrator(s) under Article 789(2) of the C. C. P., the court must select the arbitrator(s) according to the arbitration agreement between the parties but can select the arbitrator(s) at it discretion if the arbitration agreement is silent on the arbitrator's appointment.[21]

However there still remains the question of whether the Japanese courts will appoint an arbitrator(s) for the recalcitrant party pursuant to arbitration agreements, even if the arbitration agreement is governed by Japanese law, in cases where the place of arbitration and the arbitrator's appointment is outside Japan.

The final question is which Japanese court is the appropriate one to make application to, under Article 789(2) of the C. C. P., for the appointment of an arbitrator(s) for the recalcitrant party. Article 805(1) provides that the

summary court or the district court designated in the arbitration agreement is competent. If, however, no court is designated in the arbitration agreement then under Article 805(1) and (2) the competent court is the summary court or district court which would be competent to hear the substantive dispute between the parties (which forms the subject matter of the arbitration) if proceedings were instituted in a court rather than before arbitrators.

5. Foreign Arbitral Awards and the New York Convention

(a) Foreign Arbitral Awards under the Convention

Under Article I. 1 of the New York Convention, the foreign arbitral award under the Convention is defined as artbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought.

Japan has decleared on the basis of reciprocity under Article I. 3 of the Convention that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State.

Accordingly a foreign arbitral award under the Convention in Japan is defined as arbitral awards made in the territory of a Contracting State other than Japan.

(b) Recognition of Foreign Arbitral Awards

The New York Convention envisages the recognition as well as enforcement of arbitral awards. Article III requires each Contracting State to "recognize arbitral awards as binding... in accordance with the rules of procedure of the territory where the award is relied upon...". However there is no specific statutory provision prescribing a procedure for the recognition of foreign arbitral awards in Japan and Article 800 of the C. C. P. simply stipulates that an arbitral award has the same effect as a final and conclusive judgment of a court between the parties to the award. Accordingly a foreign arbitral award under the Convention has the same effect as a final and conclusive judgment of a court between the parties without any specific procedure being prescribed. The *res judicata* effect of a foreign arbitral award under the Convention is to be determined in

accordance with Articles 199 and 201 of the C. C. P.

(c) **Enforcement of Foreign Arbitral Awards**

Under Article III of the Convention each Contracting State shall enforce arbitral awards under the Convention in accordance with the rules of procedure of the territory where the awards are relied upon.

Under Article 802(1) of the C. C. P., the party who requests a Japanese court having the competency to enforce the arbitral award under the Convention has to bring an action for an execution judgment, which will declare that the arbitral award may be enforced.

The court however can refuse to enforce arbitral awards under the Convention if the party opposing the enforcement establishes evidence on the issues listed in Article V. 1 (a)—(e) or if the court finds the issues listed in Article V. 2 (a) and (b).

The Osaka District Court in its decision of April 22, 1983[22)] granted the enforcement of an American arbitral award made in New York under the Convention by rejecting the defendant's argument based on Article V.1 (b) of the Convention that he was not given proper notice of the appointment of the arbitrator and of the arbitration proceedings and therefore was unable to present his case.

The case involved an action for the enforcement of the American arbitral award by a U.K. company, TEXACO (shipowner), against a Japanese shipping company, Okada (charterer).

In 1970 the shipowner and the charterer made a time charter having such arbitration clause that any and all differences and disputes of whatsoever nature arising out of this Charter shall be put to arbitration in New York.

On March 16, 1977 the plaintiff called for the arbitration to arbitrate the dispute on the cargo damages and the charterer's breach of the charter, and made to the defendant the written notice specifying the name and address of the arbitrator chosen by him. The notice was delivered to the defendant on the same date.

The defendant requested the plaintiff to extend the time limit for appointing

his arbitrator until April 15, 1977, but failed to appoint the arbitrator by the date. The plaintiff therefore appointed the second arbitrator according to the arbitration clause and informed the defendant of the appointment of the second arbitrator on June 15, 1977.

The two arbitrators so chosen appointed the third arbitrator and the board consisting of the three arbitrators informed the defendant of the name and address of the third arbitrator and the date of the first hearing on June 17, 1977.

On July 5, 1977 the defendant appointed its counsel in New York and the defendant's counsel requested the board to postpone the first hearing on July 12, 1977, but the first hearing was not held on the postponed date.

On July 15, 1979 the board closed the hearing in the absence of the defendant after comfirming the notice of the hearing to the defendant and made the award ordering the defendant to pay US$329,356.27 together with the interest of 8% per annum, $1,200 of the attorny's fee and $500 of the arbitrators' fee.

Since the defendant did not voluntarily perform the award, the plaintiff brought an action to enforce the foreign award to the District Court of Osaka in 1981.

The Court granted the enforcement of the foreign award based on the following reasons;

(1) The Court found that the foreign award was under the Convention and the plaintiff duly furnished the Court with necessary documents required under Article IV of the Convention for its enforcement.

(2) Accordingly the foreign award was enforceable unless the defendant furnished the Court with the proof that he was unable to represent his case in the arbitration proceedings.

(3) On the other hand, the Court found that the defendant's counsel informed the plaintiff on May 16, 1979 that he was not the defendant's counsel thereafter and was not obliged to represent the defendant in the arbitration proceedings, and also that he had not any intention to attend the scheduled hearing as the defendant's counsel.

(4) The Court further found that the above notice meant the intention of the defendant's counsel to resign from his duty, and therefore that the defendant's counsel had been in his position until May 16, 1979 when the above notice was given to the plaintiff.

(5) The Court held that the defendant had enough opportunity to present his case in the arbitration proceeding since the notices of the hearing were twice given on July 18, 1977 and November 29, 1978 to the defendant's counsel before he resigned from the defendant's counsel on May 16, 1979.

Although Article V.1 (a)–(c) and (e) are self-explanatory, Article V. 1 (d) is silent on the question of which law determines the scope of an arbitration agreement. In this connection the Tokyo District Court's decision of August 20, 1959[23] is suggestive. In this case the court held that the validity of an arbitration agreement was subject to the governing law designated by the parties in relation to the enforcement of the foreign arbitral award made in London and under the Geneva Convention.

It is submitted that the scope of an arbitration agreement will be determined by Japanese courts subject to the governing law designated by the parties when the scope is questioned in relation to the enforcement of the foreign arbitral award.

There has been no court's decision discussing the issue under Article V. 2(a), but it is argued as follows:

> Under the C. C. P. only justiciable matter can be arbitrated and therefore appraisal of the value of property in dispute is not arbitrable. Matters which cannot form the subject matter of a compromise of the parties are not arbitrable. An example is the technical scope of a patent. Article 71 of the Patent Law provides that the technical scope of a patented invention may be referred to the Director-General of the Patent Office for its determination. Arbitrability of matters relating to patents, trademarks etc. depends on their nature, which must be judged under Article 786 of the C. C. P. It is not possible to arbitrate such matters as bankruptcy and violations of the Anti-trust Law.[24]

Under Article V.2(b) of the Convention Japanese courts can refuse to enforce a foreign arbitral award which is contrary to the public policy of Japan. However there is no statutory provision which exhaustively defines the public policy of Japan and there is no judicial decision where a court refused to enforce a foreign arbitral award on the ground that to do so would be contrary to the public policy of Japan.

Article 801(1)(b) of the C. C. P. provides that where a domestic arbitral award orders a party to do an act prohibited by the law, the parties may apply to a court to vacate the award. This provision is interpreted as espousing one instance where an arbitral award is contrary to the public policy. While generally true, it is submitted that an arbitral award ordering a party to do an act contrary to law is not always against the public policy of Japan as is shown by the Tokyo District Court's decision of September 6, 1969.[25]

In this case the court found that payment under the licensing agreement would violate the foreign exchange control law of Japan, but the court held that, since the restriction of exchange payment under this law was provisional in nature for the purpose of the recovery and development of Japan's national economy, the payment under the licensing agreement was not contrary to public policy even though it might entail criminal liability.

(d) Conclusion

Japanese courts have enforced one English arbitral award made in London under the Geneva Convention, two American arbitral awards made in New York under Article IV of the Treaty of Friendship, Commerce and Navigation between Japan and the U.S.A. and one American arbitral award made in New York under the New York Convention. It should be noted that there has been no judicial decision which refused to enforce a foreign arbitral award in the past.

These facts evidence Japanese courts' favourable attitude to international commercial arbitration and give assurance that Japanese courts will enforce such foreign arbitral awards under the New York Convention in the future.

Footnote

1) Kiyomiya, Kenpō (the Constitution) 2nd ed. pp. 437-443 (1973)
2) supra 1)
3) not yet reported: Showa 50 nen (wa) No. 1552, 8 Yearbook Commercial Arbitration 394 (1983)
4) 10 Kakyū Minshū 1117; English translation, 5 The Japanese Annual of International Law 112 (1961)
5) 10 Kakyū Minshū 90
6) 9 Kakyū Minshū 111, Hanrei Taikei Kokusaishihō Vol. 2, p. 2421 (5)
7) 4 Kakyū Minshū 502
8) 9 U. S. C. SS 1-14
9) Hanrei Taikei Kokusaishihō Vol. 1, p.455
10) 24 Daihan Minroku 856
11) Kawakami, Shōgai Chūsai Keiyaku (Foreign arbitration agreement) Keiyakuhō Taikei Vol. VI, p. 249 (1963): Kitagawa, Shōgai Hanrei Hyakusen revised ed., p. 185 (1976)
12) Kawakami, supra 11) at 257; Doi, Japan (National Report), 4 Yearbook Commercial Arbitration 115, 132 (1979)
13) 29 Minshū 1061
14) 4 Kakyū Minshū 502
15) 13 Kakyū Minshū 2450
16) Hanrei Jihō No. 746, p. 42
17) Hanrei Taimuzu No. 327, p. 200
18) Hanrei Jihō No. 736, p. 65
19) supra 16)
20) supra 6)
21) Koyama, Chōteihō Chūsaihō (Reconciliation Law, Arbitration Law) (Hōritsugaku Zenshū Vol. 38) p. 93 (1958)
22) Hanrei Taimuzu No. 501, p. 182
23) 10 Kakyū Minshū 1711
24) Doi, supra 12) at 122
25) Hanrei Jihō No. 586, p. 73; English translation, 15 The Japanese Annual of International Law 181 (1971)

I-2. ARBITRATION CLAUSE IN A CHARTERPARTY WITHOUT NOMINATING A SPECIFIC ARBITRATION ORGANIZATION

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1. Arbitration Clause

Regarding an arbitration clause to be inserted into a charterparty, the parties very often agree to the following wording:

> "Should any dispute arise between the Owners and the Charterers, the matter in dispute shall be referred to three persons in Tokyo, one to be appointed by each of the parties hereto, and the third by the two so chosen; their decision or that of any two of them, shall be final, and for the purpose of enforcing any award, this agreement may be made a rule of the Court. The Arbitrators shall be commercial men."

2. There is a great risk that an arbitration conducted based on the above wording will become inoperative under Japanese law

An arbitration clause worded as I have just stated will very often become inoperative under existing Japanese law for the following reasons (those Articles referred to below are Articles of the Japanese Code of Civil Procedure):

(1) Notice of appointment of an arbitrator

Under the above arbitration clause either party, who wishes to resolve a

dispute by arbitration, may appoint an arbitrator. The appointment of such an arbitrator has to be notified to the other party in writing, requesting the other party to appoint his own arbitrator within 7 days (Article 789, Para. 1). Once this notice of the appointment of an arbitrator is given to the other party, the notified party is bound by his appointment of an arbitrator (Article 790).

In case either of the arbitrators appointed according to the above procedure dies or cannot perform the arbitration for any reason, the party who appointed that arbitrator, has to appoint a substitute arbitrator within 7 days upon receipt of a notice from the other party (Article 791).

(2) Failure of appointment of an arbitrator

In case the party who has received notice of the appointment of an arbitrator from the other party fails to appoint his own arbitrator within 7 days after he has received the notice, then the other party may file his own application with the court, requesting appointment of an arbitrator for the party who failed to appoint his own arbitrator (Article 789, Para. 2). Upon filing of such an application, the court will appoint an arbitrator; however, the court will not intervene in the arbitration any further, and the arbitration has to proceed under those arbitrators appointed by the foregoing process.

(3) Appointment of a third arbitrator

In the above arbitration clause a third arbitrator is to be chosen by the two arbitrators appointed by the parties or by the court in case of the failure of either party to make an appointment.

Also, according to the above arbitration clause a third arbitrator has to be appointed before commencement of the arbitration proceedings, since the arbitration clause stipulates that the matter in dispute shall be referred to three persons in Tokyo.

The problem is the appointment of the third arbitrator by the two arbitrators already appointed, particularly when those two arbitrators are appointed one by each party. It is a general tendency and practice for each party to consult with

an expert regarding the matter in dispute, and to then nominate as arbitrator such a person who provides a favorable opinion to him. Therefore, it can be considered likely that those two arbitrators already appointed by the parties will have a favorable opinion towards the party who appointed him, particularly where he will receive his remuneration from such party.

In this situation the appointment of a third arbitrator by the above two arbitrators will be extremely difficult for the following reasons:

(a) the winner or loser of the case will be decided solely by the opinion of the third arbitrator;
and

(b) therefore, each arbitrator will consult the matter in dispute with another expert, and after having confirmed that a favorable opinion would be obtained from that expert, he will nominate that expert as a third arbitrator and give notice of his nomination to the other party, asking the other party to consent to his nomination. The other party will certainly not agree to such a nomination, since he would be exposed to the risk of losing the case entirely by his agreement to that nomination. Then, the other party will do the same and this will be also rejected by the counter-party; and

(c) under Japanese law an arbitration award has the same legal effect as that of a final and conclusive court judgment (Article 800), and once such an award is rendered, the merits of the case cannot be further disputed by the parties. The matters which can be disputed against an arbitration award are limited to procedural matters. The appointment of a third arbitrator is therefore crucial in this respect as his word has the same weight as a final and conclusive court judgment; and

(d) there is no time limit for the appointment of a third arbitrator in the said arbitration clause, nor is there a time limit under Japanese Law. Therefore, any party who considers that the matter in dispute is not in his favor, will continue to reject the appointment of a third arbitrator,

expecting that the arbitration will fail totally.

For the above reasons the appointment of a third arbitrator will be tactically rejected by a party who considers that the case is not in his favor, and he will attempt to make such an arbitration clause inoperative. In fact in our experience there are many cases in which the appointment of third arbitrators have not been agreed to between the parties and the arbitration clause agreed in the charterparties has become inoperative.

3. No remedy under the Japanese law in case a third arbitrator is not agreed to by the parties

There is no provision under the existing Code of Civil Procedure in respect of an appointment of a third arbitrator. The lack of such a provision is one of the defects in the present Code of Civil Procedure. The Code provides that if the opinion of the arbitrators is equally divided, the arbitration agreement becomes null and void, unless the parties agree to remedy such a case (Article 793, Item 2).

The law apparently contemplated that the appointment of such a third arbitrator will usually be stipulated in an arbitration contract when agreed between the parties.

4. What will be the further procedures in case an arbitration clause becomes inoperative?

As stated before, an arbitration will fail in case a third arbitrator cannot be agreed to between the parties. The remaining procedure available to solve such a dispute is a normal court litigation.

However, in a normal procedure any dispute arising under a court which contains an arbitration agreement has to be first referred to arbitration. Therefore, if a lawsuit is filed by one of the parties, the other party may object to it, and the court will dismiss such a lawsuit for the reason that arbitration has been

agreed between the parties.

It is therefore necessary that one of the parties prove that arbitration between the parties has become inoperative due to the fact that a third arbitrator cannot be agreed upon. In such a case the results would be that because there is no workable arbitration agreement between the parties the Japanese court will take up the case under its ordinary jurisdiction, if the court has jurisdiction over the case.

Regarding the question of time-limits for an action, the time-limit for such a claim is preserved by the appointment of an arbitrator, and the legal status continues until the time of filing a lawsuit. Accordingly there would be no question of a time-bar when a lawsuit is filed by one of the parties.

5. Recommendation

As stated earlier, even if a third arbitrator cannot be agreed between the parties, the case may be solved by normal court litigation. However, in such a case the parties cannot achieve the purposes of an arbitration agreed to in a charterparty, and will consume time and expense before they reach a final judgment.

In order to avoid the above problems and save time and expense for the parties, we strongly recommend the nomination of The Japan Shipping Exchange, Inc. as an arbitration organization to solve any dispute in maritime matters. The usual wording used to nominate this organization is as follows:

> "Any dispute arising from this Charter shall be submitted to arbitration held in Tokyo by The Japan Shipping Exchange, Inc., in accordance with the provisions of the Maritime Arbitration Rules of The Japan Shipping Exchange, Inc., and the award given by the arbitrators shall be final and binding on both parties."

When a case is submitted to The Japan Shipping Exchange, Inc., it will be conducted according to the Maritime Arbitration Rules of The Japan Shipping Exchange, Inc., and there is no problem regarding the appointment of a third

arbitrator. Also, the arbitration award is final in respect to the merits of the case including both factual and legal points; therefore, the case will arrive at a conclusion much faster than in litigation. In case of litigation either party will have a right to appeal to the high court and supreme court, and the case can be tactically dragged on by one party.

For further details of the maritime arbitration procedures, please refer to the "Guide to Maritime Arbitration" issued by The Japan Shipping Exchange, Inc.

I-3. PRACTICAL ASPECTS OF THE RECOGNITION AND ENFORCEMENT IN JAPAN OF FOREIGN ARBITRATION AWARDS UNDER THE 1958 NEW YORK CONVENTION

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It may be not comfortable for a lawyer to refer to some lacunae in his country's judicial scheme and/or law and/or practice before people from other countries.

However, I am going to put myself in such a position, and must now report the following in order that foreign lawyers/arbitrators and/or practitioners will not have too high an expectation of the 1958 New York Arbitration Convention, and in the hope that some sort of improvements will be made in Japan and/or in the Convention in the not too remote future to comply with the ideal aim of the Convention.

Scheme to enforce the Foreign Awards

In 1961 Japan ratified the New York Convention of 1958, with the reservation that only the arbitration awards given in the adhering States would be enforceable and executable in Japan, that is, any arbitration awards made in non-adhering States are not directly protected by the New York Convention as ratified in Japan.

There are no enactments in Japan with specific reference to the Convention, because the Convention itself is, under Japanese law, considered to be directly valid and also because Japan's Code of Civil Procedure (the C.C.P.) already

provides the methods of enforcing domestic arbitration awards and the concept of recognition and enforcement of such domestic arbitration awards is considered to be indicative enough for the purpose of the recognition and enforcement in Japan of foreign awards under the New York Convention.

I note that one of the aims of the 1958 New York Convention is to promote and realise faster and easier enforcement and execution of foreign arbitration awards made under the Convention than would otherwise be possible.

As Professor Iwasaki, the previous speaker, confirmed, theoretically and actually, once a foreign arbitration award is given in compliance with the New York Convention, the parties concerned do not of course have to raise any law suit in Japan to decide the merits of the case, and the only step they ought to take further is to apply to a Japanese Recognition Court for recognition of the award so that it can be executed in the same way as an award which had originally been conferred by a Japanese Court.

Actual Function of the Recognition Court

Once Japanese lawyers, however, try to have some foreign awards under the New York Convention recognised by a Japanese Recognition Court, it may be more prudent to advise our clients (successful plaintiff) of our not very optimistic view on the Recognition Court proceedings. If the defendant defeated in the arbitration award, maliciously or not, tries to resist the enforcement and execution in Japan of the foreign arbitration award, he may in fact raise all possible defences and/or pleadings, with the Recognition Court, provided under Articles 4 & 5 etc. of the Convention, whether or not such defences/pleadings will in fact eventually be adopted and admitted by the Court. When the Court faces such defences/pleadings, it will most probably pay attention to them and try to examine whether or not such defences/pleadings are well grounded.

One of the crucial points is whether you can anticipate how long the Recognition Court proceedings will be likely to take until it comes to a conclusion on each defence/pleading. To discuss the matter, we should take into account

some premises as follows:

First of all, there is usually no institutional Court in Japan to deal with recognition of foreign or domestic arbitration awards, i.e., an *ad hoc* Court is formed only when an application for recognition is made. This is likely to lead to the fact that not many judges and/or clerks comprising or relating to the Recognition Court are familiar with the Recognition Court proceedings. This is one factor which will determine how long the proceedings will take.

Secondly, many such defences/pleadings naturally refer to foreign laws, procedures, practices, etc., and a nasty defendant may pretend before the Court that it will take longer to obtain a foreign counsel's opinion, investigation report, etc., than is actual the case.

Thirdly, under the current Japanese law, all documentations/statements written in foreign languages must be accompanied by Japanese translations, i.e., not only the Japanese translation of the foreign award itself as prescribed in the Convention but also all other documents, telexes, letters written in foreign languages are required to be translated into Japanese.

This requisite sometimes results in a strange and rather unfair feature: supposing a Japanese defendant company did their commercial transaction in English from the beginning with a foreign plaintiff company and both of them reached an agreement in English to refer any disputes to arbitration in London, once the foreign plantiff in whose favour the award is given applies to the Japanese Recognition Court for recognition of the award, then the defendant defeated in the arbitration may ask for a thorough and complete Japanese translation of all the relevant documentary evidence despite the facts that the defendant himself understands well English and that many Japanese judges are also able to understand written English.

Thus, this also becomes a factor which can delay the Court proceedings.

The defendant defeated will usually not care about how much the Recognition Court proceedings are delayed due to his having (maliciously) raised defences/pleadings to refer to whatsoever minor or clerical issues which are found in the arbitration award, since, unless the defendant behaves particularly

badly, the Court will take no punitive action against him. As a result, if the plaintiff is lucky, he may obtain the recognition within a few months, but if unlucky, perhaps years, while the defendant possibly goes into bankruptcy! I have here a copy of the Osaka District Court's final decision dated 22nd April, 1983 (Hanrei Times No. 501, page 182) recognising an Arbitration award given by a New York arbitration on the 20th July, 1979 after about two year's arbitration in New York. The plaintiff applied for recognition thereof with the Osaka District Court in 1981. This means that it took about two years for the plaintiff to obtain the award and that it took the same time for the recognition, amounting to four years in total.

The delay as such in the Recognition Court would lead one to suspect that should the length of the Recognition Court proceedings possibly be equal to that of the ordinary (substantive) Court proceedings in examining the merits of the case, it may be preferable to file an ordinary law suit in Japan as the first legal step in claiming from the party. This is, however, not allowed. There are well established judicial precedents in Japan which state that if the parties have agreed to arbitration, then a merits-persuing (substantive) law suit made by one of the parties to the agreement should be stayed and/or dismissed, and that the parties concerned should first apply for the arbitration as agreed and then the award, if obtained, should be recognised in Japan. There is no discretionary choice.

Thus, the more I learn about this subject, the more pessimistic I feel about persuing the enforcement and execution of foreign arbitration awards. I am forced to advise my client plaintiff to accept on a compromise settlement basis a lower figure than awarded, unless the defendant is well-off and can be presumed to be financially stable for the forthcoming few or several years.

Provisional Arrest/Attachment of Property

Should the defeated defendant be found to have some good and valuable asset, then it is often advisable for the plaintiff to provisionally attach the asset for security, using the foreign award as the good and firm evi-

dence for his claim. Particularly where the defendant owns a ship, then arresting that vessel will often lead to a reasonable and prompt settlement of the claim.

Even if a final payment by the defendant is not triggered by the provisional arrest, the plaintiff will be relieved of some pressure as the defendant must put up a cash deposit usually amounting to the awarded sum in order to secure the release of the arrested asset/ship, and then the plaintiff can apply for the recognition of his award without being in such a hurry. The award when recognised is executable against the deposit.

Recommendation in Advance

If a client asks me for my advice as to the jurisdiction clause prior to his concluding any agreement with another party, I tend to tell him as follows:

If the other party is a Japanese subject/corporation having its major assets in Japan and if he assumes that he will possibly have to claim from the party in the future, perhaps he should prefer in the agreement a Japanese Court or Japanese Arbitration to some foreign arbitration.

A Japanese judgment is of course executable and enforceable without being recognised at all.

Japanese Arbitration awards must be recognised by the Recognition Court when being enforced. However, you do not have to have the award officially translated into Japanese at all, and it will be much more difficult for the defendant defeated to raise defences/pleadings in the similar manner as may be possible under the Convention.

To effect Japanese Arbitration, a concrete body of arbitration to which you would like to bring your matter should be specified in your agreement for arbitration with the other party, because under the current Japanese law a phrase like 'Arbitration in Tokyo' is not sufficient if your opponent party does not voluntarily appoint his arbitrator when requested to do so. When an arbitration body is specified, then that body may appoint arbitrators and umpires despite your opponent party's laziness.

There may possibly be some anxiety amongst non-Japanese people that

Japanese Courts and/or Arbitration Panels might actually be more sympathetic to Japanese parties than to non-Japanese. However, Japanese Courts, and Arbitration Panels seem, in my personal experience, to be more prudent and generous to non-Japanese parties. Therefore, I am pretty sure that you have no worries in this respect.

Proposition for Amendments

To promote much faster and easier execution procedure of foreign arbitration awards under the Convention, may I propose some ideas for amendments or improvements of the present scheme.

1) The Japanese Court should form an institutional (not *ad hoc*) division specifically to deal with the recognition of domestic and international arbitration awards.
2) In the Recognition Court, as above, documentary evidence written in a foreign language should not necessarily have to be translated into Japanese if the agreement for the foreign arbitration was signed with parties who understood that foreign language, and if the main portion of the commercial transaction was made through that foreign language. Of course, the Recognition Court judges should all be reasonably competent in at least the written form of the forein language although the language used and spoken in the Recognition Court proceedings should still be Japanese and the recognition itself should also be declared in Japanese for practical reasons.
3) Under the present Japanese law, if each party reserves a right to nominate his own arbitrator without specific reference to any concrete body of arbitration in Japan, and if one of the parties does not utilise the right to do so, the other party can apply for the Court to appoint an arbitrator on behalf of the lazy party. However, there is no provision at all as to how the Court is empowered to select the umpire in case the two arbitrators cannot come to an agreement to select the umpire voluntarily. Thus, in the worst case, no Arbitration Panel can be formed. To overcome

this strange situation, may I propose that the Convention should adopt a resolution towards Japan to the effect that Japan should enact to empower the Court to appoint not only arbitrators but also an umpire if the parties concerned cannot form an Arbitration Panel smoothly.

4) To discourage a lazy party from attempting to make the proceedings more slowly, may I also suggest that the Japanese Court and Arbitration Panel adopt an 'open-offer' system, where if, despite either of the parties in dispute making a reasonable offer on a compromise settlement basis, the reluctant/recalcitrant party refuses the offer unreasonably, all the leagal cost, lawyers costs, etc. which are incurred after the open offer should be borne solely by the lazy party.

5) The existence of a foreign arbitration award under the Convention should be considered to be *prima-facie* evidence for the merit of the case under the Japanese judicial system. Therefore, if the defendant defeated tries to plead on the plaintiff's application for the recognition of the award, the Court should be empowered to order the defendant to put up a deposit for the sum decided at the descretion of the Court. This will save the position of a successful plaintiff even if the Execution Court proceedings last for a long time, while the unreasonably recalcitrant party may, maliciously or not, go into bankruptcy or the likes.

   Further, that will minimise the risk of devaluation of the award due to foreign exchange market fluctuations which may often happen during the time of the lengthy Execution Court proceedings.

I hope that the foregoing will help you appreciate the really practical aspects of the recognition proceedings in Japan of foreing arbitration awards under the New York Convention and that it will instigate some improvements in the current judicial system/practice in the future.

I-4. JURISDICTION OF ARBITRATION PANEL OVER LIMITATION OF SHIPOWNER'S LIABILITY UNDER JAPANESE LAW

Mitsuhiro TODA
Law Office of FUJII & TODA

1. Nature of the Limitation Action

In December, 1975, Japan ratified the International Convention Relating to the Limitation of the Liability of Owners of Sea-going Ships (Brussels, 1957). At that time, Japan enacted the Convention as part of its domestic law in the Act Relating to the Limitation of Liability of Shipowners, etc., Act No. 94 of 1975.

In addition to the substantive provisions relating to limitation of liability, the Limitation Act also contains the Japanese procedures for limitation of liability, pursuant to Article 4 of the Convention. Article 17 of the Act provides that a person desiring to limit liability, such as a shipowner or master of a ship, must submit an application for commencement of limitation proceedings to the appropriate district court. The application must list all the claims known to the applicant existing against the shipowner arising out of the incident in question (Article 18).

The district court will decide, *ex parte* and usually without a hearing, whether or not the application should be granted and the proceedings commenced. If the applicant succeeds in establishing under Article 3 of the Limitation Act (corresponding to Article 1 of the Convention) that he is entitled to limit his liability, then the court will issue two orders. First, the court will order the applicant to deposit a fund equivalent to the limitation amount. After the fund has been deposited, the court will issue an order declaring that the limitation proceedings be commenced.

The district court's order is not final but is immediately appealable to the Court of Appeal, and if a constitutional issue is involved, further appealable to the Supreme Court.

Once the dicision becomes final and the limitation proceedings have commenced, the claims specified in Article 3 of the Limitation Act (corresponding to Article 1 of the Convention) may only be paid out of the limitation fund deposited with the court and not from any other assets of the applicant (Article 33). The amounts of the respective claims filed with and allowed by the court are paid *pro rata* out of the limitation fund.

2. The Relationship between the Limitation Proceedings and Creditors' Lawsuits

One feature of the Japanese procedure that is different from the English or American procedures is that the application to limit liability must be made in a separate limitation action and not as a defence in a creditor's (claimant's) lawsuit. Limitation Act Articles 3 and 17; compare with McGuffie, ADMIRALTY PRACTICE (1 BRITISH SHIPPING LAWS) para. 1223 (1964); 3 BENEDICT ON ADMIRALTY para. 12, at 2-9 (7th rev. ed. 1982). That is, in a creditor's lawsuit, a shipowner who wishes to limit his liability may only plead the existence of a limitation order, and may not plead that he is entitled to limit his liability.

Another more significant difference is that creditors' suits are neither stayed nor enjoined by either the application to commence the limitation proceedings or the decision allowing the commencement of the proceedings (Limitation Act, Articles 23, 30 and 35). Creditors' suits may be and sometimes are commenced after the commencement of limitation proceedings.

The reason for allowing such suits is that the issuance of the order commencing the proceedings is only a preliminary finding that the claims itemized in the application are claims that are properly subject to limitation; the claimants have not yet had an opportunity to be heard on this issue. On the one hand, the

shipowner may make the defence in a creditor's lawsuit that a limitation order has been issued; on the other hand, the creditor may respond, under Article 77 of the Limitation Act, that the claim stated in the complaint is not one that may be limited against under Article 3 of the Act. For example, salvage remuneration, general average contributions, claims based upon employment with the shipowner and claims in tort by reason of the shipowner's actual fault and privity may not be limited against.

Not only are creditors' suits allowed, but Article 77 of the Limitation Act specifically states that the decision of the court in a creditors' suit that a claim may not be limited against supersedes the limitation court's decision to commence proceedings. Thus in the Japanese procedure, many of the issues involving the right to limit liability are not decided in the limitation proceeding at all, but in a separate proceeding. If the claim in the creditor's complaint is found by the court not to be the proper object of the limitation proceedings, the court's judgment against the shipowner will not refer to the limitation order, thus denying the shipowner the right to limit against that particular claim.

Similarly, if the claim in the creditor's complaint is found by the court to be the proper object of the limitation proceedings, then the court's judgment will be subject to the limitation order, and payable in full only if the limitation order is voided, reversed, or the limitation proceedings dismissed.

3. The Relationship between Limitation Proceedings and Arbitrations

The rule that a shipowner may apply for limitation of liability only on a limitation proceeding, and not in a creditor's suit, applies with equal force where there is an arbitration. The shipowner must still apply for and obtain an order to commence limitation of liability proceedings in order to raise the defence of limitation of liability in the arbitration; as in the case of a creditor's lawsuit, this defence is based on the existence of the order to commence the limitation proceedings. In my opinion, the reference in Article 77 of the Limita-

tion Act to "a lawsuit outside these proceedings" includes arbitrations.

That is because the parties in an arbitration have merely agreed to alter the forum of their dispute, and have not waived any substantive rights. Therefore, an arbitration panel has proper jurisdiction to consider whether a particular claim is properly the subject of a limitation proceeding, just like the court in a creditor's lawsuit, but only after a limitation order has been issued.

In addition, however, the shipowner may, in his discretion, choose to forego completely the judicial limitation procedure specified in the Limitation Act and submit the entire limitation issue to the jurisdiction of the arbitration panel. In that case, an agreement the claimants to that effect would be necessary. The arbitration panel would then be empowered to decide whether the shipowner is entitled to limit liability at all, and not just with regard to individual claims.

4. Final Comment

I hope the above helps put the Japanese practice into proper perspective. I would appreciate any comments you have, as well as citations to or copies of any other articles on the relationship of limitation actions to arbitrations.

I-5. APPOINTMENT OF ARBITRATORS IN ARBITRATION IN TOKYO AND THEIR NEUTRALITY

Hironori TANIMOTO
Executive Director, The Japan Shipping Exchange, Inc.

Since founding the Maritime Arbitration Commission, so called Tokyo Maritime Arbitration Commission, in 1926, the Japan Shipping Exchange has been active as the only standing maritime arbitration court in Japan. One of the unique features of arbitration of our Exchange is the way how the arbitrators are appointed.

Our Arbitration Rules, under Section 14, provides that the Maritime Arbitration Commission shall appoint an odd number of arbitrators, including the case of a sole arbitrator, from among persons who are listed on "The Panel of Members of the Maritime Arbitration Commission", and have no connection either with the parties, or in the matter in dispute. Furthermore where both parties in dispute agreed previously to appoint their arbitrators by themselves in the arbitration agreement or in the arbitration clause in the contract, they shall have to appoint the arbitrators from among the aforesaid Panel.

In principle, the arbitration system is essentially a means of dissolving disputes voluntarily by the parties concerned. Therefore, arbitrators should properly be appointed by the parties themselves.

Thus, our Rules seem that they depart from the general principle. In a certain period of time, our Exchange had let the parties select arbitrators in accordance with the general principle, however, this method didn't come to be very popular. On the other hand, our method just explained turned out to be the most popular in Japan, and it came to be gradually established.

Now, I would like to explain the background of this unique method.

Firstly, it is expressive of the charactaristic of the Japanese people who prefers settling disputes not by legal means, but by amicable talkings or negotia-

tions with the help of the terms of contract concerned and the customs or usages of the respective trade. So, in spite of our Exchange being the arbitral institution, it has drawn up so many standard maritime contract forms and prevailed them in the shipping circles to prevent the shipping men from arising the future possible disputes, and the number of such forms now count 43 kinds.

In drafting the contract forms according to the above mentioned objects, it is necessary to take in customs and usages established over the years which meet universal and reasonable practices rather than relying on laws of any one country.

Therefore, two or three drafting committees composed of many businessmen well experiensed in the shipping and the concerning trades, are always working at our Exchange, for example one for drawing up a coal charter party, one for amending a time charter and the other for deliberating a foreign-made contract form for adoption.

And many persons listed on the Panel of Arbitrators join in the drafting committee where he can work as an expert and deliberate the forms and or the drafts from time to time. Through joining in these committees, the members are always well trained to be able candidatures of future arbitrators. The Arbitration Commission recruits the new members of the Panel of Arbitrators from among the persons who act in these drafting committees.

Under these circumstances, the Arbitration Commission if the most suitable authority for appointing suitable arbitrators to every submitted arbitration cases, because the Commission knows the business-experience, expertise, and human nature of each candidature of arbitrators listed on the Panel of Arbitrators.

Secondly, it is to do with the fact that Article 800 of Japanese Code of Civil Procedure gives the same effect to the arbitration award as a final and conclusive judgement of a Court of Justice.

Besides, in Japan where the principle of statutory laws is adopted, it happens occasionally that customs and usages in practice depart from what the law provides. Particularly in the charter party and contracts for ship building and

sale and purchases of a ship, the content of the contracts is established with the intentions of the contractual parties under the principle of liberty of contract, and their intentions are often based on customs and usages cultivated and approved internationally.

Therefore, in the event of the failure of an amicable talkings or settlement among the parties concerned, they are compelled to sellect either the legal proceedings or arbitrations. And once they exercise the said choice and select our Exchange, namely Tokyo Maritime Arbitration System, they seldom oppose the method of appointing arbitrators which our Exchange established over half century or more years.

They expect preferably the arbitration system stands on the strictly neutral base just like that of the Court of Justice. On this point, Section 14 of our Arbitration Rules defines that arbitrators who have no connection with the parties and in the matter in dispute, should be selected from among the Panel of Arbitrators.

In addition, once the arbitrators are appointed, they proceed with their arbitration procedure independently from the Arbitration Commission.

I wish my explanation about our unique system of appointing arbitrators will be of any help to your arbitration system.

I-6. INDEFINITE ARBITRATION FEE DISTURBS THE PROMOTION OF ARBITRATION SYSTEM

Hironori TANIMOTO
Executive Director, The Japan Shipping Exchange, Inc.

As you are well aware, deliberation of the draft for "Model Law on International Commercial Arbitration" by the Working Group on International Contract Practices at UNCITRAL is now approaching conclusion. There is no doubt that this Model Law will greatly contribute to those countries without arbitration laws or with unsatisfactory laws of arbitration. Japan has only twenty articles in Book 8, the Code of Covil Procedures which are related to arbitrations, and therefore we are interested in this Model Law.

Well written and organized arbitration laws and regulations do not seem to immediately lead to more popular use of arbitration. The difficulties involved in diffusion of arbitration system include whether the cost of arbitration is moderate or not while fair and competent arbitrators are assumedly appointed.

This problem does not exist in the case brought to court, a state institution, since the fees to be paid to the court is automatically determined based on the claimed amount in the case. Attorney's fees take up a fair portion of the cost, although this is negotiable in view of the amounts of claims and/or decision.

The cost of arbitration, on the other hand, may in the final analysis far exceed the cost anticipated by the parties involved as the period of deliberation prolongs and the number of meetings of arbitrators increase accumulating the fees to be paid to arbitrators, their accomodations and travel expenses. Among these, a case with a small claim amount may be much more complexed than that with large claim amount, because of the complicated relationship between the parties involved, which makes the amicable settlement almost hopeless.

Thus, the number of hearings in a small case may run up, and the arbitration cost raises up to unexpected high amount. Because of these reasons, I mentioned just now, the difficulties in determining arbitration cost for individual case arise.

Paragraph 1, Article 40 of UNCITRAL Arbitration Rules provides "the costs of arbitration shall in principle be borne by the unsuccessful party". This seems to present no problems to the successful party. The party with a smaller chance of success would naturally hesitate to consign the case to arbitration, or choose amicable settlement if the Contract includes an arbitration clause and parties agreed to arbitration in advance. This may be just as well. Arbitration is usually sought because a success of some sort is anticipated, but it is only after the arbitration award is rendered that one knows for sure that one has succeeded. Thus, it is preferable that parties have some ideas of arbitration costs at the onset.

The question arises where the two parties raise individual claims against each other; for instance a dispute arises involving two ships which have come into collission with each other as a result of their negligence in the navigation, and suffered damages to the hull of the ship and cargoes on board respectively. In such a case, deliberations may become protracted and arbitration cost may accumulate. Both parties cannot remain indifferent to how arbitration costs would amount. They are bound to hope that arbitration costs should not exceed a certain percent of the claimed amount or damages to be paid. Maritime disputes often involve such two way demands, and both parties find it trying if the arbitration procedure becomes prolonged and costs accumulate. It is a fair practice that arbitration cost be apportioned corresponding to the damages recognized.

Our Maritime Arbitration Rules, under Section 32, provides that each party must deposit with the Office of our Arbitration Commission covering the cost of arbitration within seven days after the receipt of notice from the Office such as the board of arbitrators concerned determines in accordance with the Tariff of Deposit for Arbitration Costs, and further provides under Section

33 that the proportion of costs of arbitration to be borne by the respective parties shall be decided by the board of arbitrators concerned, and be covered by the Deposits provided in Section 32.

Except for a few cases, the arbitration costs are as a rule determined by arbitrators concerned depending on the claim amount based on Tariff. This arbitration costs include remunerations for the arbitrators. In cases where the examination is complex and lengthy and arbitrators' meetings and hearings are frequently held, the cost may exceed the total sum of deposits made by claimants or both parties. Such an excess is not additionally collected from the parties. Among the cases entrusted to the Commission for arbitration, there are some with large claim amount but with less complex content. In such a case, the arbitration costs may be well less than the deposit amount which has been determined based on the claim amount. The Commission which has 20-odd cases constantly under their care can thus manage to determine the arbitration costs in advance with the deposits made for these cases. This ability of Tokyo Maritime Arbitration Commission to estimate the artibtation costs at the time the case is submitted gives those seeking their arbitration assurance and willingness to use this system.

It is concluded that the arbitration cost should preferably be foreseeable for the purpose of promotion of the arbitration system, and that the methods of determination and payment should be given full consideration in view of the nature of the case, financial ability of the parties, the place of hearing, remuneration and travel expenses of arbitrators, etc.

II. EXPLANATORY NOTES ON "NIPPONCOAL" CHARTER PARTY

GENERAL BACKGROUND

It had been around early December, 1979 that coal import into Japan had shown a sudden and tremendous increase, as a result of fabulous advance in price of petroleum compelling urgent shifts of energy sources in all economic fields of Japan.

In such situation of coal business, there appeared an unexpected daily practice becoming immensely popular with the coal business people in Japan; that was a trial to make another review of the Americanized Welsh Coal Charter which had long been in customary use among the Japanese traders.

On such background, the Documentary Committee of the Japan Shipping Exchange, Inc. (hereinafter called the Exchange) had decided to take up the work of drafting a standard Coal Charter Form and on December 18, 1980, organized a Sub-Committee for all works of its institution.

This Sub-Committee was composed of the members of 23 persons in total, all learned and experienced, especially in trading and shipping relating to coal business, with daily life background in business as shipowner and charterer, iron and steel manufacturer, trading, electric power generating, marine underwriting and shipbroking.

In this Sub-Committee, study, review and discussion were deliberately rendered in reference to and on the basis of "Nipponore", "Amwelsh", "Richards Bay", "Orevoy", "Gencon" Charterparties etc.

Mention must be made here that coal business, especially coal import business into Japan, has long been done by use of "Amwelsh" Charter, in many cases of the transactions. It was so much feared therefore that once a form too much afar from the provisions stipulated on "Amwelsh" Charter be drafted, it would lead to materialization of a Coal Charter Form which has little or no

prospect of opportunity of actual use in the coal trading of Japan. Thus, the Sub-Committee came to set up and work to draft the desired Coal Charter Form on the basis of "Nipponore" Charter with adjustment and or allowance taken into consideration from "Amwelsh" Charter.

The Documentary Committee of the Exchange arrived at an agreement in its meeting held on March 7, 1983 to send the draft of its Coal Charter which had been submitted thereto by its Sub-Committee to the Documentary Council of The Baltic and International Maritime Conference (hereinafter called BIMCO) for its possible adoption.

The said draft was adopted by BIMCO Documentary Council held on November 9, 1983, with some pieces of advices and suggestions which had been made by BIMCO.

NAME and LAYOUT

It is called COAL CHARTER PARTY with code name, "NIPPONCOAL" and the Box-type layout is adopted as in the case of "Nipponore" Charter.

Clause 1 (Port of Loading, Cargo, Port of Discharge)

In view of the fact that most of the vessels for transport of coal are suited to mechanical loading and grab discharge, Clause describes definetely to that effect.

Wordings of so called "near thereto clause" relating to loading and discharging port, i.e., "so near thereto as she may safely get", has not been added, on the ground that such a port or ports so near thereto may seldom have equipment and facilities for loading and discharging of the cargo of coal, allowing any work of such loading and or discharge.

Clause 2 (Freight)

It is provided in view of the actual practice that all freight shall be prepaid on bill of lading weight which shall be fixed by the draft survey at the port

of loading, unless there is any special agreement in Box 39.

Clause 3 (Sailing Telegrams)

In transport of coal by charter, it is the general usage that the vessel loads the cargo of the various kinds of coal. In consideration of such usage, it is provided that, in the sailing telegram from the last port to the loading port, quantities of cargoes which may be allowed in the respective holds shall be stated.

Clause 4 (Laydays and Cancelling Date)

It is provided that, in case where the vessel shall not be ready to load by the cancelling date, the shipowner may ask the charterer whether he will exercise his right of cancelling the charter, and that in such case the charterer shall declare his option within 48 hours in advance of the vessel's expected time of arrival at the loading port. Regarding the grace of time of excercise of the option of cancellation, the words used in "Amwelsh" Charter was considered too much in favor of charterer. Hence in this Clause the wordings indicating the step meeting halfway between the expressions of "Nipponore" and "Amwelsh" Charters are adopted.

Clause 5 (Loading and Discharging Commencement of Laytime)

Commencement of laytime at the port of loading and the mode of calculation of laytime are the same with the provision in the case of "Nipponore" Charter.

The provision regarding time lost in waiting for berth is left for option of the parties to the charter out of 2 clauses, one of which takes into consideration the special circumstances and affairs in Japan as well as the quarantine practice on East Coast of Australia, and the other is the "Genwait" clause, namely Baltic Conference General Waiting for Berth Clause, instituted by BIMCO.

Clause 6 (Time and Expense for Opening and Closing Hatches)

It is provided that times required for operation of opening and closing of hatches at each loading and discharging port or berth, all risks and expenses

required therefore shall be borne by the shipowner.

Clause 7 (Demurrage and Despatch Money)

Regarding these items, it is provided so that the place, time, in addition to currency for settlement of the related accounts could be agreed upon and indicated in Boxes 32 and 33 respectively.

Clause 8 (Free In and Out)

It is provided that the shipowner has no relation whatever with risks and expenses which may arise from and through loading, stowing, trimming of cargo, and discharging.

Clause 9 (Overtime)

Payment for overtime work shall be borne by the party who has given order for such overtime work. In case such order or instruction is given by and through the relating Port Authority and or other administrative authorities, the charterer shall be liable for such payment.

Clause 10 (Dues and Charges)

Dues and other charges levied on the cargo shall be borne by the charterer and those levied on the vessel, by the shipowner.

Clause 11 (Agency)

This Clause is the provision regarding the vessel agency at the ports of loading and discharging.

Clause 12 (Stevedore's Damage)

In coal trade, it is the general custom that any damage beyond ordinary wear and tear to any part of the vessel by stevedores at both ends shall be settled directly between the shipowner and the stevedores. This Clause provides that the charterer shall cooperate so that the case will be settled earlier.

Clause 13 (Deviation)

Provision of this Clause is same with the provisions of the Clause in other forms of the Exchange.

Clause 14 (Bill of Lading)

It is provided that the master shall sign the bill of lading with provisions relating to charterer's indemnity.

Clause 15 (Responsibilities and Exceptions)

So far as the shipowner's responsibility and immunity do concern, they should be the same both under the charter and the bill of lading. This Clause is provided, following the Clause 21 of "Orevoy" Charter, to make the provisions of the Hague Rules/Hague-Visby Rules applicable to the case between the shipowner and the charterer, under the charter as well. Either party shall not be liable against any loss, damage, delay and non-fulfilment of the present charter, arising from some specific cause or causes.

Clause 16 (Owner's Lien)

This Clause provides that the shipowner shall have a lien on the cargo for freight, etc., with the normal wordings of the lien clause. It is clearly provided that the charterer shall remain responsible for demurrage incurred at the port of discharge.

Clause 17 (Extra Insurance)

This Clause provides that any extra insurance on cargo on account of the vessel's age and or flag and or class shall be for the shipowner's account, provided however such extra insurance shall not exceed the lowest extra premium which would be charged for the vessel and voyage in the London insurance market, unless otherwise agreed.

Clause 18 (Sublet)

The charterer shall have the option of subletting whole or part of the vessel and the charterer shall at the same time remain responsible for due fulfilment of the original charter.

Clause 19 (Substitution)

This is a Clause in which the shipowner shall have liberty to substitute a vessel, with the charterer's prior approval.

Clause 20 (General Average)

This is of the normal pattern.

Clause 21 (Strike)

This Clause is based on General Strike Clause, with slight modifications.

The first paragraph of the General Strike Clause is deleted as it is overlapped with the provision for the mutual exceptions in Clause 15, in the lines 166 and after.

In the provision regarding strike (or lockout) occurred at the port of loading, it is provided that the grace of time of the characterer's declaration whether he agrees to count such time hindered by strike (or lockout) at laytime, is the period from receipt of the shipowner's request to the next business day.

In case where the charterer does make no declaration, the shipowner shall have his right of cancellation. It is further provided that, even in such case, the shipowner shall have his right to keep his vessel waiting on his own account until the time when the said strike (or lockout) comes to end.

In case strike (or lockout) begins after part of the cargo loaded, and the charterer does not agree to count such time hindered by strike (or lockout) as laytime, the shipowner shall proceed with the part cargo, but on the way he is entitled to complete with other cargo on his own account, with the wordings to avoid possible contamination if required.

Regarding the case where a strike (or lockout) occurs at the port of discharge,

it is provided that the charterer shall have an option of keeping the vessel waiting by the charterer's payment of the half of the demurrage unless the vessel has already been on demurrage, whether or not the said strike (or lockout) has continued longer than 48 hours, or option of ordering the vessel to discharge at another port.

When such substituted port is ordered to discharge the cargo, the shifting time to such port shall not be counted even if the vessel has already been on demurrage.

Clause 22 (Both to Blame Collision Clause)

Clause 23 (New Jason Clause)

These are the standard Clauses.

Clause 24 (Ice)

This Clause has been provided borrowing the wordings in Ice Clause of "Nipponore" Charter with a slight modification.

In case the loading port is feared of ice frozen, and the charterer who has been requested for a revised order does not give any orders within the next business day after receipt of request, the chartererparty shall become null and void.

Regarding a case the loading port meets with a fear of ice frozen after part of the cargo has been loaded, this Clause admits the right of the shipowner to complete with other cargo on the way, but with the same wordings of avoiding contamination as in the Strike Clause.

Clause 25 (War Risks)

This Clause adopts the provision regarding the provision of "Chamber of Shipping War Risks Clauses, 1952", with addition of the same wordings of avoiding contamination as in the Strike Clause, if he exercises his right to complete with other cargo on the way.

Clause 26 (War Clause)

This is the Clause which provides that the charter shall become null and void when a certain specific country indicated in Box 42 joins a war.

Clause 27 (Brokerage)

It is provided in this Clause that brokerage shall be paid even on demurrage according to the practice.

Clause 28 (Arbitration)

It is provided in this Clause that, unless otherwise agreed, any and all disputes arising from the charter shall be submitted to arbitration by the Japan Shipping Exchange, Inc. In case a place other than Tokyo is agreed in Box 44, arbitration shall be conducted in the place and by the law and procedures of the place which are so adopted.

English Forms of the Standard Contracts and Agreements Issued or Adopted by the Exchange and Approved Internationally in the World Maritime Business

BILL OF LADING	Code Name "SHUBILL – 1958" Amended August, 1972 Uniform Form, I C S
BILL OF LADING	Ibid. Copy
SHIPPING ORDER	Original
SHIPPING ORDER	Office Copy
SHIPPING ORDER	Extra Copy
MAIT'S RECEIPT (Original)	

Obtainable at cost, when ordered for a reasonable number of copies in lump sum sets, the name, address and other requisites will be printed at cost.

VOYAGE CHARTER PARTY
Code Name: NIPPONVOY 1963

UNIFORM GENERAL CHARTER Lay out 1966
Code Name: GENCON

NANYOZAI CHARTER PARTY
Code Name: NANYOZAI 1967

FIXTURE NOTE (NANYOZAI)

BEIZAI (American Logs/Lumber) CHARTER PARTY
Code Name: BEIZAI 1964

IRON ORE CHARTER PARTY
Code Name: NIPPONORE

FIXTURE NOTE (NIPPONORE)

TANKER VOYAGE CHARTER PARTY
Code Name: INTERTANKVOY 76

STANDARD VOLUME CONTRACT OF AFFREIGHTMENT
Code Name: VOLCOA

UNIFORM TIME-CHARTER
Code Name: BALTIME 1937

MEMORANDUM OF AGREEMENT
(Sale Contract of Ship)
Code Name: NIPPONSALE 1977

TOWAGE CONTRACT
Code Name: NIPPON TOW

STANDARD BAREBOAT CHARTER
BARECON 'A', BARECON 'B'

OPERATION CONTRACT
(UNKO ITAKU KEIYAKUSHO)
Code Name: ITAKU

SALVAGE AGREEMENT
(No Cure – No Pay)

Obtainable at cost
The Japan Shipping Exchange, Inc.

Address	Mitsui-Rokugokan, No. 8 Muromachi 2-Chome, Nihonbashi Chuo-ku, Tokyo, Japan
Telex No.	2222140 SHIPEX

Issued by The Documentary Committee of The Japan Shipping Exchange, Inc., Tokyo 26/8/1983.

THE DOCUMENTARY COMMITTEE OF THE JAPAN SHIPPING EXCHANGE, INC.

COAL CHARTER PARTY

CODE NAME "NIPPONCOAL"

1. Place and date	
2. Owners/Chartered Owners/Disponent Owners	3. Charterers
4. Vessel's name and type (also state kind of engine, and geared or gearless)	5. Flag / 6. Class
7. When built / 8. GRT/NRT	9. Length overall / 10. Breadth moulded
11. Depth moulded / 12. Total d.w. (about)	13. Summer draft / 14. Present position
15. Expected date of arr. (load) / 16. Laydays date (Cl.4)	17. Cancelling date (Cl.4)
18. Loading port(s)/berth(s) and permissible draft (Cl.1)	19. Discharging port(s) and permissible draft (Cl.1) Number of days for final nomination of destination (Cl.1)
20. Sailing telgr., advance notices and final notice of 24 hours prior to e.t.a. (load.) (also indicate when and to whom to be given) (Cl.3)	21. Advance notices prior to e.t.a. (disch.) (also indicate when and to whom to be given) (Cl.3)
22. Notice of readiness (load.) (indicate when and to whom to be given), (state whether SHEX or SHINC), (indicate (a) or (b) regarding waiting for berth) (Cl.5)	23. Notice of readiness (disch.) (indicate when and to whom to be given) (state whether SHEX or SHINC), (indicate (a) or (b) regarding waiting for berth) (Cl.5)
24. Number of hours' notice time (load.) (Cl.5)	25. Number of hours' notice time (disch.) (Cl.5)
26. Loading rate per day of 24 run. hours (state whether SHEX unless used or SHINC) (Cl.5)	27. Discharging rate per day of 24 run. hours (state whether SHEX unless used or SHINC) (Cl.5)
28. Demurrage rate (load.) (Cl.7 & 24) / 29. Despatch Money (load.) (Cl.7)	30. Demurrage rate (disch.) (Cl.7) / 31. Despatch Money (disch.) (Cl.7)
32. Demurrage and/or Despatch Money to be settled at (time and place) & in (currency) (load.) (Cl.7)	33 Demurrage and/or Despatch Money to be settled at (time and place) & in (currency) (disch.) (Cl.7)
34. Agents (load.) (Cl.11)	35. Agents (disch.) (Cl.11)
36. Description and quantity of cargo in bulk; also state margin percentage more or less in Owners' option (Cl.1)	
37. Freight rate per metric ton or long ton (Cl.2)	38. Mode of freight payment (Cl.2)
39 State the means by which B/L weight to be decided, if other than draft survey is agreed (Cl.2)	40. Maximum amount of extra insurance (Cl.17)
41. General Average to be adjusted and settled at & in (currency) (Cl.20)	42. War cancellation (state countries if Cl. 26 (a) applicable)
43. Brokerage Commission and to whom payable (Cl.27)	44. Place of Arbitration (optional) (Cl. 28) 45. Numbers of additional clauses attached, if any

PREAMBLE. It is this day mutually agreed between the Owners/Chartered Owners/Disponent Owners indicated in Box 2 above (in any case hereinafter referred to as the Owners) of the Vessel with particulars indicated above, now in a position as indicated in Box 14 and expected ready to load under this charterparty on the expected date of arrival indicated in Box 15 at the (first) loading port and the party mentioned as Charterers in Box 3 that the carriage under this charterparty shall be performed in accordance with the terms and conditions contained in the "Nipponcoal" Charter Party which shall include Page 1 with boxes filled in as above including possible additional clauses attached as indicated in Box 45 and Pages 2 to 4 with clauses 1 to 28 (including arbitration clause), and that typewritten provisions of Page 1 hereof shall prevail over the printed provisions of Pages 2 to 4 to the extent of any conflict between them.

For the Owners	For the Charterers

Adopted by The Documentary Council of The Baltic and International Maritime Conference (BIMCO), Copenhagen.

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1. Port of Loading, Cargo, Port of Discharge.
The said Vessel, being suitable for mechanical loading and grab discharge, shall with all convenient speed sail and proceed to the loading port or ports inserted in Box 18, and there load, always safe and afloat provided that the Vessel's draft does not exceed the permissible draft as indicated in Box 18, in the customary manner, as and where ordered by the Agents of the Charterers a full and complete cargo as described in Box 36. Being so loaded the Vessel shall therewith proceed with all convenient speed to the discharging port or ports inserted in Box 19 as ordered on signing Bills of Lading, but the Charterers shall latest number of days as indicated in Box 19 before the Vessel's expected arrival at the port of discharge have liberty to require the Owners to order the Vessel to another port named herein or within the range specified herein by telegram or radio, and there discharge the cargo always safe and afloat provided that the Vessel's draft does not exceed the permissible draft as indicated in Box 19, as customary alongside any wharf and/or craft as directed by the Charterers.

2. Freight.
Freight shall be prepaid on Bill of Lading weight as per Boxes 37 and 38.
Unless otherwise stated in Box 39, Bill of Lading weight shall be decided by means of the Vessel's draft survey by a licensed marine surveyor at the port or ports of loading appointed by the Charterers and such fees are free to the Owners.
Freight to be considered as earned and non-returnable upon completion of loading, the Vessel and/or the cargo lost or not lost.

3. Sailing Telegrams.
On sailing from the last port for the port of loading the Owners or the Master shall telegraph to the party as indicated in Box 20 stating expected date of arrival and approximate holdwise loadable quantity of the cargo.
Notice of expected arrival. The Master shall also give radio notices prior to the Vessel's expected time of arrival at the port or ports of loading as per Box 20.
The Owners or the Master shall telegraph prior to the Vessel's expected time of arrival at the port or ports of discharge as per Box 21.

4. Laydays and Cancelling Date.
Laydays not to commence before the date as indicated in Box 16.
The Charterers shall have the option of cancelling this charterparty if the Vessel be not ready to load on or before the cancelling date as indicated in Box 17. If it appears that the Vessel will be delayed beyond the cancelling date, the Owners may ask the Charterers by telegram whether they will exercise their option of cancelling this charterparty. Such option shall be declared at least 48 hours before the Vessel's expected time of arrival at the port of loading.

5. Loading and Discharge.
Notice of readiness, Commencement of laytime. Laytime for loading or discharge to commence at the elapse of number of hours as indicated in Box 24 or 25 after the Vessel is in all respects ready to load or discharge and notice of readiness to load or discharge is given as per Box 22 or 23.

Indicate either (a) or (b) in Box 22 and Box 23. If no indication is made, (a) is to apply.

(a) If loading or discharging berth be occupied and the Vessel be compelled to wait for berth on the Vessel's arrival at or off the port of loading or discharge or so near thereto as she may be permitted to approach, the Vessel shall be entitled to give notice of readiness after arrival there provided that free pratique has been granted. But, if the Vessel be compelled to wait for berth outside the quarantine area by an order of port authorities, the Vessel shall be entitled to give notice of readiness after arrival at the waiting place subject to free pratique being granted prior to or on arrival at berth. Actual time occupied in moving from place of waiting to loading or discharging berth not to count as laytime.
(b) If loading or discharging berth is not available on the Vessel's arrival at or off the port of loading or discharge or so near thereto as she may be permitted to approach, the Vessel shall be entitled to give notice of readiness on arrival there with the effect that laytime counts as if she were in berth and in all respects ready for loading or discharging provided that the Master warrants that she is in fact ready in all respects. Actual time occupied in moving from place of waiting to loading or discharging berth not to count as laytime. If after berthing the Vessel is found not to be ready in all respects to load or discharge, the actual time lost from the discovery thereof until she is in fact ready to load or discharge shall not count as laytime.

If the loading or discharge be commenced earlier, laytime shall count from actual commencement.
Time for loading or discharge. Cargo to be loaded and discharged, respectively, at the average rate as stated in Box 26 or 27, weather permitting. Laytime for loading and discharge, respectively, to be calculated on the basis of Bill of Lading weight decided as per clause 2 at the port or ports of loading.
Laytime for loading and discharge to be non-reversible.

6. Time and Expense for Opening and Closing Hatches.
The operation of first opening and last closing of hatches at each loading and discharging port or berth always to be done at the Owners' time, risks and expenses.

7. Demurrage and Despatch Money.
Demurrage to be paid to the Owners at the rate as stated in Box 28 as to loading and in Box 30 as to discharging per day of 24 running hours or pro rata for any part thereof for all time used in excess of laytime at the port or ports of loading and/or discharge.
Despatch Money to be paid to the Charterers at the rate as stated in Box 29 as to loading and in Box 31 as to discharging per day of 24 running hours or pro rata for any part thereof for laytime saved at the port or ports of loading and/or discharge.
Demurrage and/or Despatch Money at the port or ports of loading to be settled as per Box 32 and at the port or ports of discharge as per Box 33.

8. Free In and Out.
The Charterers to load, dump, spout-trim to the Master's satisfaction and discharge the cargo free of risks and expenses to the Owners. The Charterers to have the liberty of working all available hatches as determined by the Master. The Vessel, if required, to supply light for night work on board free of expenses to the Charterers.

9. Overtime.
Overtime for loading and discharging to be for account of the party ordering the same. If overtime be ordered by Port Authorities or any Governmental Agencies, the Charterers to pay extra expenses incurred. Officers' and crew's overtime charges always to be paid by the Owners.

10. Dues and Charges.
Dues and other charges levied against the cargo shall be paid by the Charterers, and dues and other charges levied against the Vessel shall be paid by the Owners.

11. Agency.
At the port or ports of loading the Vessel to be consigned to the Agents as stated in Box 34 and at the port or ports of discharge to the Agents as stated in Box 35.

12. Stevedore Damage.
Any damage (beyond ordinary wear and tear) to any part of the Vessel caused by stevedores at both ends shall be settled directly between the Owners and stevedores, and the Charterers shall cooperate for early settlement of the damage.

13. Deviation.
The Vessel shall have liberty to call at any ports en route, to sail with or without pilots, to tow and to be towed, to assist vessels in distress, and to deviate for the purpose of saving life and/or property or for bunkering purposes or to make any reasonable deviation.

14. Bills of Lading.
The Master shall sign Bills of Lading as presented without prejudice to this charterparty. The Charterers shall indemnify the Owners if the Owners are held liable under the Bills of Lading in respect of any claim for which the Owners are not liable towards the Charterers under this charterparty.

15. Responsibilities and Exceptions.
The Hague Rules contained in the International Convention for the Unification of certain rules relating to Bills of Lading, dated Brussels the 25th August 1924 as enacted in the country of shipment shall apply to this charterparty and to any Bill of Lading issued hereunder.
When no such enactment is in force in the country of shipment, the corresponding legislation of the country of destination shall apply, but in respect of shipments to which no such enactments are compulsorily applicable, the terms of the said Convention shall apply.
In trades where the International Brussels Convention 1924 as amended by the Protocol signed at Brussels on February 23rd, 1968 – The Hague-Visby Rules – apply compulsorily, the provisions of the respective legislation shall apply.
The Owners shall in no case be responsible for loss of or damage to cargo howsoever arising prior to loading into and after discharge from the Vessel or while the goods are in the charge of another owner nor in respect of deck cargo and live animals.
Save to the extent otherwise in this charterparty expressly provided, neither party shall be responsible for any loss or damage or delay or failure in performance hereunder resulting from Act of God, war, civil commotion, quarantine, strikes, lockouts, arrest or restraint of princes, rulers and peoples or any other event whatsoever which cannot be avoided or guarded against.

16. Owners' Lien.
The Owners shall have a lien on the cargo for freight, dead-freight, demurrage and damages for detention. The Charterers shall remain responsible for dead-freight and demurrage (including damages for detention), incurred at port of loading and shall also remain responsible for freight and demurrage (including damages for detention) incurred at port of discharge.

17. Extra Insurance.
Any extra insurance on cargo on account of the Vessel's age and/or flag and/or class shall be for the Owners' account. Unless a maximum amount has been agreed in Box 40, such extra insurance shall not exceed the lowest extra premium which would be charged for the Vessel and voyage in the London insurance market.

18. Sublet.
The Charterers shall have the option of subletting whole or part of the Vessel, they remaining responsible for due fulfilment of this charterparty.

19. Substitution.
The Owners shall have liberty to substitute a vessel, provided that such substituted vessel's main particulars and position shall be subject to the Charterers' prior approval, which is not to be unreasonably withheld.

20 General Average.
General average to be adjusted and settled according to York-Antwerp Rules, 1974 as per Box 41.

21. Strike.
If there is a strike or lock-out affecting the loading of the cargo, or any part of it, when the Vessel is ready to proceed from her last port or at any time during the voyage to the port or ports of loading or after her arrival there, the Master or the Owners may ask the Charterers to declare, that they agree to reckon the laytime as if there were no strike or lock-out. Unless the Charterers have given such declaration in writing (by telegram, if necessary) within the next business day after receipt of the request, the Owners shall have the option of cancelling this charterparty. If part cargo has already been loaded and the Charterers have not given such declaration, the Owners must proceed with same, (freight payable on loaded quantity only) having liberty to complete with other cargo on the way for their own account in which case separation, if required for avoiding contamination, to be at the Owners' risks and expenses.
In any event, however, the Owners are entitled to keep the Vessel waiting at the loading port without time counting.
If there is a strike or lock-out affecting the discharge of the cargo on or after the Vessel's arrival at or off the port of discharge, the Charterers shall have the option of (a) keeping the Vessel waiting against paying half demurrage without time counting until the moment when such strike or lock-out is at an end (unless the Vessel is already on demurrage in which event full demurrage remains payable), or (b) ordering the Vessel to a safe port where she can safely discharge without risk of being detained by strike or lock-out. On delivery of the cargo at such port, all conditions of this charterparty shall apply and the Vessel shall receive the same freight as if she had discharged at the original port of destination, except that if the distance of the substituted port exceeds 100 nautical miles, the freight on the cargo delivered at the substituted port to be increased in proportion. Shifting time between ports not to count even if the Vessel is already on demurrage.

22. Both-to-Blame Collision Clause.
If the Vessel comes into collision with another ship as a result of the negligence of the other ship and any act, neglect or default of the Master, Mariner, Pilot or the servants of the Owners in the navigation or in the management of the Vessel, the owners of the cargo carried hereunder will indemnify the Owners against all loss or liability to the other or non-carrying ship or her owners in so far as such loss or liability represents loss of, or damage to, or any claim whatsoever of the owners of said cargo, paid or payable by the other or non-carrying ship or her owners to the owners of said cargo and set-off, recouped or recovered by the other or non-carrying ship or her owners as part of their claim against the carrying Vessel or the Owners. The foregoing provisions shall also apply where the Owners, operators or those in charge of any ship or ships or objects other than, or in addition to, the colliding ships or objects are at fault in respect of a collision or contact. Charterers shall procure that all Bills of Lading issued under this charterparty shall contain this clause.

23. New Jason Clause.
In the event of accident, danger, damage, or disaster before or after commencement of the voyage resulting from any cause whatsoever, whether due to negligence or not, for which or for the consequence of which the Owners are not responsible by statute, contract or otherwise, the cargo, shippers, consignees, or owners of the cargo shall contribute with the Owners in general average to the payment of any sacrifices, losses or expenses of a general average nature that may be made or incurred, and shall pay salvage and special charges incurred in respect of the cargo. If a salving ship is owned or operated by the Owners, salvage shall be paid for as fully as if the salving ship or ships belonged to strangers. Such deposit as the Owners or their agents may deem sufficient to cover the estimated contribution of the cargo and any salvage and special charges thereon shall, if required, be made by the cargo, shippers, consignees, or owners of the cargo to the Owners before delivery. Charterers shall procure that all Bills of Lading issued under this charterparty shall contain this clause.

24. Ice.
In the event of the loading port being inaccessible by reason of ice when the Vessel is ready to proceed from her last port or at any time during the voyage or on the Vessel's arrival or in case frost sets in after the Vessel's arrival, the Master, for fear of the Vessel being frozen in, shall proceed to the nearest safe and ice-free position and at the same time request the Charterers by radio for revised orders. Unless the Charterers have given such orders within the next business day after receipt of request, this charterparty shall become null and void. Where loading is made at any port or ports or place or places in accordance with the revised orders, freight shall be increased or decreased in proportion and in addition any period by which the time taken to reach such port or ports or place or places exceeds the time which would have been taken had the Vessel proceeded there direct shall be paid for by the Charterers at the rate of demurrage as specified in Box 28 per day of 24 running hours or pro rata for any part thereof, plus the cost of any additional bunkers consumed, all other conditions as per this charterparty.
If during loading the Master, for fear of the Vessel being frozen in, deems it advisable to leave, he has the liberty to leave the port with whatever quantity of cargo he has on board, and must proceed to the destination with the said cargo on board, (freight payable on loaded quantity only), having liberty to complete with other cargo on the way for the Owners' account, in which case separation, if required for avoiding contamination, to be at the Owners' risks and expenses.
In case of ice preventing the Vessel from reaching or entering the port of discharge, the Charterers shall have the option of keeping the Vessel waiting until the reopening of navigation paying demurrage, or of ordering the Vessel to safe and immediately accessible nearby port or ports where she can safely discharge without risk of detention on account of ice. Such orders to be sent within 48 hours after receipt of the Master's telegraphic information to the Charterers of the impossibility of reaching the port or ports of destination. On delivery of the cargo at such port or ports, all conditions of this charterparty shall apply and the Vessel shall receive the same freight as if she had discharged at the original port or ports of destination, except that if the additional sailing distance exceeds 100 nautical miles, the freight on the cargo delivered at the substituted port or ports to be increased in proportion.

25. War Risks.
1. The Master shall not be required or bound to sign Bills of Lading for any blockaded port or for any port which the Master or the Owners in his or their discretion consider dangerous or impossible to enter or reach.
2. (a) If any port of loading or of discharge named in this charterparty or to which the Vessel may properly be ordered pursuant to the terms of the Bills of Lading be blockaded, or (b) if owing to any war, hostilities, warlike operations, civil war, civil commotions, revolutions, or the operation of international law i) entry to any such port of loading or of discharge or the loading or discharge of cargo at any such port be considered by the Master or the Owners in his or their discretion dangerous or prohibited or ii) it be considered by the Master or the Owners in his or their discretion dangerous or impossible for the Vessel to reach any such port of loading or of discharge — the Charterers shall have the right to order the Vessel or the cargo or such part of it as may be affected to be loaded or discharged at any other safe port of loading or of discharge within the range of loading or discharging ports respectively established under the provision of this charterparty (provided such other port is not blockaded or that entry thereto or loading or discharge of cargo thereat is not in the Master's or the Owners' discretion dangerous or prohibited). If there is no range of loading ports agreed this charterparty to be considered cancelled for the voyage in question.
If part cargo has already been loaded and no range of loading ports being agreed, the Owners must proceed with same, (freight payable on loaded quantity only) having liberty to complete with other cargo on the way for their own account in which case separation, if required for avoiding contamination, to be at the Owners' risks and expenses.
If in respect of a port of discharge no orders be received from the Charterers within 48 hours after they or their Agents have received from the Owners a request for the nomination of a substitute port, the Owners shall then be at liberty to discharge the cargo at any safe port which they or the Master may in their or his discretion decide on (whether within the range of discharging ports established under the provisions of this charterparty or not) and such discharge shall be deemed to be due fulfilment of this charterparty so far as cargo so discharged is concerned.
In the event of the cargo being loaded or discharged at any such other port within the respective range of loading or discharging ports established under the provisions of this charterparty, this charterparty shall be read in respect of freight and all other conditions whatsoever as if the voyage performed were that originally designated.
In the event, however, that the Vessel discharges the cargo at a port outside the range of discharging ports established under the provisions of this charterparty, freight shall be paid as for the voyage originally designated and all extra expenses involved in reaching the actual port of discharge and/or discharging the cargo thereat shall be paid by the Charterers or cargo owners. In this latter event the Owners shall have a lien on the cargo for all

such extra expenses. 367
3. The Vessel shall have liberty to comply with any directions or recommendations as to departure, arrival, routes, ports of call, stoppages, destinations, zones, waters, delivery or in any otherwise whatsoever given by the government of the nation under whose flag the Vessel sails or any other government or local authority including any de facto government or local authority or by any person or body acting or purporting to act as or with the authority of any such government or authority or by any committee or person having under the terms of the war risks insurance on the Vessel the right to give any such directions or recommendations. If by reason of or in compliance with any such directions or recommendations, anything is done or is not done such shall not be deemed a deviation. 368–380
If by reason of or in compliance with any such direction or recommendation the Vessel does not proceed to the port or ports of discharge originally designated or to which she may have been ordered pursuant to the terms of the Bills of Lading, the Vessel may proceed to any safe port of discharge which the Master or the Owners in his or their discretion may decide on and there discharge the cargo. Such discharge shall be deemed to be due fulfilment of this charterparty and the Owners shall be entitled to freight as if discharge has been effected at the port or ports originally designated or to which the Vessel may have been ordered pursuant to the terms of the Bills of Lading. All extra expenses involved in reaching and discharging the cargo at any such other port of discharge shall be paid by the Charterers and/or cargo owners and the Owners shall have a lien on the cargo for freight and all such expenses. 381–395

26. War Clause. 396
(Section **(a)** *and* **(b)** *are optional but section* **(b)** *to apply if section* **(a)** *not specifically agreed in Box 42.)* 397–398
(a) In the event of war involving two or more of the countries as indicated in Box 42, either party to have the right to cancel this charterparty. 399–401
(b) If a world war breaks out or a situation arises that is similar to a world war, either party shall have the right to cancel this charterparty. 402–404

27. Brokerage. 405
A commission of the number of percentage as stated in Box 43 on the earned amount of freight, dead-freight and demurrage is payable by the Owners as per Box 43. 406–408

28. Arbitration. 409
Unless otherwise indicated in Box 44, any dispute arising from this charterparty shall be submitted to arbitration held in Tokyo by the Japan Shipping Exchange, Inc., in accordance with the provisions of the Maritime Arbitration Rules of the Japan Shipping Exchange, Inc., and the award given by the arbitrators shall be final and binding on both parties. 410–415
If any place other than Tokyo is indicated in Box 44, any dispute arising from this charterparty shall be referred to Arbitration at the place or before the arbitration tribunal indicated in Box 44, subject to the law and procedures applicable there. 416–419

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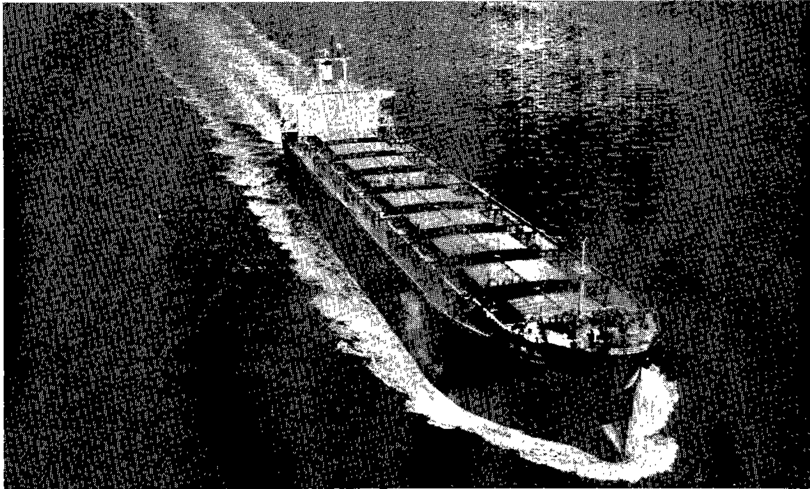

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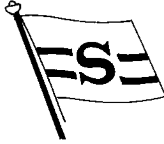

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