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CONTENTS

VIIIth ICCA International Arbitration Congress - New York, May 6 - 9, 1986

The International Council for Commercial Arbitration (ICCA) will hold its VIIIth International Arbitration Congress in New York, in the Waldorf Astoria Hotel, from May 6 to May 9, 1986. The American Arbitration Association was invited to be the Host Organization. (140 West 51st Street, New York, N.Y. 10020; U.S.A.: Phone: (212) 484-4000; telex 12463).

The Congress will have two working groups: Comparative Practice, and The Impact of Public Policy, in each of which four Rapporteurs will highlight the various aspects of the subject. In addition, several commentators will further elaborate the picture by short presentations on the law and practice of the country, or group of countries, represented by them.

Comparative Practice - this working group will consider a number of specific practical questions based on a hypothetical case, which has been prepared by a common law lawyer, Howard M. Holtzmann, and a civil law lawyer, Giorgio Bernini. The presentation for this working group will be made by four Rapporteurs, one from a Socialist country (Serguei N. Lebedev - President, Maritime Arbitration Commission at the USSR Chamber of Commerce and Industry, Moscow); one from a civil law country (Sigvard Jarvin, - General Counsel, ICC Court of Arbitration, Paris); one with British common law experience (J. Martin H. Hunter - Solicitor, London) and one with American common law experience (Michael F. Hoellering - General Counsel, American Arbitration Association, New York).

The Impact of Public Policy - in this working group, the four Rapporteurs will each discuss a separate topic: Public Policy and the Arbitrability of Disputes (Karl - Heinz Boeckstiegel - President, Iran - U.S. Tribunal, The Hague; Professor at the University of Cologne); Public Policy and Arbitration Procedure (Stephen Schwebel - U.S. Judge, International Court of Justice, The Hague); Application by Arbitrators of National Public Policy Rules to the Substance of the Dispute (Yves Derains - lawyer, Paris); and the Arbitrator and the Truly International Public Policy (Pierre Lalive - Professor at the University of Geneva).

Disclosure of Candidates for Arbitrator(s) and Creation of Simplified Arbitration System

— Tokyo Maritime Arbitration Commission of The Japan Shipping Exchange, Inc. Revises the Arbitration Rules!!

As of July 1, 1985, the Tokyo Maritime Arbitration Commission of The Japan Shipping Exchange, Inc. (hereinafter the "Commission") amended Section 14 of the Maritime Arbitration Rules which concerns the appointment of arbitrators, and created "Rules of Simplified Arbitration Procedures" as a supplement to the Rules of Maritime Arbitration of The Japan Shipping Exchange, Inc. These two points are outlined below.

[I] Addition of Disclosure System to Section 14 of the Rules of the Maritime Arbitration

1. Appointment of arbitrators under Section 14 before revision

There were two methods;

(a) In the event that the parties agreed to arbitration in the arbitration clause or arbitration agreement by using such comprehensive language as "resort to arbitration by the Japan Shipping Exchange, Inc." or "resort to arbitration by the Rules of Maritime Arbitration of the Japan Shipping Exchange, Inc.", the Commission examined the Application for Arbitration filed by the Claimant, and the Defense submitted by the Respondent (including the Application of the Respondent if the Respondent also filed on Application for Arbitration of a counterclaim arising out of the same cause) and appointed an odd number of arbitrators selected from the list of the Panel of

Members of the Commission (1) who had no connection with either of the parties or with the matter in dispute, and (2) who had the optimum expertise in relation to the nature of the matter in dispute. If no such person(s) were found on the Panel, they could be selected from among those residing in Tokyo (irrespective of their nationality) and meeting the above standards.

(b) If, in addition, the arbitration clause or arbitration agreement specifically provides that "the parties shall themselves appoint the arbitrators", then the parties were to do so. Such arbitrators, however, were to be selected from among those listed in the Panel of the Commission. (The reason why the appointees are limited to the Panel of the Commission is to enable parties who opt for arbitration by the Shipping Exchange to benefit fully from the arbitration system.)

Under (a) or (b) above, the arbitrators conducted their arbitration proceedings independently of the Shipping Exchange and of the Commission. Although there would generally be assigned two clerks of the Shipping Exchange as assistants to the arbitrators at the tribunal, they are bount to keep the matter confidential until the matter is resolved and a fair and just examination carried out.

2. Why Institutional Arbitration?

In most cases, the arbitrators are selected by method (a). In addition, almost all maritime arbitrations in Japan are assigned to the Shipping Exchange, and there are hardly any ad hoc cases. The likely reasons for this are given below.

(a) The Japan Shipping Exchange is one of the leading institutions for drafting maritime contract forms, which presently number 43. Drafting of any one of the forms involves participation by representatives with practical experience in the related industrial fields and sufficient time is spent and

detailed discussions undertaken before publication. Those who have participated in drafting such forms are usually appointed as members of the Commission. Thus, arbitration by the Japan Shipping Exchange is one with "arbitrators who are merchants with expertise in the trade", and their expertise is highly valued.

As of the end of June, 1985 there were 226 members of the Commission; about 200 are first class men of practical knowledge and experience selected from such areas of the industry as the shipping, shipbuilding, trade, marine insurance, and shipping brokerage, and the rest are academics and lawyers.

(b) In countries like Japan which adopt statutory law, the laws tend to lag behind business practices and manners which are universally accepted as reasonable, and this lag may be caught up with by appointing merchants as arbitrators.

(c) There is no independent arbitration law in Japan, and there are only twenty articles related to arbitrations in Volume 8 of the Code of Civil Proceedings. As is illustrated in the procedure for appointing arbitrators, there is not enough support by the court, and an arbitration tends to end in failure if it is conducted ad hoc. Therefore, arbitration by a standing arbitration institution which always has detailed arbitration rules ready and well prepared is required.

3. The Commission shall Disclose Candidates to the Parties before Appointing Arbitrators (The main point of the current revision)

The current revision incorporates a system of disclosing candidates to the parties in method (a) before appointment of arbitrators by the Commission. Except for introduction of this disclosure, the system remains unchanged. Paragraph 1 of Section 14 as revised defines method (a) to which the disclosure system has been added and Paragraph 2 method (b) which is unchanged.

Introduction of the disclosure system was triggered by the questionnaire survey conducted among those who relied on arbitration by the Japan Shipping Exchange. The survey indicated that the method of selecting arbitrators by a third party organ such as the Commission was valued as (1) it ensures that the arbitration will be conducted by fair and smooth procedures, and (2) consistency and justice can be attained by the publication of arbitration awards by the Commission; but that since arbitration itself is a voluntary means of the parties to resolve disputes, provision of room for the parties to participate in the process of selection of arbitrators was needed.

4. Disclosure of Candidates and Appointment of Arbitrators

At its General Assembly, the Arbitration Commission appoints for a term of 1 year a Committee of up to 20 members for selecting arbitrators, and the "Committee for Appointing Arbitrators" is convened when an arbitration application is accepted and the Defense by the Respondent has been submitted (about 3 weeks after acceptance).

The Committee shall examine the Application and the Defense carefully, and select candidates (1) who have no connection with either of the parties or with the matter in dispute, and (2) who would make up a tribunal capable of examining the matter from every angle. As a rule, the candidates are selected from among the members of the Commission, but they may be selected from outside (irrespective of their nationality) if suitable person(s) are not found on the panel.

Three candidates who have the same kind of expertise are selected in each of 3 groups if the tribunal is to be made up of three arbitrators, which is usually the case. Therefore, there will a total of 9 candidates.

Suppose in a matter concerning a time charter, we have a case where the speed deficiency of a vessel is said to be a breach of the contract, the charterer asserts that the underpreformance in excess of a certain percent was a violation of the contract, the shipowner asserts that the fuel oil supplied by

the charterer was a low calorie oil and therefore reduced the engine efficiency and thus the shipowner was not responsible for the slow speed.

If there are to be three arbitrators, in one group there will be three candidates who are scientists capable of investigating the relation between the calorific value of fuel oil and the efficiency of the ship's engine. Another group would comprise three men of knowledge who can elucidate the matter of the slow speed in the light of legal decisions, and another group will comprise those experienced in time charters.

Each of the parties may rank the three candidates of each group in the order of their preference, and may also reject one candidate from each group. If no order of preference is given, then all three will be considered to be acceptable.

The Committee for appointing the arbitrators considers the preference of the parties and finally selects one arbitrator from each of the three groups.

[II] Creation of Simplified Arbitration System

There are maritime disputes concerning time charters extending 4 to 5 years, and consecutive voyage charters which extend from 1 to 2 years. During the currency of such contracts, at any time and in respect of any particular voyage expenses may be incurred, the liability for which is not clearly stated. If the owners and charterers differ in opinion concerning such expenses, this may, depending on the portion of the contract still remaining, lead to a large scale dispute even though the amount involved may be small. This is because the cost may accumulate to a large amount thereafter.

For instance, a sudden change in the regulations at a port of regular call may cause the vessel in question to anchor offshore instead of at the quay. This results in an increased burden of the costs of going ashore for the crew. There are no problems when landing on a privately hired boat, but when the landing combines business as well or when the shipowner gets a ride on the boat, the

problem of who is to pay the hire for the boat arises. Or in the event of a defect being unexpectedly found in the vessel upon delivery under a ship purchase contract, the seller may make a discount from the ship's price rather than delay the delivery date and incur accommodation costs for the crew who came to take over the ship. In such a case, a dispute over the discount can arise.

In the above mentioned examples, the contracts themselves are continuing and arbitration or mediation by the arbitrators with extensive experience in such transactions is sought to obtain fair and unbiased judgements.

In such cases, if an application for arbitration by either or both parties is made based on a clause in the contract reading "by arbitration by the Japan Shipping Exchange" or according to an arbitration agreement separately concluded, the application is accepted and arbitration proceedings initiated at any time. This is the same as arbitrations conducted by the ordinary Rules.

However, we have decided to create Rules of Simplified Arbitration as a supplement to the current Rules of Maritime Arbitration, and to accept application for simplified arbitration if the "Application Form for Simplified Arbitration" available at the Exchange or one similar thereto is used. Provided, however, that the amount of damages is limited to ¥15,000,000 or the equivalent in foreign currency.

The duplicate of the statement of claim in simplified arbitration (with copies of the documentary evidence, if attached) will be immediately forwarded to the opponent by the Exchange Office, and if the opponent files a "Defense in Simplified Arbitration", which is also available at the Exchange, within 15 days from the mailing date of the duplicate, then the parties are deemed to have agreed to arbitration by the simplified arbitration procedure.

If the response is not made by using the above mentioned form, then the case will be an ordinary arbitration by the Exchange.

If it concerns the same matter, the respondent is allowed to file an application procedure concerning a counterclaim. The procedure is the same as above mentioned. If the Claimant who first filed for the simplified arbitration does not reject this — that is, if he files a response thereto under the simplified

arbitration —, then the two applications are combined for examination. In such a case, the total sum demanded by both parties may exceed ¥15,000,000.

If the Claimant rejects simplified arbitration in respect of the counterclaim, the case including the first filed one will be examined as an arbitration under the ordinary arbitration rules.

The Claimant has to submit the statement and evidence, if any, within 10 days counting from the date of service of the duplicate of the statement of response to simplified arbitration.

Neither party is required to submit further statements, but they will be asked to make oral statement to the arbitrators at the hearing.

As for the appointment of arbitrators, the Tokyo Maritime Arbitration Commission of the Exchange will review the application and response, and appoint an odd number of arbitrators (one or three) who have no connection with either of the parties or with the matter in dispute. The Arbitrators will then proceed with the arbitration independently of the Exchange and the Commission. Within 35 days from the date when the statement of the Claimant is submitted or should have been submitted, whichever is earlier, the arbitrators should organize hearings.

Separate hearings are organized for each party — consideration being given to the fact that one or both parties may not be represented by attorneys as Japanese arbitration does not require appointment of an attorney —, and the hearing is concluded with both parties present. The first hearing is given in two sessions, one in the morning and the other in the afternoon for each party, and the hearing may be concluded on the following day with the two parties present. The above mentioned 35 days is a restrictive period on the hearing, suggesting although indirectly, that the hearing is given during a short and concentrated period of time.

Within 30 days following the conclusion of the examination, the Award is made. The Award will be in writing, and consists of the main text and the reasons in simple form.

If a request for mediation is submitted by a party during examination of

the matters in dispute, the arbitrators will try to mediate a conciliation if they deem it reasonable. However, such mediation efforts shall last a maximum of 50 days. This is to prevent a party from requesting mediation with the purpose of wilfully delaying the arbitration procedure.

We shall now explain the costs of simplified arbitration. The applicant for simplified arbitration must pay the engagement fee of ¥100,000 to the Office with the application. (If the other party does not agree to the simplified arbitration as mentioned above, the matter will be treated as an ordinary arbitration with the engagement fee of ¥100,000, and the amount paid will be appropriated to this fee).

The applicant must pay the Office the arbitration costs according to the tariff; ¥490,000 for a claim of up to ¥5 million, ¥525,000 for a claim of ¥5 million to ¥10 million, ¥560,000 for a claim of ¥10 million to ¥15 million, and for an amount exceeding in aggregate ¥15 million, in the case of combined examination, then 90% of the ordinary arbitration costs. The money thus paid shall be the arbitration fee including the compensation to the arbitrators. Thus, this is very economical arbitration. Provided, however, that translation fees of not exceeding ¥200,000 will be charged when a true copy of the arbitration award in the English language is desired.

Arbitration in English may be requested subject to payment of the above mentioned extra charge for translation.

How to Arrest Unregistered Ships in Japan

Tameyuki HOSOI
Bengoshi (Attorney at Law) Licensed throughout Japan

Introduction

One of the most exciting moments for a maritime lawyer is when he tries to arrest a ship. You can imagine how the master or the captain of a ship feels when he is told by the court marshal that his ship is under arrest. Some masters become very upset and others overreact and try to refuse the court marshal entry to their cabins. Both foreign and Japanese ships are legally subject to arrest proceedings under Japanese law, and it is theoretically possible to arrest a ship which has already been constructed but has not yet been registered: in practice, however, it is rather difficult and complicated.

Registration of the Court Order for Arrest

When a ship registered in Japan is to be arrested, the court order for her arrest must be entered into the ship's registration book, as otherwise the court order will eventually be cancelled. This can easily be carried out in the normal manner by means of a notice sent by the court to the Japanese Ministry of Justice, which has jurisdiction over the registration of ships. In the case of a foreign-registered ship, no such procedure is necessary, and no great difficulty will be encountered when arranging for her arrest.

However, if a ship is not registered (either in Japan or abroad), then it is the claimant who should make arrangments for ship's register to be opened, for and on behalf of the owner or the dockyard, in which the ship's arrest order will

be entered. A typical situation where this might occur is when a creditor has some claim rights against a dockyard that has almost or completely finished building a ship, but which has not yet delivered it to the owner, and when the dockyard has no other assets from which the creditor can recover his claims.

The creditor may have the right to attach or arrest the ship belonging to the dockyard before the ship is delivered to the owner. After the ship is delivered to the owner, the proprietorial rights of the ship usually shift from the dockyard to the shipowner, in which situation the creditor will have no right to attach what is now an asset, not of the dockyard, but of the shipowner.

Documents Necessary to Open a Registration Book

To arrest an unregistered ship, the creditor needs, in addition to various other documents to support his claim against the dockyard, the following documents:

a) The dockyard's company registration certificate

b) All the company directors' local government registration certificates of residence ("Juminhyo" in Japanese).[1] According to the law, all the directors of a company which owns a Japanese flag vessel must be Japanese nationals.

c) "Sempaku Kenmeisho (Tohon)" in Japanese – a certificate from Japan's Marine Transport Bureau as to the ship's existence, specifications, etc.[2]

d) A certificate, issued by the branch of the Ministry of Justice which has jurisdiction over the area where the ship was built, to certify that the ship in question has not yet been registered. This is to avoid double registration if the dockyard is not situated in the prospective port of registry.

e) A document which shows the structure, etc. of the ship.[3] Under normal circumstances this is prepared by the dockyard.

You will now note that some of the above documents may prove hard for the

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1 (Sempaku Toki Kisoku, Section 19, Sub-section 1)
2 (Sempaku Toki Kisoku, Section 16)
3 (Sempaku Toki Kisoku, Section 15-2)

creditor to obtain since they are generally prepared by the dockyard, which is now your opponent.

Sempaku Kenmeisho

In particular, you should note how the above-mentioned "Sempaku Kenmeisho" should be prepared by the Marine Transport Bureau as one of the agencies belonging to Japan's Ministry of Transport. The Marine Transport Bureau is usually notified about the building of the new ship by the dockyard and/or the ship's prospective owner at an early stage if the ship under construction is scheduled to be registered in Japan, and the Marine Transport Bureau is invited to the ship's sea trials, etc., at which time the Bureau's inspectors embark onto the ship and are able to obtain information about the function, quality, navigational speed, etc. of the ship, after which the Marine Transport Bureau issues to the parties concerned a certificate (called a "Sempaku Kenmeisho") as to the specifications of the new ship.

However, the Marine Transport Bureau is involved only with ships which are supposed to be registered in Japan and has nothing to do with any ship which is being built in a Japanese dockyard but which is supposed to be exported.

This indicates that you cannot get any "Sempaku Kenmeisho" from the Bureau at all, and thus you cannot enter the court order of arrest in the ship's registration book, with the result that your arrest will eventually be deleted and cancelled. This would cause the greatest difficulty to a creditor attempting to arrest a ship which is expected to be exported.

When I was personally involved in a case in which I represented a Japanese creditor and tried to arrest an almost completed ship which was expected to be delivered to a foreign shipowner in a few days' time, I asked the local Marine Transport Bureau to issue, in place of their "Sempaku Kenmeisho", which according to them was unavailable because the dockyard had not informed them of the ship's construction, a sort of substitute certificate which certified that there was no "Sempaku Kenmeisho" for that particular ship.

The Bureau first resisted my request and said that they were not able to issue any sort of certificate at all. I protested and told both the Bureau and the court that my clients would probably sue both of them for the possible loss or damage which might arise from their not legally being able to complete their arrest of a ship simply due to lack of a "Sempaku Kenmeisho".

The Bureau eventually agreed to issue to the court a sort of certificate saying that the ship had not been registered in the jurisdiction of the Bureau.

Acceptance by the Ministry of Justice of the Substitute for the "Sempaku Kenmeisho"

However, there was no assurance that when the court sent in a notice of arrest of the ship to the Ministry of Justice together with the Bureau's substitute certificate, the Ministry of Justice would open a new registration book. I was lucky since I was able to make a compromise settlement with the dockyard before the Bureau's substitute certificate reached the Ministry of Justice.

Proposition

For future cases, I propose that the laws and regulations be changed to the effect that if a ship under construction is expected to be exported, the ship should be treated substantially the same as a foreign-registered ship so that no registration of the arrest order of the court would be necessary.

This would help not only the creditor in an arrest attempt, but also the dockyard and the foreign prospective shipowner who would no doubt be annoyed if the ship, which was originally supposed to be newly registered in a foreign country, became a second-hand ship as a result of being registered in Japan in advance of her delivery.

Such an unexpected registration of the ship prior to her delivery may easily cause a dispute concerning breach of the shipbuilding contract between the dockyard and the prospective shipowner, who will possibly refuse acceptance

of the delivery of the vessel, which may legally be considered not a maiden ship, even after the ship has been released from the court arrest after the creditor's claims against the dockyard are settled. It is obvious that the creditor's intent is not to destroy the shipbuilding contract but is simply to obtain security for his claims by arresting a ship in the custody of the dockyard.

Is the Importance of Maritime Arbitration in the Order of London, Tokyo, New York?

— Result of Questionnaire Survey on Arbitration by The Japan Shipping Exchange —

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

We conducted two questionnaire surveys in May and July of 1984 among those who had recently used arbitration by the Japan Shipping Exchange, Inc (hereinafter "JSE"). The questionnaire were detailed, and I shall introduce here the matters which were the objects of lively interest and make some comments. It would indeed be a pleasure on our part if this paper helps to deepen understanding of The Tokyo Maritime Arbitration System of JSE.

The survey in May was conducted among lawyers. Questionnaire forms were mailed to 102, and sent back by 31. The one in July was conducted among the parties to arbitration cases, and the forms were sent to 402, 149 of whom returned completed questionnaires.

Since the parties are free to retain or not to retain laywers in arbitration in Japan, different questions were asked of the laywers and of the lay persons and thus the two surveys were conducted. When a party to the case is a foreign national, a lawyer is almost always retained.

1. Strong Support of the Method of Selecting Arbitrators by the Commission

1) The Tokyo Maritime Arbitration Commission of JSE (hereinafter "The Commission") selects an odd number of persons who have no connection

with either of the parties or with the matter in dispute as arbitrators, these persons being selected as a rule, from the Arbitrators' Panel (Section 14(1) of the Arbitration Rules).

Those who supported this system were:

19 lawyers (61%) and 88 lay persons (59%)

Those who agreed with the principle of this system but preferred to select the candidates for arbitrators by a method which would somehow reflect the intent of the parties were:

7 attorneys (23%) and 36 lay persons (24%)

Total: 26 attorneys (84%) and 124 lay persons (83%)

(The provision was revised recently by incorporating a system of disclosure to the parties of the candidates for arbitrators.)

2) When the parties specifically agree to making their own choice of arbitrators, they are to select the arbitrators from the Arbitrators' Panel of the Commission (Section 14 (2)).

Those who supported this system were:

14 attorneys (45%) and 121 lay persons (81%)

Those who preferred a system of selecting the arbitrators not from the Panel alone were:

11 attorneys (35%) and 14 lay persons (9%).

It is concluded from the above that method (1) of selecting arbitrators according to the Rules of Arbitration of JSE is highly valued both in Japan and abroad. This must be a sign of appreciation by the parties who requested arbitration by JSE for the Commission's efforts in selecting the ideal arbitrators.

What may be commonly said in respect of (1) and (2) is that arbitration by JSE is characterized as "arbitration by merchants" and enables application of common law which tends to precede the statutory laws in Japanese shipping transactions. In the background of such common law is most probably English

case law.

2. How much is Expected of Mediation during Arbitration Proceedings?

The following result was obtained regarding the arbitration by arbitrators. Those who tought that arbitrators must probe the possibilities for mediation were:

10 attorneys (32%) and 48 lay persons (32%)

Those who approved of arbitrators trying to mediate depending on the development of arbitration proceedings were:

17 attorneys (55%) and 70 lay persons (47%)

Total: 27 attorneys (87%) and 118 lay persons (79%)

In practice, there are many cases where a party or parties request mediation during the hearings, with 6 to 7 cases out of 10 being settled amicably by reconciliation. A greater number of reconciliation during the arbitration proceedings suggests that in many cases the parties applied for arbitration because negotiation was becoming difficult as the parties became emotional, however when after some time they meet each other at the hearing, they can review the matter calmly as the arbitrators examine the dispute closely fact after fact, and then they begin to approach reconciliation. Section 800 of the Japanese Law of Civil Proceedings provides that the effect of an arbitration award is identical to that of a final judgement, so a party who may apprehend a disadvantage may be induced to seek reconciliation.

3. The Examination Periods Considered Reasonable were 6 months and 1 year

How many months would they consider reasonable as the arbitration period counting from the day when application for arbitration was filed until the day when the award is given?

	Lawyers		Lay Persons	
Within 3 months	—		13 (9%)	
Within 6 months	7 (23%)		57 (38%)	
Within 9 months	5 (16%)	19 (61%)	17 (11%)	136 (83%)
Within a year	7 (23%)		36 (24%)	
Within 15 months	—		—	
Within 18 months	—		3	

While the above figures disclose that 12 lawyers (39%) and 13 lay persons (9%) did not respond, many of the respondents recognized that the delay in responding to the proceedings was largely for reasons of the parties or lawyers and indicated that in many cases they could not comply with the stipulated time limits.

The above figures also indicate that both the lawyers and lay persons generally preferred "within 6 months" or "within a year". One view to support this preference is that the overwhelming opinions (89 lay persons or 60%) suggested simplified proceedings for cases with clear points of disputes and small claims.

Other questions included one on the future promotion of maritime arbitration in Tokyo. Both lawyers and lay persons hoped for the establishment of arbitration by a system of short term, concentrated examination.

The Simplified Arbitration System created in July, 1985 was introduced based on such responses to our questionnaires.

4. High Appreciation of Fixed Amount of Arbitration Costs

On the tariff of arbitration fees based on the claimed amount, the surveys indicated the following.

Those who supported the current system were:

17 lawyers (55%) and 86 lay persons (58%)

Those who supported an increase depending on the length of examination period were:

10 lawyers (32%) and 39 lay persons (26%)

As the arbitration fees include remuneration to the arbitrators, the fact that the parties can estimate the cost of arbitration easily, apply for arbitration, and respond to the claim without undue apprehension is highly appreciated. In principle, the remuneration to the arbitrators does not exceed the arbitration costs, but when the examination becomes lengthy, the remuneration increases proportionately, thus reducing the share to JSE as the administration cost. JSE manages its affairs financially be processing a number of arbitration cases.

Section 72 of the Japanese Lawyers' Law prohibits legal activities as business by those who are not lawyers, and arbitrators who are merchants cannot become arbitrators for a fee. Thus, it is impossible to set the arbitrators' fees separately from the arbitration costs. Although the arbitrators do not demand remuneration, the Commission pays them in accordance with their internal rules. The ratio of appropriation of the arbitration fees is, as a rule, to be borne by the losing party.

5. London is at the Top, followed by Tokyo and New York

Arbitration by JSE was compared with arbitration in London and New York. The lawyers' responses revealed the following.

	JSE Tokyo			Domestic Trial			London			New York		
	1st	2nd	Total	1st	2nd	Total	1st	2nd	Total	1st	2nd	Total
Prefer the method of appointment of arbitrators	8	1	9	—	—	—	7	4	11	3	4	7
Adequate qualification of arbitrators (judges)	4	6	10	3	3	6	8	1	9	1	1	2
Fairness and justness of arbitration award (judgement)	3	4	7	5	1	6	5	1	6	2	2	4
Speedy examination	6	6	12	2	2	4	2	4	6	2	2	4
Low costs	3	6	9	—	2	2	4	2	6	1	—	1
Overall evaluation	5	6	11	2	6	8	5	1	6	2	—	2

It should be noted that the Japanese court which is generally unpopular as far as the maritime cases are concerned was considered comparable to that of JSE regarding their fairness and reasonableness of decisions. This may be partly due to the feeling prevalent at least among some of the attorneys who would rather respect a decision made by a judge than that of an arbitrator who is a merchant since the former is of the same legal profession. This is particularly so in the cases where legal issues are points of dispute. The same feeling may be applicable to arbitration in New York.

For a dispute over a legal issue the Commission tries to make up the tribunal comprised of 2 merchants and one person of expertise. The decision of such tribunal is generally well received by lawyers.

The same international comparison was made among the general public. The questionnaire mainly asked the respondents to submit concrete comments and tried to find directions by various improvements.

		JSE Tokyo	Domestic Trial	London	New York
Order of Evaluation	1st	19	—	31	5
	2nd	10	1	13	14
	Total:	29	1	44	19
Prefer the method of appointing arbitrators		6	—	9	4
Arbitrators (judges) have understanding of the practice		10	1	27	10
Arbitration award (decision) is reasonable		11	3	19	3
Examination is speedy		7	—	5	7
Low cost		12	1	3	1

Both questionnaires among lawyers and the general public revealed an evaluation of New York arbitration which was lower than we expected. This may be because only a few respondents used the New York arbitration.

When we ponder the future of the arbitration by JSE, we believe that the high appreciation of London Arbitration by Japanese parties is well grounded because practical maritime business has been nurtured by English law. If transition from London to Tokyo were to be expected, this would call for training of capable arbitrators, and extending the system of publishing arbitration awards in order to inform those concerned in Japan and abroad of how fairly our arbitrations are conducted.

Next to arbitrators and awards, the examination period and costs are very important aspects of arbitration, and arbitration by JSE may be competitive in these respects. At any rate, the above figures seem to be useful in considering future problems, particularly the future of maritime arbitration in Tokyo.

Arbitral Award in a Dispute Arising from Time Charter Party for M. V. "Lee Wang Zin"

Claimants : Shipowners (Japan)
Respondents: Charterers (Belgium)

The undersigned, the Arbitrators appointed by the Rules of Maritime Arbitration of the Japan Shipping Exchange, Inc. hereby render the following judgement having carefully considered the issue regarding the time charter party for M. V. "Lee Wang Zin" between the parties.

TEXT

1: Respondents . . . . . shall pay Claimants . . . . . the sum of US$ 46,157.42 and the interest thereon at 6% per annum for the period from August 16, 1977 until the date when payment is completed.

2: Respondents . . . . . shall pay Claimants . . . . . the sum of BF 38,250.00 without delay when Claimants . . . . . pays their agent, "M" the sum of BF 48,000.00.

3: Claimants . . . . . shall pay Respondents . . . . . the sum of US$ 21,981.20 and the interest thereon at 6% per annum for the period from the day following the date on which this Award is delivered until the date when payment is completed.

4: Other claims of the parties are dismissed.

5: Cost for Arbitration is ¥696,000 which is to be paid by the parties on 50–50 basis.

6: This Arbitration falls under the jurisdiction of the Tokyo District Court.

FACTS

1: Assertions of both parties are as follows.

[Claimants]

(1) Respondents shall pay Claimants the sums of US$68,124.81, BF48,000.00 and the interests accruing on the said sum of US$68,124.81 for the period from August 16, 1977 to the date when payment is completed.

(2) Demand by Respondents is to be dismissed.

[Respondents]

(1) Demand by Claimants is to be dismissed.

(2) Claimants shall pay Respondents the sum of US$33,895.99 and the interest thereon at 6% per annum for the period from the day following the service of the counterclaim to the date when payment is completed.

2: Outline of Assertions of Both Parties

[Claimants]

(1) Claimants concluded a time charter party (Exhibit No. A-1, in the form of "BALTIME 1939", hereinafter referred to as the Original Charter) in respect of M. V. "Lee Wan Zin", (hereinafter referred to as the Vessel) on May 18, 1977 which included the following clauses.

Clause 1: The Owners let, and the Charterers hire the Vessel for a period of about 40 days without guarantee, for one round voyage via Brazil, from the time the Vessel is delivered and placed at the disposal of the Charterers not before 10th June, 1977, she being in every way fitted for ordinary cargo service, with holds shovel clean. The Vessel to be delivered when and where ready CONTINENT.

Clause 6: The Charterers to pay as hire: US$1.20 per long ton dead-weight per 30 days, commencing in accordance with Clause 1 until her re-delivery to the owners. Payment of hire to be made in cash, in US Dollars without discount, every 15 days, in advance, to Fuji Bank Ltd., Tokyo Head Office, Account . . . . . .

Clause 7: The Vessel to be re-delivered on the expiration of the Charter with shovel clean holds and in the same good order as when delivered to the charterers (fair wear and tear excepted) at a safe ice-free port in the Charterers' option in Continent.

Clause 36: It is agreed that "on-survey" shall be held in Owners' time and at Owners' expense and "off-survey" shall be held in Charterers' time and at Charterers' expense, each party paying for their own surveyors, if used.

As Respondents subsequently requested a change in the terms and conditions of the Original Charter, Claimants agreed to such a change, and prepared the Addendum No. 1 (Exhibit No. A-1) dated June 13th of the same year, containing the following amendments (The Charter concluded by amending a part of the Original Charter with the Addendum No. 1 is hereinafter referred to as the Charter No. 1.).

Clause 36 shall be amended to read:—

"Owners and Charterers to hold joint on-hire and off-hire surveys, time used and cost incurred to be equally divided."

Clause 1 and Clause 6 be respectively amended to:—

"approximately 80 days without guarantee", the words "for one round voyage via Brazil" being deleted and "US$1.25 per long ton deadweight".

All other terms, conditions and exceptions of the aforementioned Charter Party remain unaltered.

On 24th day of June of the same year, Addendum No. 2 (Exhibit No. A-1) containing the following amendment was prepared by the parties concerning the Original Charter (The Charter concluded by adding and amending a part of the Original Charter with this Addendum No. 2 and the said Addendum No. 1 is hereinafter referred to as the Charter No. 2).

In line 2 after the name "LEE WANG ZIN" the word "orecarrier" shall be inserted.

All other terms, conditions and exceptions of the aforementioned Charter Party, including Addendum No. 1 remain unaltered.

(2) After completion of the previous voyage from Port Hedland to Ghent of

the Vessel carrying iron ores, on-hire survey was conducted by joint surveyors.

At 24:00 local time on June 14, 1977 the Vessel was delivered at Ghent to Respondents, and the agent for Respondents signed the delivery certificate of the Vessel (Exhibit No. A-3).

(3) On June 15th, the day following the delivery date of the Vessel, Respondents notified Claimants by telex that they could not accept the Vessel since the holds of the Vessel were covered with a great deal of rusts. At the same time, Respondents further claimed that the Vessel did not meet the provisions of Clause 1 of the Charter No. 1, and also demanded that the holds of the Vessel be cleaned to meet the said provisions.

(4) Claimants counterargued against the above allegation of Respondents based on the following reasons (a) to (c).

(a) The previous voyage of the Vessel carrying iron ores was completed without any difficulties.

(b) Following the on-hire survey, the surveyor found that the holds of the Vessel were covered with a great deal of rusts. However, Respondents at that stage did not refuse to have the Vessel delivered to them.

(c) Respondnets had the Vessel delivered to them and signed the delivery certificate without making any objections.

(5) Claimants and Respondnets exchanged many telex messages, but both parties held their stands claiming that the other party was to blame. Respondents had finally conducted the following (a) to (c).

(a) They had the holds of the Vessel cleaned at Flushing.

(b) They deducted US$68,124.81 from the fourth charterage paid on August 16, 1977.

(c) They assigned the Vessel to transportation of bauxite from Port Kamsar to St. Croix, and also to carrying phosphor ores from Tampa to Weser.

(6) Counterarguments against Respondents' assertions

Although Claimants admits that the holds of the Vessel were covered with rust at the time the Vessel was delivered and accepted, this does not constitute a

breach of Clause 1 of the Charter No. 2.

The term "ordinary cargo" as used in Clause 1 of the Charter No. 2 reading ".... she being in every way fitted for ordinary cargo service" means ordinary cargoes for a specific vessel. What is meant by "specific vessel" is that it was understood, prior to conclusion of the Original Charter, that the Vessel was built in 1963, the type of the Vessel was the ore carrier, and that the cargo transported in the previous voyage were iron ores, and it was confirmed by the Addendum No. 2 (Exhibit No. A-1) dated June 24, 1977 that the Vessel was "ore carrier". What are ordinary cargoes for the ore carriers are iron ores or similar cargoes, and others are not ordinary for the ore carriers.

That the typed phrase "with holds shovel clean" was inserted to Clause 1 of the Charter No. 2 after the phrase, ".... she being in every way fitted for ordinary cargo service", was because the party at the time the Original Charter was signed intended to transport iron ores or similar cargoes which required no special preparations or cleaning. This insertion of the aforesaid typewritten phrase limits the degree of cleanness of the holds which is an item of cargo-worthiness to "shovel clean".

Accordingly, the state of the holds of the Vessel as required by the provision of Clause 1 of the Charter No. 2 reading "she being in every way fitted for ordinary cargo service, with holds shovel clean", means the state which has been shovel cleaned and fitted for transportation of iron ores or similar cargo. Thus, Claimants have no obligation to make and or keep the holds cleaner than the above. That the holds of the Vessel were shovel clean has been confirmed by the on-hire survey. Rusts found in the holds of the Vessel in no way present obstacles to the transportation of the cargo.

Respondents carried bauxite ores and phosphor ores on the Vessel, and these cargoes are not ordinary cargo as mentioned in Clause 1 of the Charter No. 2, but a special cargo requiring special preparations or cleaning. Supposing that the holds of the Vessel were not fit for transportation of bauxite and phosphor ores because of the rusts, this Vessel was still sufficiently cargoworthy for the ordinary cargo as mentioned in Clause 1 of the Charter No. 2.

The Court Surveyor's report (Exhibit No. B-1, B-2) prepared by the surveyor appointed by the Commercial Court of Antwerp which Respondents submitted to substantiate their pleadings is objected of its admissibility.

(7) Therefore, Respondents should be held responsible for the expenses incurred and the time spent to make the holds of the Vessel fit for the special cargo selected by Respondents.

Claimants demand the payment of US$68,124.81 which Respondents unreasonably deducted from the remittance of the fourth charterage and interests accrued thereon for the period from August 16, 1977 on which the said deduction was made until the time when the payment is made in full, and the payment of BF48,000.00 which the agent of Claimants, "M", invoiced and which is due to Respondnets.

The said sum of BF48,000.00 is made up as follows;

(a) BF28,500.00 for professional services rendered for protecting the interests of the shipowners by "F", an agent for P & I Club for the original owner ("B") at the time the case in dispute occurred.

(b) BF19,500.00 for Mr. H.'s fees and expenses, the attorney appointed by the said agent at the Court of Commerce to protect the interests of the shipowners, which includes the attorney's fees and expenses for communications, etc.

As for the counterdemands by Respondents, they are to be borne by Respondents as is clear from the assertions made by Claimants.

[Respondents]

(1) Respondents admit the assertion (1) of Claimants.

(2) As for the assertion (2) of Claimants, the fact that the Vessel was accepted at the time and place asserted by Claimants is not admitted, but the rest is admitted.

(3) Respondents admit the assertion (3) of Claimants.

In the Charter No. 2, it is provided in Clause 1 that ". . . . she being in every way fitted for ordinary cargo service", and Claimants warrants to Respondents that the Vessel which is the object of the Charter is capable of

safely navigating and has cargoworthiness for "ordinary cargo".

There is a typewritten phrase "with holds shovel clean" inserted after the above clause, which provided the mode of removal for any remaining cargoes in the holds from previous voyage at the time the Vessel is delivered, and it provides that such cargo may be cleaned with shovel. Accordingly, as far as the removal of the remaining cargo is concerned, any expenses for any cleaning in excess of shovel cleaning is due to Respondents. This does not modify any obligation of warranty of Claimants in respect of the Vessel's seaworthiness and cargoworthiness.

On or about June 10, 1977 after the Original Charter was concluded, Respondents notified Claimants that they provisionally planned to carry bauxite ores on the first voyage of the Vessel. On this occasion, negotiation for extension of the Charter period and the increase in the charterage were made, and the Addendum No. 1 dated June 13th was prepared. The agreed cargo under the Charter No. 2 is unspecified, with an only expression of "ordinary cargo", and it was reconfirmed at this time when the Addendum was prepared that it at least contained ores such as those of bauxite.

However, when the Charter was to be started for the Vessel at Ghent, Belgium, on 14th day of the same month, Claimants failed in their obligation of warranty as provided under Clause 1 of the Charter No. 2 and failed to provide the Vessel with cargoworthiness to safely transport the ores such as bauxite, and unreasonably rejected to correct the inferior cargoworthiness of the Vessel in spite of the fact that Respondnets pointed out the fact repeatedly.

(4) As for Claimants' assertions (4)-(b) and -(c), the fact that the Vessel was accepted without objections is not admitted, and the rest are admitted.

Respondents were notified by the on-hire surveyor that the Vessel holds were affected by rusts and were in extremely deteriorated conditions, and communicated to the captain through "S" at about 23:40 on June 14, 1977 to anchor off the Port of Flushing instead of leaving for the place of shipment, and sent another communication similar to the above at 0:35 on the following day, June 15th, through the radio installations of the Ghent Pilots.

On the other hand, the person in charge at "G" acting as an agent for both parties signed the delivery certificate for the Vessel at about 23:45 of 14th of the same month without being notified of the status the Vessel holds were in as afore-mentioned.

(5) Claimant's assertion (5) are admitted.

On the morning of June 15, 1977, Respondents formally notified Claimants of their rejection of the acceptance of the Vessel by telex, and requested for another joint survey in order to mutually confirm the facts constituting the rejection. However, Claimants rejected this request on the grounds that the delivery certificate had already been signed, and Respondents then proposed a survey by the surveyor appointed by the competent court in order to solve the problem by obtaining fair materials through intervention by the authorities. Claimants refused this proposal as well. Respondents were then forced to request the Commercial Court at Antwerp for the appointment of a suitable surveyor as an expert in maritime matters, and the survey by thus appointed surveyor was conducted on 17th day of the same month. As a result of such a survey, objective records including 19 color photos of the status of the holds in question were established, and expert opinions on the fair and impartial grounds were obtained. (Exhibit No. B-1 is the original text of the report by the surveyor appointed by the said court, and Exhibit No. B-2 is its translation into English.)

According to the said records and the opinion, there is no doubt that the state the Vessel was in on 14th day of the same month did not meet the warranted cargoworthiness as provided by the Charter No. 2 and not suitable for transportation of bauxite ores.

(6) The Vessel was subjected to scaling and cleaning by high pressure water jet pump, etc. by "R" at Flushing from June 19th, 1977 to 27th of June, 1977 in compliance with the recommendation of the said surveyor, and left for Port Kamsar on the African west coast on the same day for loading bauxite ores.

Under the situation as above outlined, there was no offer of cargoworthy Vessel meeting the intent of the Charter Party during the period from 14th of

the same month until the day the scaling was over, and Claimants have no right to demand the charterage (US$28,447.04) for the said period. (If Respondents had the right to demand, then Respondents have the right to ask for damages for the same amount, and the amounts therefore are to be offset.)

(7) As for the amount of US$68,124.81 comprising (1) the above mentioned sum of US$28,447.04 (2) the cost for fuels consumed during the above period, US$6,125.00, (3) the cost for the above survey, US$2,406.74, and (4) the cost for scale cleaning of the holds, US$31,146.03, Respondents have a claim for damages based on the breach of the Charter No. 2, or a right to be indemnified for having satisfied the obligations of Claimants, or the right to demand reimbursement, Respondnets counterargue for offsetting the amount claimed by Claimants for the charterage.

(8) In addition to the above sum of US$68,124.81, Respondnets have paid at the Port of Flushing the following expenses which are due to Claimants:

1 US$16.405.91 for expenses incurred for the Vessels' calling at Flushing

2 US$13,793.34 for additional cleaning expenses for the holds

3 US$2,382.95 for the fees of the court appointed surveyor

4 US$1,215.07 for the attorney's fees incurred in connection with the appointment of the court surveyor

5 US$98.72 for the translation fee of the court surveyor's original report into English

Accordingly, payment of the total sum of US$33,895.99 is demanded as a counterclaim.

3: Evidences

Claimants submitted Exhibits No. A-1 to A-16, and Respondnets submitted Exhibits No. B-1 to B-14.

REASONS

1: There are no disputes about the facts that the Vessel completed discharging her last cargo (iron ores ex Australia) at Ghent on June 14, 1977 at 16:30 local

time, that the joint on-hire survey by surveyors of "U" was completed at 22:00 local time on the same day, and that the person in charge at "G" acting as agent for both Claimants and Respondents signed the delivery certificate (Exhibit No. A-3) certifying that "the Vessel was delivered to Respondents who are the charterers at 24:00 local time in accordance with the Charter No. 1."

However, having received a communication in the morning of the following day, June 15th, to the effect that the entire surface of the holds of the Vessel was covered by a great amount of rusts, Respondnets notified Claimants that they could not accept the Vessel because she was not ready for ordinary cargo service as defined in Clause 1 of the Charter No. 1 and requested a second joint survey so as to have the facts constituting the basis for this notice confirmed mutually.

Whereas, Claimants asserted that Respondents' claim was without grounds, because, since the Charter No. 2 was concluded with a provision that the Vessel was to be delivered/redelivered with holds shovel cleaned only, Respondents who are the charterers were respondible to have the Vessel ready for any cargo requiring the holds to be cleaned exceeding the above degree, and because since Respondents planned to carry iron ore products one round trip via Tubarao being fully aware at the time the Charter was concluded that the Vessel was an ore carrier, she was 16 years old and her last cargo iron ores, and since Claimants agreed to Respondents' proposed change in Vessel's service on condition that provisions of the Original Charter were not violated, Respondents have no reasonable grounds for their complaint of the Vessel's non-cargoworthiness having changed the cargo from those they originally planned to load, and there would have been no problems for the rusts in the Vessel holds if they had not in fact changed their initial plan of assigning the vessel.

A series of development are observed from the documentary evidences submitted by both parties and from the results of examinations; Respondents shifted the Vessel to Flushing on June 15th, requested the Commercial Court at Antwerp to appoint a surveyor who was an expert in maritime matters without Claimants' agreement, had a survey conducted on June 17th by the

court surveyor, ... , ordered scale cleaning of the holds by high pressure water jet pumping by "R" at Flushing on June 19th based on the record and opinions of the said surveyor, which cleaning was completed on June 27th, and caused the Vessel to leave for Port Kamsar on the African west coast on the same date to laod bauxite ores.

On June 17th the first payment of charterage was remitted to Claimants (Exhibit No. A-8), and on June 27th another remittance was made in respect of the cost of fuels incurred at the time the Vessel was delivered (Exhibit No. A-8). On August 12th and 16th, Respondents deducted from the said remittance of charterage to Claimants the total sum of US$68,124.81 comprising (1) US$ 34,572.04 as off-hire charge for the period from 05:30 of June 15 to 09:30 of 27th of the same month plus the cost for fuel consumed during the said period (Exhibit No. A-5), (2) US$31,146.03 for the cost of scale cleaning at Flushing and (3) US$2,406.74 for the court surveyor's fee.

Claiming that Respondnets unreasonably deducted the above sum and defaulted under the Charter No. 2, Claimants asked Respondents to return the money and to pay additional sum of BF48,000.00 for the expenses invoiced by the agent for Claimants comprising (1) BF28,500.00 for professional services and (2) BF19,500.00 for the cost related to Mr. H., and applied for arbitration in the case. They did not admit payment of the whole sum of the counterclaim made by Respondents.

Respondnets, on the other hand, did not admit the whole sum of the claim made by Claimants because Claimants defaulted under Clause 1 of the Charter No. 2 as evidenced in the surveyor's report by delivering the vessel without cargoworthiness, and unreasonably rejecting Respondents' request to correct the Vessel's uncargoworthiness, thus causing the Vessel to have the cargoworthiness as defined in the Charter No. 2 only after the holds were scaled at Flushing from June 19th to 27th. They further asserted that the damages suffered by Respondents during the said period were US$33,895.99 comprising (1) US$16,405.91 for various expenses incurred for the Vessels' calling at Flushing, (2) US$13,793.34 for additional cost of cleaning the holds, (3) US$

2,382.95 for the court surveyor's fee, (4) US$1,215.07 for the attorney's fees in connection with appointment of the court surveyor, and (5) US$98.72 for the translation fee for the court surveyor's original report into English, and they counterdemanded the payment based on Respondents' right to compensation based on Claimants' default under the Charter No. 2, or the right of recourse for disbursement they made on behalf of Claimants.

2: The issue of the present dispute is what degree of seaworthiness of the Vessel, particularly its cargoworthiness, is meant by the Charter No. 2. Since there is a much dispute between the parties over the interpretation of the provision at line 16 of Clause 1 of the Charter No. 2 reading ". . . she being in every way fitted for ordinary cargo service, with holds shovel clean" (phrase "with holds shovel clean" being typed and inserted into the printed form), this point is now reviewed.

As for insertion of the phrase "with holds shovel clean", it is recognized that Respondents proposed on May 17th, a day preceding the conclusion of the Original Charter, that "holds on delivery to be shovel clean, but crew to clean en route to first load port in order to have vessel ready and clean to load a cargo of pellet feed" (Exhibit No. A-11), and that Claimants counterproposed on May 18th that "holds conditions on delivery/redelivery as per shovel cleaned only" (Exhibit No. A-11), and that "holds condition on delivery/redelivery — as advised her last cargo iron ore ex Australia and in view vessel ore carrier and charterers loading port Tubarao (or near about) we presume cargo should be iron ore products wherefore we don't see any necessity crew to clean up holds en route further . . . ." (Exhibit No. A-11), and further that the Original Charter came into force after Respondnets agreed to this counterproposal on the same day.

Claimants then assert that the warranted degree of the Vessel's cargo-worthiness is to be understood as being a state sufficiently fit for carrying iron ore products since the phrase "with holds shovel clean" was specially inserted after the printed phrase concerning seaworthiness at line 16th of the Charter No. 2 from the above situation; and they further assert that Re-

spondents' assertion that the Vessel should be fitted for carrying bauxite ores basing their reason only on the phrase "for ordinary cargo service" which they picked out of the phrase "she being in every way fitted for ordinary cargo service" at line 16 is not reasonable.

Respondents counterargue that since the phrase "with holds shovel clean" providing for cleaning of the holds at the time of redelivery of the Vessel is also inserted at line 55 of Clause 7 of the Charter No. 2, the phrase "with hols shovel clean" is merely an agreement providing that the mode of removing remains of the last cargo in the holds at the time the Vessel is delivered is to be about "shovel cleaned", and that any cleaning beyond "shovel clean" is to be paid by Respondnets and this in no way affects the Claimants' obligation for warranted seaworthiness or cargoworthiness of the Vessel. They state that the phrase "ordinary cargo" at line 16 of the Charter No. 2 should have been amended to read as "iron ore product", if the assertion of Claimants were to be accepted.

On the other hands, Claimants argue that if the phrase of "with holds shovel clean" was to be understood as provision concerning treatment of holds at the time the Vessel is delivered because of the existence of the similar provision concerning redelivery elsewhere in the Charter No. 2, then the phrase should have been inserted at line 17 of the Charter No. 2 where the language providing redelivery of the Vessel appears instead of at line 16, and further that presuming from the fact that this insertion was made at line 16, the Vessel's cargoworthiness is to be such that it was sufficient to clean the holds merely with shovel.

Although assertions of both parties are completely antagonistic as regards the degree of the Vessel's cargoworthiness and its relation to insertion of the phrase "with holds shovel clean", it is understood as the fact that the said phrase was discussed and agreed by the parties as describing the mode of removing any remains of the last cargo in the Vessel holds during the negotiation preceding conclusion of the Original Charter and also that the said phrase was inserted in the Charter No. 2 after the agreement. When considering the facts that the

said phrase is completely different from and not a repetition of the phrase at line 16 of the Charter No. 2 reading "for ordinary cargo service" providing the cargoworthiness, then the line where the above phrase is inserted, be it be at line 16 or line 17 of the Charter No. 2, is irrelevant to the degree of cargoworthiness of the Vessel, and the Claimant' assertion about the cargoworthiness of the Vessel in relation to the phrase reading "with holds shovel clean" cannot be recognized as being reasonable.

3: The question then whether the Vessel's cargoworthiness used in the Charter No. 2 does mean the cargoworthiness on the general level or not is to be reviewed.

Claimants claim that the status of the holds of a sixteen year old ore carrier is unimportant so long as the cargo carried are iron ores as in the case of her last voyage, but that it becomes important when the cargo is bauxite ores requiring a higher degree of cargoworthiness, and, therefore, the Vessel is sufficiently cargoworthy if she is fit for transportation of iron ore products.

Respondents argue that Claimants' interpretation that the ore carrier may suffice so long as it is a vessel suited for carrying iron ore products is not only unilateral but is in fact mistaken in regard of the definition of an ore carrier as used in the literatures, unless Claimants were discussing the cargoworthiness of an ore carrier with a definite use compared with bulk carriers.

In reviewing the assertions of both parties as outlined above, it is considered unreasonable from the practical viewpoint to discuss the cargoworthiness of the Vessel by disregarding the particulars of the present case where the Vessel involved is 16 year old ore carrier, where the holds of such a vessel usually are quite rusty, and where Respondents accepted the quotation for a charter being fully aware of her old age. It is considered that these assertions concerning cargoworthiness should be reviewed in the light of the details of negotiations at the time the Carter No. 2 was concluded.

The conditions presented by Respondents in answer to the inquiry for a charter for the Vessel are now reviewed; on May 11th they proposed that ". . . . pellet feed Tubarao or Point Ubu (just north Tubarao) to Ghent . . .

alternatively we would try t/c basis delivery DOP Ghent . . . . for one trans Atlantic round voyage, if Claimants prefer t/c basis . . . . " (Exhibit No. A-11); they further proposed on May 12th and May 17th respectively "Ghent, one Brazil round t/c – duration about 40 days . . . . " (Exhibit No. A-11), and " . . . . to have vessel ready and clean to load a cargo of pellet feed . . . . " (Exhibit No. A-11). It was revealed that as a result of acceptance by Claimants of these proposals, a typewriten phrase " . . . . about 40 days without guarantee, for one round voyage via Brazil . . . . " was inserted after the printed clause of "The Owners let, and the Charterers hire the Vessel for a period of . . . . " at line 11 of the Original Charter which is the provision concerning the duration of the time charter, and that a concrete agreement was reached concerning a voyage rather than a duration.

Accordingly, it would be reasonable to regard the Original Charter as a voyage charter for one voyage via Brazil to load pellet feed concluded using BALTIME Form for time charter. This Original Charter which was concluded as a voyage charter for transporting pellet feed was amended as Respondents submitted on May 25 to Claimants that "Charterers now have possibility 2nd round and asking offer 2nd trans Atlantic round in charterers option declarable on or before 8th June", and Claimants confirmed on the same day that the submission of Respondents was such that "without prejudice c/p . . . with understanding same trade/duration (i.e. Tubarao round duration about 40 days) . . . . otherwise as per present c/p", to which Respondents agreed on the same day, and amended the Charter with an option for the second voyage by agreeing to the submission by Respondents on May 26.

The matter of facts was that Respondnets who were charterers did not exercise the option in spite of Claimants' request to do so until the last due date of June 8th for exercising the option for the second voyage, whereupon Respondents requested an extension of the deadline date; Claimants approved such an extension; Respondnets submitted to Claimants a telex on June 10th that "owing charterers original intentions altered circumstance beyond their control . . . . Amend period by deleting 'about 40 . . . . via Brazil' and inserting

'approximately 80 days' .... delete option 2nd round voyage .... Charterers present intentions (without guarantee) ballast from delivery port to Port Kamsar load bauxite for St. Croix, V.I. then ballast Brazil load ore for Ghent"; and on June 13 Claimants agreed to this proposal. On June 14th, the Vessel finished discharging the last cargo, had a joint survey conducted, and the disputes in question occurred concerning the delivery and acceptance of the Vessel.

As for the proposal for change made by Respondents on June 10th, the Addendum No. 1 (Exhibit No. A-1) was prepared on June 13th, and Claimants argue that no alteration was made regarding the Vessel's cargoworthiness since the said Addendum mentions that "All other terms, conditions and exceptions of the aforementioned charter party remain unaltered". Since May 25th when Respondents proposed the second voyage to June 10th, Respondents made no proposal to alter the cargo for the Vessel under the Original Charter to anything else other than pellet feeds but consistently presented the charterers' option in respect of the second voyage; on June 10th Respondnets withdrew the charterers' option by a single notice citing a cause beyond their control, and presented the content of the charter which was completely different from the route and cargo of the Original Charter, and which made the Original Charter to a 2-voyage charter. It is contemplated that this dispute would have been avoided if Claimants had asked Respondents to concretely show the cause for the said alteration when accepting their proposal instead of merely using abstract languages normally used in providing for unalteration of items of the Charter in the addendum, and had Respondents confirm that there would be no change regarding the Vessel's cargoworthiness which was the crucial matter since the alteration effected on June 10th was so radical as to have the Original Charter completely revoked.

However, it is clear from the further development that the Charter No. 2 initially concerned one round voyage via Brazil carrying pellet feeds and that there was no change effected regarding the cargo being pellet feed in the first voyage even after Respondents made an option for the second voyage on May 25th. We hesitate to approve Respondents' contention that the Vessel should

have had the cargoworthiness fit for bauxite ores which is more sophisticated than that required for pellet feeds, which was the cargo initially intended just because Respondnets submitted a change so radical as to almost completely revoke the Original Charter on June 10th, the date which was very close to the delivery date of the Vessel, merely giving a cause which they said was beyond their control, and Claimants approved this submission. If the Charter No. 2 had been what is generally referred to as a time charter party, then it was not necessarily necessary to specify the route and cargo for the two voyages on June 10th. We have to but admit that Respondents intended the Charter No. 2 to be actually the voyage charter even after alterations were made on June 10th while they continued taking the form of a time charter party as the Original Charter.

In the voyage charter party of this type which takes the form of a time charter party and yet specifies the route and cargo, if the Vessel's cargoworthiness as planned initially were to change accordingly with the change in the route and cargo made by the charterers, even for a reason beyond their control, then the shipowners would be forced to accept an extremely instable stand during the duration of the Charter in respect of both expenses and time, which stand greatly depends on the attitudes of the charterers. Particularly because the Addendum exchanged in respect of the change of the route and cargo clearly states that "all other terms, conditions and exceptions, of the aforementioned charter party remain unaltered", it is clear that in practice understanding the change of the route and cargo to mean the change of cargoworthiness of the Vessel under the Original Charter is not admissible even if the said phrase was a general and abstract provision.

In summation of the above various considerations, it is found reasonable that the cargoworthiness of the Vessel as agreed was such that it could satisfactorily carry the iron ore products.

4: Respondents had shifted the Vessel to Flushing after delivery, and in the face of Claimants' refusal to conduct scaling because the Vessel was not unseaworthy, Respondents conducted scaling of the Vessel holds based on the

expert opinion of the aforementioned court surveyor without Claimants' agreement. This is considered to be excessive on the part of Respondents.

However, since Claimants benefitted from this conduct in the cleaning of holds, it would be reasonable for Claimants to pay the expenses incurred by Respondnets within the limit that the former benefitted.

5: Having incorporated the results of the review, the following are admitted to be reasonable in respect of the items of the demands made by both parties.

(1) Items demanded by Claimants

(a) US$28,447.04 of the charterage paid by Respondnets for the period starting at 05:30 of June 15th to 09:30 of 27th of the same month, and US$6,125.00 which is the cost of fuel consumed during the said period both of which Respondnets deducted from the remittance of charterage made on August 16, 1977.

As discussed in 3, deduction of the above sum is considered unreasonable and the demand for the full amount thereof is allowed. The interest on the said sum is to be at 6% per annum in respect of the period starting August 16th, 1977 when Respondnets deducted the said sum from the charterage remittance to the date when payment is completed.

(b) US$31,146.03 for the cost of scale cleaning at Flushing which Respondents likewise deducted from the charterage remittance made on August 16, 1977.

As discussed in 4, expenditure of the said sum lead to an improved state of the vessel holds, and US$20,764.02 which is 2/3 of the said cost is to be reasonably paid by Claimants; accordingly the demand for US$ 10,382.01 which is equivalent to 1/3 of the said sum and the balance thereof is also admitted. The interest on this sum is to be at 6% per annum for the period from August 16th, 1977 until the date when payment is completed as in the above case.

(c) US$2,406.74 for the court surveyor's fee which Respondents had deducted from the charterage remittance made on August 16th, 1977 as in the case (a).

Based on the similar thinking as in (b), US$1,230.37 which is half the said cost is to be reasonably paid by Claimants; accordingly the demand for US$1,203.37 which is equivalent to half the said sum and the balance thereof is admitted. The interest on this sum is to be at 6% per annum for the similar period of August 16th, 1977 as in the case (a).

(d) Demands made to Claimants by the agent for Claimants of

(1) BF28,500.00 for professional services

(2) BF19,500.00 for fees, etc. in respect of Mr. H.

is regarded as expenses needed by Claimants to counteract Respondents in respect of Respondents' deed in having a survey conducted by a Court Surveyor, and therefore on condition that the said sum to be paid fully by Claimants to the agent for Claimants, the demand of the full sum in respect of (1) professional services is admitted and regarding (2) the fees for Mr. H. one half, BF9,750.00, is admitted. No interest on these sums is allowed since neither of the sums has been paid.

(2) Items demanded by Respondents

(a) US$16,405.91 expenses incurred for calling of the Vessel at Flushing and US$13,793.34 additional expenses for cleaning holds

Based on the same thinking as in the above (1)–(b), US$20,132.83 which is 2/3 of the total of the said sum, US$30,199.25, is admitted of its demand. The interest on this sum is to be at 6% per annum for the period starting from the day following delivery of this Award to the date when payment is completed.

(b) US$2,382.95 for the court surveyor's fee, US$1,215.07 for the attorney's fees required for having the court surveyor appointed, and US$98.72 the fee for translation fo the original court surveyor's report into English.

Based on the similar thinking as in the above (1) – (b), US$1,848.37 which is half the total amount of the said sum of US$3,696.74 is admitted of its demand. The interest on this sum is to be at 6% per annum for the period from the day following delivery of this Award to the date when

payment is completed.

(3) Totalling the sums admitted in the items demanded by the parties, Respondnets should pay Claimants the sum of US$46,157.42 and BF38,250.00 on condition that Claimants pay BF48,000.00 to the agent for Claimants, and the interest at 6% per annum for the said sum of US$ 46,157.42 in respect of the period starting from August 16th, 1977 to the date when payment is completed.

Claimants should pay Respondents the sum of US$21,981.20 and the interest at 6% per annum on this sum in respect of the period starting from the day following delivery of this Award to the date when payment is completed.

6: The cost for this Arbitration is ¥696,000 to be paid by both parties on 50 – 50% basis.

Having reviewed the statements of both parties and the result of examinations, we have made careful deliberations and render the Award as per the Text.

Dated this 30th day of March, 1979.

Arbitrator :

Seiiku Kumazawa

Arbitrator :

Hiroshi Miura

Arbirrator :

Ryogoro Tada

THE JAPAN SHIPPING EXCHANGE, INC.
(Nippon Kaiun Shukaisho)
PRINCIPAL OFFICE
Mitsui Rokugo-kan, No. 8, Muromachi 2-chome,
Nihonbashi, Chuo-ku, Tokyo 103, Japan
TELEX: 2222140 (SHIPEX)
CABLE ADDRESS: SHIPEXCHANGE
KOBE OFFICE
Meikai Bldg., 32, Akashi-machi, Chuo-ku, Kobe 650, Japan