THE BULLETIN OF

THE JAPAN SHIPPING EXCHANGE, INC.

No. 13

March 1986

© The Japan Shipping Exchange, Inc., March 1986.

CONTENTS

How to Make Use of Tokyo Maritime Arbitration
— Special for Foreigners —
by Hironori TANIMOTO 1

Recent Developments in Arbitration Schemes in Japan
by Tameyuki HOSOI 12

ARBITRAL AWARDS:
A Dispute Arising from Charter (Sub-charter)
Party in respect of M.V. "UNION CARIBBEAN" 15

A Dispute Concerning a Claim for Damages
for Loss of Cargo on M.V. "SEMARANG" 30

How to Make Use of Tokyo Maritime Arbitration

— Special for Foreigners —

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

Preface

One of the major problems which may bother you in negotiating the terms and conditions of a shipping contract must be where to choose as the place of arbitration. If you agree, however, to refer disputes to arbitration in Tokyo, you will probably need to refer to The Japan Shipping Exchange, Inc. (JSE), the office of maritime arbitrations here, because almost all maritime arbitration cases brought in Tokyo are now decided by arbitrators appointed by Tokyo Maritime Arbitration Commission (TOMAC) of JSE.

Surprising as it may sound, TOMAC's growing reputation has been, and still is, contributing to its dominance, the reasons for which one can find in the facts that JSE is a non-governmental organization and that arbitrators nominated by TOMAC, who are principally businessmen and hold no inclination toward any particular country's law, are quite competent to give proper and reasonable awards on the basis of customs and practices of commercial transactions. I have, therefore, enough grounds to introduce this manual for the future users of TOMAC. Here we go:

1. The System of Appointing Arbitrators and Steps You Should Take

(1) When the arbitration agreement or clause provides to the effect that the parties shall themselves appoint the arbitrators, you may appoint an arbitrator of your choice from among those listed on the Panel of Members of

TOMAC (see Tokyo Maritime Arbitration [Main] Rules Sec. 14 (2)).
If you hesitate over the choice among the candidates due to a lack of familiarity with Japan, you may contact the Office of TOMAC, i.e. the Department of Arbitration (DOA) of JSE either in writing or by Telex and get proper information. Or if you have nominated as your agent a lawyer in Japan or staff of your branch stationed in Tokyo, that person will provide it or refer to DOA.

(2) When there is no express stipulation in the arbitration agreement or clause as regards the way to appoint the arbitrators, instead, if it only goes to the effect that any dispute shall be referred to arbitration in accordance with JSE's Rules, then it is up to TOMAC to select candidates who have no connection with either of the parties or with the matter in dispute and finally decide the arbitrators taking into account their availability and willingness to act. (for details of the system, see *Bulletin* No. 12, p. 3 onwards.)
The normal process is as follows:
When the Claimant files the Statement of Claim with DOA, TOMAC will accept it on the same day, which means that a duplicate of the Statement of Claim will usually be delivered to the Respondent within a couple of days. The Respondent is obliged to file the Defence within 21 days after despatch of the Claim. And within 14 days after the day when the Defence was filed or should have been filed, whichever is sooner, candidates for arbitrators for the dispute are to be nominated by TOMAC.
The usual number of candidates is 9, grouped according to their business background into 3 units of 3 each. Now each of the parties may rank the three candidates in each unit in order of preference and may also reject as unqualified one candidate in each unit. Within 14 days after despatch of the List of Candidates, each of the parties must return it properly filled in. It is advisable to Telex lest you should miss the date due to your residence outside Japan. TOMAC will, having respect for the parties' preferences,

eventually select three arbitrators, one from each unit, which, as can now be seen, is the reason why we made a grouping of three units.

In addition, let me say a word in connection with the number of arbitrators. We are of the opinion that (i) arbitrators must get a global picture of the dispute in order to give a fair award, and (ii) arbitrators, who are given equal qualification, can examine the case most deeply if they have expertise. To take up a dispute in collision damage, we make three groups at the stage of selecting candidates, one comprises those experts in maritime technique who are able to analyze every stage of the collision process, another consists of persons experienced in handling claims involving shipping companies, and another those concerned with marine insurance. Consequently an arbitral tribunal in such a case takes its form with three arbitrators, one chosen from each group. None of the arbitrators, of course, has any connection with either of the parties, so that they can examine the case and give an award without any bias. Incidentally TOMAC is not allowed to get in touch with the arbitrators once they have been nominated. In case you feel like getting some information about each candidate's career and business background, the most practical way is just to Telex.

(3) If the amount of claim does not go beyond ¥15,000,000 and both parties to the dispute agree to refer to Simplified Arbitration by TOMAC (see Tokyo Maritime Arbitration [Simplified] Rules), TOMAC nominates the most eligible arbitrators taking into consideration the Statement of Claim and the Defence. Needless to say, the arbitrators so appointed are impartial and have no direct interest in either of the parties or in the dispute although no publication of candidates is made before selection. If you regard any of the arbitrators as unqualified, you can find a way out in Section 16 of our Rules: challenge to an arbitrator. Challenge to an arbitrator is also permissible in the preceding (1) and (2)of this chapter.

2. How to Speed Up Proceedings

Arbitrations by TOMAC are placed into two categories: the main system and the simplified one, and in either system an award is given through a series of hearings by the arbitrators.

(1) Procedure in Ordinary Arbitration

The Claimant files his Statement of Claim and the Respondent, in return, submits his Defence, the duplicate of which is sent to the Claimant and the Claimant will then, if he thinks it necessary, file his Supplementary Statement against the Defence. From then on Supplementary Statements will go back and forth on a reciprocal basis between the Claimant and the Respondent. As two weeks of grace is permitted before filing each Supplementary, it may take some 40 days until one round of reciprocation of Supplementaries is made if the parties are overseas. During the period usually one hearing is called, where the arbitrators will directly examine the respective parties and/or their witnesses on the statement and interrelation of facts, resulting in no further exchange of Supplementaries.

A party from overseas is most welcome to appear in person at a hearing and in such cases you may even be given a choice of the date and time and also an opportunity of intensive hearings. But taking into account every possibility which may hinder you from showing up at a hearing it is safe to nominate as your agent a lawyer in Japan or staff of your branch office, if any, or some reliable agency stationed in Tokyo. (To nominate an attorney-at-law as your agent is not compulsory.)

One problem is that you may have to bring with you as a witness a master who is unreliable in terms of fixing a date of a hearing due to the nature of his occupation. A solution to this is to gain the understanding and consideration of the arbitrators by timely informing them of his movements. Alternatively, if necessary, you may submit his written oath. Hearings are in principle held jointly, but the arbitral tribunal may give each of the parties another round of hearings separately if they seem unable to

articulate their statement at the first hearing through not having nominated an agent. In that case, if one party would like to know about the contents of the other party's hearing, he may contact the DOA and receive a copy of its minutes of the hearing.

At a joint hearing three arbitrators take their seats at the head of tables arranged in rectangular shape and the Claimant (the Claimant himself, his agent of staff) sits to the right of them, the Respondent to the left and two staff of the Office on the far side. Although you are usually to respond to inquiries from the arbitrators, you may, with the permission of arbitrators, take positive steps proceeding with your statement and/or explanation of documentary evidence. The leading language in use is Japanese and if you have difficulty communicating in this language, you are, as a rule, required to hire an interpreter at your expense. DOA will, at your prior request, see to it that a competent one specializing in maritime practice will be at your disposal.

Documentary evidence written in English, however, need not be translated into Japanese.

Occasionally you may be asked by the arbitrators about facts you might have kept hidden or not have noticed at all because our Civil Action Law provides in Article 794 (1) to the effect that arbitrators shall, prior to a decision, afford the parties hearings and examine, as required, the interrelation of facts giving rise to the dispute. That would also be because most of TOMAC's arbitrators are well versed in business practices and customs after longtime engagement. Should you get such an inquiry from the arbitrators it would be advisable to state the facts truthfully.

During the hearings, which proceed in an informal atmosphere with some refreshments, one or both of the parties may express a desire to settle the dispute amicably. When both parties desire the arbitrators' mediation, the arbitrators will do so. If the mediation proves to be successful, the claim is withdrawn.

(2) **Procedure in Simplified Arbitration**

Usually, only three documents appear: Claimant's Statement of Claim, Respondent's Defence, and Claimant's Supplementary against it (if any). The arbitral tribunal is to organize hearings within 35 days from the day when the Supplementary was filed or should have been filed, whichever is sooner, first holding them separately for each party and concluding them with both parties sitting together at the final one.

You only have to explain orally the process leading up to the dispute, while showing the arbitrators the documentary evidence, if any. Simplified Arbitration has made such complicated jobs as drafting Supplementaries totally unnecessary.

When either of the parties desires conciliation by the arbitrators, such an attempt is to be made by the arbitrators with a 50 days limit. The reason for this lies in the consideration that a party might deliberately suggest conciliation by the arbitrators in order to delay the proceedings.

(3) In either arbitration system, if the arbitrators pronounce the conclusion of hearings on the basis of their recognition that sufficient examinations have been made, they are, in principle, to give an award within 30 days from that time. The award bears the text and reasons. Reasons are in detail in case of Ordinary Arbitration but are concise in Simplified Arbitration.

(4) Fixing the date and time of a hearing is to be made considerably beforehand. It is possible that a hearing will be held in the evening or on Saturday because the parties are unable to appear during their working hours. If the date or time offered by the arbitrators is inconvenient to you, it is better for you to propose another possible date rather than simply to reject it for the purpose of delaying the proceedings.

In case you do not appear at the fixed date without reasonable grounds or do not take any action at all from the start, the arbitrators will try to appoint substitute dates for the next few times. If you ignore all of them

and fail to come up, that will be interpreted as abandonment of your right to express yourself at a hearing and the proceedings will continue in your default. The justice of the above step has been established by precedents.

(5) Generally speaking, a hearing is called with both parties themselves or their respective agents (their employees or attorneys-at-law) sitting before the arbitral tribunal. But if you are distant from Tokyo and cannot afford to hire an agent here, we can, at your request, provide the service that you may submit an answering statement in reply to a questionnaire from the arbitrators. It is also possible, in case some party who must know a crucial fact is, for example, confined to a sickbed, that one arbitrator representing the tribunal will go over and give a hearing at the hospital.

In short, TOMAC's radical principle in maritime arbitration is to make its utmost effort to remove every obstacle to the establishment of the truth, with co-operation from the parties and, instead of written statements, direct hearings, so that the case may be settled as fast as possible.

3. Criteria in Giving an Award

JSE is also famous for its work in drafting standard shipping contract forms, which now amount to 43 including those adopted. The preparation of each form takes one to five years of careful discussion by all concerned gathering together until its completion, so that our forms enjoy a high reputation among their users. JSE forms, except for Bills of Lading, lack Governing Law clauses. Technical terms used in each form are those most prevalent in maritime commerce. Furthermore, the prevalence of JSE standard forms is attributable in part to the comparative lack of regulation in Japanese maritime commerce, resulting in the substantial degree of freedom of contract enjoyed by parties engaged in such business.

As one of the DOA's daily jobs, we closely study new cases of both the UK and the US, as well as of Japan, and provide all the arbitrators with analyzed

data of the cases and their trend.

Almost all of our arbitrations take the form of three arbitrators — the sole arbitrator system is limited to a very simple dispute — and they are usually businessmen. Supporting them are two staff from DOA and it is these staff who engage in the operation of the arbitral tribunal and respond to the questions, if any, from the arbitrators about the above-mentioned trends in cases.

If one of the major problems in dispute is that of law, a judicial officer or a scholar specializing in international maritime law is appointed as one of the arbitrators, so that the arbitral tribunal may take a more direct approach to the legal problem.

Besides, the commercial arbitrators can be said to be experts in Japan's customs and practices of maritime transactions which can be categorized as leaning towards English law.

In brief, TOMAC's criteria in giving an award are:

(1) to give top priority to the parties' intention in the contract;

(2) to apply customs and practices of international maritime transactions;

(3) to consider every aspect in the light of governing regulations and conventions.

As regards (3) above, I can point out as an example that Japanese legislation stipulates the limits of the lien which is granted to a carrier in a contract of affreightment and he can not enlarge them. In other contracts such as ship sales or shipbuilding, every provision is construed exactly in accordance with what it says, with which businessmen engaged in international seatrade are well acquainted.

4. Costs and Period of Arbitration

The parties are required to pay the costs of arbitration in accordance with Main Rules Sections 32 and 33, and the Tariff of Fees for Arbitration Costs.

(1) **Engagement Fee**

Any person wishing to apply for either Ordinary or Simplified Arbitration must pay an Engagement Fee of ¥100,000 on his application to DOA which serves as a window to TOMAC. This fee is non-returnable. If the Respondent wishes to file a counter-claim (see Section 11) — counter-claims are not merely denials or objections made within the limits of the Claimant's Statement, but other claims beyond those limits such as, for example, one for immediate repayment of advances brought against the Claimant's claim for unpaid hire — he is also required to pay ¥100,000 as Engagement Fee upon filing such counter-claim.

(2) **Costs of Ordinary Arbitration**

The rates of the Arbitration Fee to be paid to DOA by each party are in principle as follows:

When the amount of claim is ¥15,000,000 or less, the fee to be paid is ¥350,000.

When the amount of claim exceeds ¥15,000,000, but does not exceed ¥50,000,000, the whole fee to be paid is the fee to be paid for ¥15,000,000 plus ¥10,000 for each additional ¥1,000,000.

When the amount of claim exceeds ¥50,000,000, but does not exceed ¥100,000,000, the whole fee to be paid is the fee to be paid for ¥50,000,000 plus ¥5,000 for each additional ¥1,000,000.

When the amount of claim exceeds ¥100,000,000, but does not exceed ¥1,500,000,000, the whole fee to be paid is the fee to be paid for ¥100,000,000 plus ¥20,000 for each additional ¥10,000,000.

When the amount of claim exceeds ¥1,500,000,000, but does not exceed ¥3,000,000,000, the whole fee to be paid is the fee to be paid for ¥1,500,000,000 plus ¥10,000 for each additional ¥10,000,000.

When the amount of claim exceeds ¥3,000,000,000, the whole fee to be paid is the fee to be paid for ¥3,000,000,000 plus ¥10,000 for each additional ¥500,000,000.

The above Tariff can be altered in each case according to its degree of difficulty or the necessity for arbitrators to take an official trip to a distant place, for instance. But, in general, the fee tends to be in line with the Tariff.

Arbitration costs are the combined amount of rates paid by each party and are borne, as a rule, by the losing party. These costs include the remuneration for the arbitrators and are decided in accordance with the Tariff, regardless of the length of proceedings or the number of hearings called. So TOMAC might run into a problem rewarding the arbitrators with only small cases coming in, but in practice we manage by pooling some part of the fees paid by the parties in big cases.

(3) **Costs of Simplified Arbitration**

The Tariff of Fees for Simplified Arbitration is also fixed. The person liable to pay, however, is the Claimant alone this time, which results in the reduced level of costs, compared with those of Ordinary Arbitration.

The rates of the Simplified Arbitration Fees to be paid are as follows:

When the amount of claim is ¥5,000,000 or less, the fee to be paid is ¥490,000.

When the amount of claim exceeds ¥5,000,000, but does not exceed ¥10,000,000, the fee to be paid is ¥525,000.

When the amount of claim exceeds ¥10,000,000, but does not exceed ¥15,000,000, the fee to be paid is ¥560,000.

In Ordinary Arbitration until the amount of claim reaches ¥15,000,000, each party is to pay ¥350,000 respectively, the total fees adding up to ¥700,000. As you see, the amount to be paid is at most ¥560,000 in Simplified Arbitration, 20% less than in Ordinary Arbitration.

The combined amount of claims in one case, however, can exceed ¥15,000,000 because you are allowed to file a counter-claim even in Simplified Arbitration. In such a case the fee to be paid is double the fee to be paid in accordance with the Tariff of Fees for (Ordinary) Arbitration

Costs, less 10%.

(4) The fact that the rates of arbitration fees are fixed may facilitate your reference to our arbitration, for you will be able to foresee the costs of your claim. In addition, one of the major features of TOMAC's arbitration lies in the relative shortness of the arbitration period, so that indirect costs saved might be considerable. Finally, let's take a brief look at TOMAC's performance in the past three years.

As for the cases in which the arbitration periods (from acceptance to conclusion) were long, I can pick up two, that is, "Z-B Owl No. 7" (an American shipowner v. a Japanese charterer over a dispute arising from a voyage charter) and "Solano" (a Dutch tugowner v. a Japanese shipper over a dispute out of a towage contract). They took as long as one year and eight months and one year and four months respectively. Among the remaining cases, those in which one or both parties came from another country took, in general, nine months to one year until their conclusion and those in which both parties were Japanese required eight to ten months of examination to be settled.

Among those which were concluded in shorter periods of time are "Dunedin" (three months; a Liberian buyer v. a Liberian seller over a ship-sales contract) and two others (both concluded within a month, but following mediation by the arbitrators).

Recent Developments in Arbitration Schemes in Japan

This article was originally presented to the 7th International Congress of Maritime Arbitrators held in Casablanca from 25th to 27th September, 1985 and was afterwards re-drafted for the bulletin of the Japan Shipping Exchange, Inc.

11th November, 1985

Tameyuki HOSOI
Bengoshi (Attorney at law) Tokyo

Introduction

Tokyo Maritime Arbitration Commission of The Japan Shipping Exchange, Inc. (JSE), hereinafter called TOMAC, has had a history of more than 70 years of maritime arbitration since its founding in Kobe.

I would now like to comment on the actual function of the present formal maritime arbitration scheme under TOMAC and I will raise some issues which have caught my attention.

Selection/Appointment of Arbitrators

Under the Rules of Maritime Arbitration of JSE, it is not possible for a party to compulsorily appoint its own arbitrator, although it is totally acceptable for the party to appoint a lawyer to present its contention to the arbitration panel. This matter has caused some unpleasantness, especially to foreign parties who are considering whether or not to participate in, or to adopt arbitration before TOMAC.

However, TOMAC has now agreed to take into consideration arbitrators who are desired by each party to be appointed by TOMAC, although the final and conclusive authority to decide the arbitrator is still TOMAC.

How to Appeal to the Court

Unlike the British Arbitration scheme, the award rendered by the arbitration panel under TOMAC is final and conclusive and there is no way at all for a party to appeal the award to ordinary court proceedings for review for any substantive reason except for non-fulfilment of procedural inquiries.

This would not all the time be fully convincing if an arbitration award is felt to be very much different from what would be judged by the court, in particular with respect to an interpretation of the law.

This issue is, however, not a matter which TOMAC can control, but results from Japan's Civil Procedural Code, and the Japanese parliament should hopefully consider amending this Code so as to leave some way for a party to bring the award of the arbitration panel to an ordinary court for review only in an extreme case.

Official Language

One advantageous point in arbitration is that the parties do not necessarily have to translate all the various charter parties, fixture notes, agreements, bills of lading, etc. into Japanese, particularly if the documentary evidences are in English, whilst if a matter is brought before the court in Japan all evidences written in foreign languages must be translated into Japanesee, although most judges are quite capable of understanding written English.

To make the TOMAC arbitration scheme more attractive to foreign parties, I suggest that not only documentary evidences but also the actual arbitration proceedings be conducted in English as well as Japanese if English is considered to be the appropriate language.

Professional Arbitrators

Arbitrators appointed by TOMAC are often businessmen working for their

own companies and sometimes it is not easy for all the three arbitrators including an umpire to get together to discuss the matter due to the heavy pressure of their own businesses.

To speed up the arbitration proceedings, I suggest that TOMAC should try to select professional arbitrators from people, for example, who have experience in the shipping business but have retired, or the like, since such people may have a lot of time exclusively free for the arbitration proceedings.

Evaluation of Evidences

Also, what is important in arbitrators is not only a familiarity with shipping business but also training in learning an appropriate way of considering and selecting valuable evidence to support each party's contentions from amongst various different and sometimes confusing evidence and testimonies.

Evaluation of the evidence does need special training and in this respect, some training system should be introduced by TOMAC.

Affiliation with Foreign Arbitration Schemes

TOMAC agreed with the Asian-African Legal Consultative Committee (AALCC) to cooperate with each other with respect to forming an affiliated relationship with the Kuala Lumpur Regional Centre for International Commercial Arbitration in October, 1978.

By this agreement the Kuala Lumpur Arbitration Centre and TOMAC are able to mutually ask for cooperation from each other and are able to transfer, if necessary and appropriate, arbitration matters to each other.

I hope that TOMAC will broaden this sort of affiliation and cooperation with other arbitration bodies in the future, which will surely improve the practice of arbitration.

Arbitral Award in a Dispute Arising from Charter (Sub-Charter) Party in respect of M.V. "UNION CARIBBEAN"

Claimant: Chartered Owners (Tokyo, Japan)
Respondent: Sub-Charterers (London, England)

Having regard to the dispute between the above mentioned parties arising from Voyage Charter Party dated 28th September, 1981 in respect of MV UNION CARIBBEAN the undersigned Arbitrators appointed in accordance with the provision of Article 34 of the said charter party hereby render the following award having closely examined the case.

Decision

1: Respondent shall pay to Claimant the sum of US$124,875 and interest thereon at the rate of 6 percent per annum for the period from 22nd February, 1982 to the date on which payment is completed.
2: All other claims of both parties shall be renounced.
3: The cost of this arbitration is ¥1,032,000 which sum shall be paid in full by Respondent. Claimant shall receive reimbursement therefore from Respondent in addition to the sum described in Paragraph 1. above.
4: Tokyo District Court shall have jurisdiction over this arbitration.

Facts

[1] Allegations Made by Claimant

I Claim

1. Respondent shall pay to Claimant the sum of US$154,125 with interest of 6 percent per annum from 29th November, 1981 until its final payment.

2. Respondent shall bear the cost of the arbitration.
3. Jurisdiction of Tokyo District Court over the arbitration shall be awarded.

II Grounds for the Claim

(1) Contract Concluded

Both parties entered into a voyage charter party under date of 28th September, 1981 in Tokyo in respect of MV UNION CARIBBEAN (hereinafter called "the Vessel") including the following relevant articles by means of a Fixture Note (Exhibit A-1).

1. Name of vessel: M/V "UNION CARIBBEAN"
2. Cargo: Steel Rail Scrap
3. Quantity: 10,000 M/tons 5% MOLOO Owners' option
4. Loading Port(s): One SBP Dammam
5. Discharging Port(s): One SBP Chittagong
6. Laydays not to commence before: October 10th, 1981
7. Cancelling Date: October 25th, 1981
8. Freight Rate: As arranged
9. Payment of Freight: Freight to be paid in cash by U.S.Dollar only. Discountless
11. Laydays Loading: 1,200 M/tons per WWDFHEX EIU
 Discharging: 800 M/tons per WWDSHEX UU,
 if used actual time to be counted as laytime
12. Demurrage: US$3,000.00 per day or pro-rata for all time lost
14. Agents: Owners' agents and expenses at both ends
16. Others: Other terms and conditions as per "GENCON (1-8)" C/P revised 1922 and 1976.
 One original Fixture Note being made, mutually signed and possessed by Owners.

RIDER TO M/V "UNION CARIBBEAN" FIXTURE NOTE DATED TOKYO, SEPTEMBER 28, 1981

17. Laytime for loading and discharging shall commence at 1 p.m. if notice of readiness is given on or before noon, and at 8 a.m. next working day if notice given during office hours after noon whether in berth or not, unless sooner commenced. Notice at loading port to be given to the Shippers named in Box 17. Time actually used before commencement of laytime shall count. Time lost in waiting for berth to count as loading or discharging time, as the case may be.
34. Any dispute arising from this Fixture Note to be settled by the Arbitration in Tokyo in accordance with the rules of Maritime Arbitration of The Japan Shipping Exchange, Inc. One arbitrator to be nominated by the Owners and other by the Charterers and in case the Arbitrator shall not be agreeable then to the decision of an umpire to be appointed by them. The award of the Arbitrators of the umpire to be final and binding upon both parties.
36. Master of the vessel or the Owners' agent shall despatch a cable or telex upon completion of loading of the time and date of completion loading (GMT) and the quantity of the cargo loaded (MT) to . . . . . Co., Ltd., Tokyo and . . . . . Inc., Tokyo.

Both parties concluded Addendum No. 1 (Exhibit A-2) in respect of the above mentioned Fixture Note under date of 29th September, 1981 in Tokyo, which Addendum provides inter alia as follows (Exhibit A-1 and Exhibit A-2 as above hereinafter called collectively "the Contract"):

1. Freight rate to be U.S. $29.00 per M/tons F.I.O.S.T. (U.S. $30.00 per M/tons deduct U.S. $1.00 per M/tons as Charterers' Address Commission) on basis of One port loading and One port discharging.
2. Freight to be remitted to the Owners nominated Bank in cash by U.S. Dollar in Tokyo within 7 days after completion of loading discountless and non-returnable ship and/or cargo lost or not lost.

Moreover, the Vessel was chartered by Claimant under a voyage charter party concluded between Claimant and the Shipowners, ... Co., S.A. (hereinafter called "Shipowner") dated 28th September, 1981 and thence sub-let to Respondent under the Contract.

(2) Respondents' Failure to Perform

1. Claimant sent the Vessel to Dammam in accordance with the Contract and there the Vessel gave notice of readiness for loading to Respondent at 1200 hours, on 17th October, 1981 with the result that laytime commenced at 1300 hours on the same day. Respondent failed to provide cargo under the Contract even at 2000 hours on 22nd October, 1981.

2. In order to save the Vessel from suffering further detention damage by waiting for cargo, on or about 22nd October, 1981 Respondent approached Claimant for carrying about 10,000 tons of bagged rice from Karachi to Dammam at the freight of US$20.50 per ton, which Claimant accepted.

   As called upon the Vessel sailed from Dammam for Karachi at 2000 hours on 22nd October, 1981 and loaded at Karachi a total 11,000 tons of bagged rice. The Vessel arrived at Dammam on 10th November, 1981 and shifted to anchorage to wait for arrival of the cargo under the Contract at 1300 hours on 17th November, 1981 after completing discharge at 1000 hours on the same day.

3. The cargo under the Contract was not provided by Respondent even thereafter and therefore through the good offices of Claimant Shipowner reached agreement with ········ Ltd., being outside this arbitration case, to use the Vessel and carry about 10,000 tons of urea fertilizer in bags from Umm Said to Chittagong. As called upon under this agreement, the Vessel left Dammam for Umm Said at 1500 hours on 28th November, 1981.

(3) Damage Sustained by Claimant by Reason of Respondent's Failure to Perform

1. Dead Freight US$304,500

   The maximum loading quantity permissible under the Contract Article 3 is calculated to be 10,500 tons and it is clear from the Vessel having loaded 10,500 metric tons of bagged fertilizer that she

could have loaded that quantity of cargo under the Contract, had it been actually provided. Dead freight for the permissible maximum loading quantity will be US$304,500 at the rate per metric ton of US$29.00 (Exhibit A-2).

2. Demurrage US$49,125

   The Vessel stayed at Dammam for a total period of 16 days 9 hours consisting of (a) 5 days 7 hours from 1300 hours, 17th October, 1981 until 2000 hours, 22nd October, 1981 and (b) 11 days 2 hours from 1300 hours, 17th November, 1981 until 1500 hours 28th November, 1981. As the Contract Article 12 provides for daily demurrage of US$3,000.00, total demurrage for the above mentioned period amounts to US$49,125.

3. Credit against Damage Claim, US$199,500

   The Vessel, which was staying at Dammam, left there at 1500 hours on 28th November, 1981 for Umm Said under the agreement mentioned in II(2) 3. above. The Vessel loaded at Umm Said 10,500 metric tons of urea fertilizer in bags (Exhibit A-23) and discharged it at Chittagong and Chalna (Exhibit A-25), Shipowner earning the freight of US$199,500.

   In settling the damage claim which Claimant became obligated to pay to Shipowner (arising from the Vessel's detention and Claimant's failure to provide cargo to Shipowner) Claimant obtained a reduction to the extent of the fertilizer freight earned and therefore ventured not to claim that reduced portion from Respondent.

   As a result of Respondent's non-performance, Claimant sustained damage amounting to US$154,125 which sum has been arrived at by deducting the freight amount mentioned in 3. above from a combined total of the dead freight and demurrage amounts mentioned in 1. and 2. above and therefore claims reimbursement from Respondent.

(4) Evidence

Claimant submitted as documentary evidence Exhibits A-1 through A-65 and applied for presenting as a witness K. N. who was in the employ of Claimant.

[2] Reactions Received from Respondent

Neither Respondent nor Attorney for Respondent responded to repeated requests from the Board of Arbitrators for submission of a Defence and documentary evidence, but the latter made comments twice in the form of telexes addressed to The Japan Shipping Exchange, Inc. as follows:

Under date of 19th January, 1984

(1) THE CLAIM BY ····· (CLAIMANT) IS MISCONCEIVED IN THAT IT DOES NOT TAKE INTO ACCOUNT ANY ALLOWANCE FOR THE CARGO OF BAGGED RICE FROM KARACHI TO DAMMAM AMOUNTING TO 10,000 TONS WHICH EARNED FOR THE OWNERS US DOLLARS 200,000. IT DOES NOT TAKE INTO ACCOUNT THE INVOICE SUBMITTED BY OUR CLIENTS FOR 87,000 DOLLARS WHICH SHOULD BE CREDITED AGAINST ANY SUM ALLEGEDLY DUE TO ····· (CLAIMANT).

(2) ····· (CLAIMANT)'S CLAIM FOR US DOLLARS 30,000 FOR DEMURRAGE FROM THE 17TH OCTOBER TO THE 26TH OCTOBER IS MISCONCEIVED. THE ORIGINAL FIXTURE NOTE AS AMENDED ON THE 7TH SEPTEMBER INCLUDED ····· (CLAIMANT)'S AGREEMENT THAT LAYTIME WOULD NOT COMMENCE AT DAMMAM UNTIL THE 30TH OCTOBER.

(3) ····· (CLAIMANT)'S SECOND CLAIM FOR US DOLLARS 33,249.99 FOR DEMURRAGE FROM THE 17TH NOVEMBER TO 28TH NOVEMBER IS MISCONCEIVED. UNDER CLAUSE 17 OF THE FIXTURE NOTE, LAYTIME WOULD COMMENCE AT 8AM ON THE NEXT WORKING DAY IE 18TH NOVEMBER.

PERMITTED LAYTIME UNDER CLAUSE 11 WAS 1,200 M.T. PER WEATHER WORKING DAY FRIDAY AND HOLIDAYS EXCLUDED EVEN IF USED. ON THE BASIS OF A 10,000 TON CARGO THE PERMITTED LAYTIME WOULD NOT HAVE BEEN EXHAUSTED BY THE 28TH NOVEMBER. ·····(CLAIMANT) ARE NOT THEREFORE ENTITLED TO DEMURRAGE.

(4) ·····(CLAIMANT)'S CLAIM FOR DEAD FREIGHT IN THE SUM OF US DOLLARS 110,250 IS MISCONCEIVED. THE FACT THAT THE CARGO WAS NOT IMMEDIATELY AVAILABLE ON THE 17TH NOVEMBER WOULD NOT ENTITLE ·····(CLAIMANT) TO RESCIND. THEIR ENTITLEMENT TO RESCIND WOULD ONLY ARISE IF THE DELAY WAS SUCH AS TO FRUSTRATE THE CHARTER PARTY OR OUR CLIENTS EVINCED AN INTENTION NOT TO PERFORM. THERE CAN BE NO JUSTIFICATION FOR THIS ON THE EVIDENCE.

(5) SUBJECT TO THE ABOVE, ·····(CLAIMANT) WOULD ONLY BE ENTITLED TO CLAIM DAMAGES IF THERE WAS EVIDENCE THAT THEY DID IN FACT RESCIND THE ORIGINAL FIXTURE NOTICE.

WE HAVE NOT SEEN A TELEX MESSAGE GIVING NOTICE OF RESCISSION.

(6) WE ALSO WOULD QUESTION WHETHER IT IS CORRECT TO SUBMIT THIS MATTER TO ARBITRATION TO YOUR GOODSELVES. THE ARBITRATION CLAUSE COVERS ANY DISPUTE ARISING FROM 'THIS FIXTURE NOTE'. THE ARBITRATION CLAUSE WOULD NOT APPLY TO THE FIXTURE NOTE AS IT WAS SUBSEQUENTLY AMENDED.

Under date of 14th February, 1984

THANK YOU FOR YOUR TELEX.

WE HAVE NOT HAD A FULL OPPORTUNITY OF TAKING OUR CLIENT'S INSTRUCTIONS BUT WOULD COMMENT AS FOLLOWS:—

(1) THE CARGO OF BAGGED RICE WAS CARRIED OUT AS AN ALTERNATIVE EMPLOYMENT IN VIEW OF THE CARGO OF RAIL TRANSPORTATION. OUR CLIENT DID NOT MERELY ACT A AGENT.

THE PAYMENT TERMS WERE THAT THE GRAIN BOARD HAD PAID ·····(RESPONDENT) BY WAY OF LETTER OF CREDIT FOR95 PCT 5 PERCENT PCT AFTER DISCHARGE.

OUR CLIENTS HAVE STILL NOT RECEIVED THE MONIES OWED.

(2) THE A/P ON ACCOUNT AVERAGE OF SEA VESSEL IS ON ·····(CLAIMANT)'S ACCOUNT, AND THE AMOUNT OF US DOLLARS 73,000 HAS BEEN PROPERLY CLAIMED BY OUR CLIENT.

(3) THESE REMARKS ARE MADE OUT OF CONTEXT.

THE ALTERNATIVE EMPLOYMENT WAS PROPOSED BY ·····(RESPONDENT) AND FOR REASONS NOT CLEAR, ·····(CLAIMANT) DEMANDED MUCH HIGHER RATES. AFTER A LAPSE OF ABOUT 10 DAYS ····· (CLAIMANT) SUGGESTED LOWER RATES, BUT IN THIS PERIOD THE BUSINESS WAS LOST AS THE MARKET WAS FALLING STEADILY.

(4) AND (5) WE REPEAT, ·····(CLAIMANT) NEVER NOTIFIED ·····(RESPONDENT) OF THEIR INTENTION TO WITHDRAW AND STATE THEIR TERMS.

·····(RESPONDENT) NOT AWARE OF ANY NOTICE TO ······· WHO ARE NOT A PARTY TO THE CONTRACT.

THE WRITER WILL BE AWAY FROM THE OFFICE UNTIL MONDAY, THE 20TH FEBRUARY, BUT WILL DEAL TO ANY RESPONSE ON HIS RETURN.

Reasons

It is reiterated that Respondent failed to file any Defence, Statement or documentary evidence as required. Nor did he comply with repeated requests for appearance at hearings. In the circumstances, the Arbitrators have based their decision solely on the allegations made by Claimant, the evidence Claimant submitted and the examination of the witness Claimant applied for, as well as the comments made in the telexes sent by Attorney for Respondent, having given due consideration to all of them as well as what the arbitrators have found out through their investigations ex officio:

I What Contract Involved and How this Arbitration Has Been Handled.

Attorney for Respondent questioned the correctness of submission to this arbitration in his telex dated 19th January, 1984, stating that the arbitration clause would not apply to the fixture note as it was subsequently amended. This will now be dealt with.

(1) According to Witness K. N. who in the employ of Claimant was engaged in the preparation of contracts in this case, inquiry related to carriage of the cargo under the Contract was first brought by W. Shipping to Claimant, who in turn passed the matter on to ·····, a Taiwanese broker, and word about Shipowner's acceptance was referred back to W. Shipping by P. through Claimant. W. Shipping introduced to Claimant A. Japan as Respondent's agent in Japan, saying that the cargo in this case had been arranged by Respondent and details of the Contract were thus negotiated between Claimant and A. Japan. Consequently, Claimant concluded two separate charter parties, as charterers vis-a-vis Shipowner and as disponent owners vis-a-vis Respondent and the Contract was thus finalised and signed by and between Claimant and A. Japan acting on behalf of Respondent (Exhibits A-1 and A-2). Apart from establishing these facts, the witness went on to submit documentary evidence Exhibits A-3 through A-25 as a means of testifying how the negotiation developed leading to the Contract.

It is clear from the foregoing that the Contract was properly negotiated and

formally concluded. Therefore, the Arbitrators must rely on the Contract for their decision in the absence of evidence showing that there has been either any revision of the Contract or any new contract.

(2) Claimant notified Respondent by a letter dated 22nd February, 1982 that an arbitrator had been nominated by Claimant and the dispute in this case submitted to arbitration in accordance with the Contract Article 34 being the arbitration clause. Thereupon, Respondent notified Claimant of Respondent's nomination of an arbitrator. Thus, the two arbitrators required under the Contract were legitimately appointed in Tokyo.

On the other hand, the corresponding dispute arising between Claimant and Shipowner under the other charter party, referred to in (1) above, was submitted to arbitration by The Japan Shipping Exchange, Inc. and proceedings got under way soon. As a result, the present arbitration case was left in abeyance pending a decision in that arbitration.

The Contract provides in its Article 34 for arbitration in Tokyo in accordance with the rules of Maritime Arbitration of The Japan Shipping Exchange, Inc.; Section 3 of the said rules stipulates as follows:

> "Where the parties to a dispute have, by an arbitration agreement entered into between them or by an arbitration clause contained in any other contract between them, stipulated that any dispute shall be referred to arbitration of the Exchange or arbitration in accordance with its rules, these Rules shall be deemed to constitute part of such arbitration agreement or arbitration clause."

It therefore follows that this arbitration is governed by the said Article of the rules.

(3) This arbitration was not activated until 19th July, 1983 when Claimant filed the Supplement to his previous application for arbitration.

The Arbitrators' instructions for filing the Defence to the said Supplement together with supporting documentary evidence were relayed to Respondent in a letter dated 25th July, 1983.

Time limit for filing the documents was finally set at 7th November, 1983 after two extensions, as Attorney for Respondent came back each time, applying on some pretext or other, for extension of the first set deadline or another

extension of the re-set deadline. None of the required documents were filed by Attorney for Respondent after all, although more than sufficient time had been given to meet the requirements.

As for the first hearing, a date which was deemed convenient for a proposed visit to Japan by a representative of Respondent was set well in advance. However, at the first hearing only the Claimant was represented (no one appeared on behalf of Respondent).

Thereafter, Respondent and Attorney for Respondent were advised that the second hearing date would be 20th January, 1984. The only result was that the telex dated 19th January, 1984 came forward from Attorney for Respondent, making comments as quoted in [2] above. No person appeared on behalf of Respondent at the second hearing. Nor were any of the required documents received. Attorney for Respondent was then specifically instructed by the Arbitrators to submit documentary evidence in support of the comments 1 through 6 made in his telex, but again without any result.

At neither the third hearing (16th February, 1984) nor the fourth hearing (23rd March, 1984) was Respondent represented.

On the other hand, Claimant sent a telex dated 8th February, 1984 to Respondent making counter-comments in the light of the telex comments 1 through 6 dated 19th January, 1984. Thereupon, Attorney for Respondent restated his position in a telex dated 14th February, 1984 but no document evidencing it was made available.

In accordance with Article 20 of the Rules of Maritime Arbitration the Arbitrators pronounced the hearing as concluded on 23rd March, 1984 directly following the fourth and last session of the hearing, at which again only the Claimant was represented. This action on the part of the Arbitrators was because, in their opinion, Respondent had been afforded ample opportunities to take part in the arbitration proceedings as well as adequate time to prepare for them, if he so wished, though without any result.

As reviewed above, this arbitration, which is legitimate in itself, has been handled in an appropriate manner and due consideration was given to the

circumstances in which Respondent was placed. More particularly, the failure on the part of Respondent to take part in the arbitration proceedings was entirely of his choice and making, so that there is nothing that justifies Respondent in denying the validity of this arbitration.

II **Next comes the question of whether Claimant's claim is reasonable.**

(1) Dead Freight

The vessel proceeded to Dammam under the Contract and was detained there for an extended period excluding a certain interval, waiting for Respondent to provide cargo. The Vessel was then employed for carriage of urea fertilizer as arranged with ········ (Exhibit A-46). All this is Claimant's version of what happened, but it is not disputed by Respondent. It is also substantiated by documentary evidence (Exhibits 3 through 25). The Arbitrators therefore accept these facts as alleged by Claimant.

Attorney for Respondent asserted by telex under date of 19th January, 1984 that the fact that the cargo was not immediately available on 17th November, 1981 would not entitle Claimant to rescind. It was also asserted in the same context that Claimant's entitlement to rescind would only arise if the delay was such as to frustrate the charter party or Respondent evinced an intention not to perform. Thus, Attorney for Respondent concluded that there can be no justification for Claimant's claim for dead freight.

The Vessel was detained at Dammam for the second time to wait for arrival of the cargo after 1000 hours, 17th November, 1981 (Exhibit A-58) when discharge of bagged rice loaded at Karachi was completed. Three days later, on 20th November, 1981, Claimant sent a telex to A. Japan as agent for Respondent (Exhibit A-37).

This telex was ended with the message requesting cargo position to be confirmed not later than 23rd November, 1981 (London time) in order to minimise losses and save expenses mutually. It was also added that any failure would be construed as the charterers' breach of contract and the owners would instruct the Master to sail the Vessel from Dammam and take all necessary steps to

protect the owners' interest. However, no definite answer came.

It is found that Claimant had exhausted such necessary measures as could have been taken in the circumstances before the Vessel was actually ordered to sail and the comments made by Respondent in this connection are considered to be irrelevant.

Significantly, there is no evidence available indicating that any identifiable cargo was ever shipped by any other vessel after the Vessel sailed.

It should be noted that well over a month had elapsed from 17th October, 1981 when the Vessel tendered notice of readiness for loading at noon under the Contract upon her arrival at Dammam and laytime commenced to run an hour later up to 20th November, 1981 when Claimant despatched to Respondent the telex message referred to above. At no time during that period was any clearcut answer made to repeated requests emanating from Claimant for the exact position of cargo and/or the identity of the shippers/suppliers. It is reiterated that even the ultimatum-like telex message sent before the Vessel's sailing elicited nothing concrete from Respondent.

As for the point reflected in the telex of 14th February, 1984 sent by Attorney for Respondent that the cargo of bagged rice was carried as an alternative employment in view of the non-availability of the cargo under the Contract, there is no evidence of any kind in favour of the existence of anything amounting to such an agreement.

It therefore follows that there is no point to be accepted in the comments made by Attorney for Respondent. It is also found that Claimant, who, under due advice to Respondent, sailed the Vessel after having stayed longer than a reasonable period, has the right to claim damages sustained as a result of the non-performance on the part of Respondent. The amount of dead freight payable shall be US$304,500 as per Claimant's calculations shown in [1] II (3) 1. above, which are found appropriate.

(2) Demurrage

In his telex dated 19th January, 1984 Attorney for Respondent made reference to an amended fixture note including Claimant's agreement that lay-

time would not commence at Dammam until 30th October, 1981. However, here again, there is nothing evidencing the Claimant's agreement referred to.

Next to be discussed is another point raised in the telex of Attorney for Respondent, that is, that laytime would commence on 18th November, 1981.

Since the Vessel tendered notice of readiness for loading at 1200 hours on 17th October, 1981, laytime commenced at 1300 hours in accordance with the Contract Article 17. The Vessel left Dammam for Karachi at 2000 hours on 22nd October, 1981 on rice business and arrived back at Dammam at 2225 hours on 10th November, 1981. The Vessel completed discharge at 1000 hours on 17th November, 1981 and shifted to her anchorage at 1300 hours on the same day.

In the absence of contrary agreement, it is generally accepted that if something happens that causes laytime to be interrupted after it begins to run, laytime resumes to run when it ceases to be so interrupted. It is found that there is no merit in the point raised by Attorney for Respondent. In this connection, laytime is reasonably considered to have resumed to run at 1300 hours on 17th November, 1981 when the Vessel completed shifting to the anchorage to wait for arrival of the cargo.

On analysis, the Vessel's period of waiting at Dammam for cargo under the Contract was from 1300 hours, 17th October, 1981 until 2000 hours, 22nd October, 1981 and from 1300 hours, 17th November, 1981 until 1500 hours, 28th November, 1981. According to the Contract Article 11, laydays are based on 1,200 tons per weather working day, Fridays and holidays excluded even if used. It is already established that the maximum permissible quantity of 10,500 tons could have been loaded. On this basis, the permitted laytime would have been 8 days 18 hours, expiring at 2400 hours, on 21st November, 1981 (Friday, 20th November, 1981 excluded), leaving 6 days 15 hours until 1500 hours, 28th November, 1981 when the Vessel ceased to wait for arrival of the cargo.

According to the Contract Article 12, demurrage to be claimed shall be US$19,875.

(3) Award on Claimant's Claim

As reviewed above, the Arbitrators find that Claimant has justifiable claims against Respondent for dead freight amounting to US$304,500 and demurrage of US$19,875 totalling US$324,375.

It follows that it is proper that Claimant claims payment of US$124,875 from Respondent after deducting from the said total amount the sum of US$199,500 which corresponds to the freight earned on the urea fertilizer for the reasons stated in [1] II (3). above.

Claimant seeks payment of interest at 6 percent per annum from 29th November, 1981 until the date on which payment is completed. It is found proper for Claimant to claim interest at the said statutory rate until the payment date from 22nd February, 1982 when Claimant made application for this arbitration.

III Counter-claim Made by Respondent

Attorney for Respondent made an allusion in his telex dated 14th February, 1984 to a certain counter-claim on insurance premium which is not directly related to the cargo under the Contract. Arbitrators find the matter beyond the scope of this Arbitration.

Thus, the decision is rendered as per the Decision.

Tokyo, 7th June, 1984

Arbitrator : Kenichi ABE

Arbitrator: Reiji SAKURAI

Arbitral Award in a Dispute concerning a Claim for Damages for Loss of Cargo on M. V. "SEMARANG"

Claimant (Insurer) : (Taiwan, China)
Respondent (Shipowner) : (Taiwan, China)
Respondent (Charterer) : (Taiwan, China)

Regarding the dispute among the parties as above mentioned concerning a claim for damages for loss of Cargo on M. V. SEMARANG, the Claimant filed an application for arbitration with The Japan Shipping Exchange, Inc., in accordance with Clause 20 (Arbitration) of the Bills of Lading dated April 12, 1979 (Nos. 01/III/79 and 01/III/79), and the undersigned arbitrators appointed in accordance with the Rules of Maritime Arbitration of The Japan Shipping Exchange, Inc., hereby render the following arbitration award.

Award

1: The Respondent (Shipowner) · · · · · , shall pay to the Claimant the sum of N. T. $6,390,000 (say New Taiwan Dollars Six Million Three Hundred and Ninety Thousand only) within one month from the date of this Award.

2: The cost of this arbitration case shall be ¥984,000 (say Japanese Yen Nine Hundred and Eighty Four Thousand only) which is to be borne by the Respondent (Shipowner) · · · · · . The Claimant shall pay the cost and then receive the payment for the same in addition to the sum mentioned in Paragraph 1 hereof from the Respondent (Shipowner) · · · · · .

3: Tokyo District Court, Japan shall have the jurisdiction over this arbitral award.

Facts and Claims of the Parties

1: Claims made by Claimant

(1) The Respondents shall jointly pay the Claimant the sum of N. T.

$6,390,000 plus the interest thereon at 6% per annum for the period starting from February 1, 1980.

(2) The cost of this arbitration shall be borne by the Respondents.

2: Pleadings made by Claimant

····· Co., Ltd. (hereinafter referred to as "JST") which is not a party to this arbitration purchased 3,199.943 m^3 (12,626 pieces) of Indonesian Round Logs (hereinafter referred to as "the Cargo") from ····· Company (hereinafter referred to as "CVI") which is not a party to this arbitration.

CVI concluded a contract of carriage with the Respondent (Charterer) ····· (hereinafter referred to as "the Respondent (II)") for transporting the Cargo from Kendari, Indonesia to Taiwan, and the Respondent (II) (Charterer) in turn concluded a voyage charter party with the Respondent (Shipowner) ····· (hereinafter referred to as "the Respondent (I)") to have the Cargo transported by M. V. SEMARANG (hereinafter referred to as "the Vessel").

On the other hand, JST has concluded marine cargo insurance contracts for the Cargo with the total amount of N. T. $6,390,000 (Nos. HT902-00742 and HT904-01842; hereinafter referred to as "the Cargo Insurance") with the Claimant as of February 15 and March 13, 1979. (Exhibits A-2-1 and -2)

The Vessel sailed from Kendari on April 13, 1979 and sank with the Cargo on the following day, 14th, at a point 100 miles from Kendari. JST demanded the Claimant to pay the insurance money of N. T. $6,390,000 for total loss of the Cargo under the Cargo Insurance. The Claimant paid the said sum to JST, and acquired the right to claim damages for loss of the Cargo from JST (Exhibit A-1) under the contract of carriage evidenced by two Bills of Lading (Nos. 01/III/79 and 02/III/79; Exhibits A-4-1 and -2; hereinafter referred to as "the Bills of Lading") issued against loading of the Cargo on the Vessel. The Claimant therefore demands the Respondents (I) (Shipowner) and (II) (Charterer) to pay the damages in the amount of N. T. $6,390,000.

3: The Bills of Lading

The Bills of Lading submitted by the Claimant are for 9,901 pieces

(1,200.053 m^3) and 2,725 pieces (1,999.89 m^3) of the Cargo, and were issued as of April 12, 1979 at Kendari. The Bills of Lading were signed by · · · · · acting "for Master", and the consignor was CVI.

The Bills of Lading contained the following arbitration clause as Article 20.

20. Arbitration

Any dispute arising under this Bill of Lading shall be submitted to arbitration by the Japan Shipping Exchange, Inc., in Tokyo conducted under the provisions of the Maritime Arbitration Rules of the Japan Shipping Exchange, Inc., and the award given by the arbitrators appointed in accordance with the said Rules shall be final and binding.

4: Pleadings by Respondent (II) (Charterer)

JST purchased the Cargo under FOB contract from CVI, and consigned the Respondent (II) (Charterer) to charter the Vessel on January 20, 1979 for carriage of the Cargo (Exhibit B-1; hereinafter referred to as "the Power of Attorney"). Based on this consignment, the Respondent (II) (Charterer) concluded with the Respondent (I) (Shipowner) a voyage charter party on March 13, 1979 for carriage of the Cargo (Exhibit B-2; hereinafter referred to as "the Voyage Charter Party"), and chartered the Vessel. After the Vessel had loaded the Cargo from CVI, · · · · · acting as an agent for the Respondent (I) (Shipowner) issued the Bills of Lading, which were then delivered to CVI directly. There is no evidence whatsoever that JST paid the freight for carriage of the Cargo to the Respondent (II) (Charterer) upon issuance of the Bills of Lading. The Bills of Lading were delivered to JST at a later date via bank for receipt of the Cargo at the port of discharge. Thus, under consignment by JST the Respondent (II) (Charterer) acting as their agent chartered the Vessel, and had not concluded a carriage contract for the Cargo with JST. Therefore, the Claimant who acquired the right of claim for the damages to the loss of the Cargo from JST in subrogation is not entitled to demand the Respondent (II) (Charterer) for compensation of the damages.

5: The Power of Attorney

The Power of Attorney submitted by the Respondent (II) (Charterer) used the letterhead of JST and is dated January 20, 1979. The Power of Attorney reads as follows.

> LET IT BE KNOWN that we, JST, residing at ······ Taipei, Taiwan do hereby appoint Messrs. the Respondent (Charterer) residing at ······ Taipei, Taiwan with full authority to act on our behalf of chartering ships for loading Indonesian Round Logs (totally around 5000 m^3) Vessel's age to be under 15 years old.
>
> JST Respondent (Charterer) ·····
>
> (signed) (signed)

6: Supplementary Statement made by Claimant concerning the Power of Attorney

Concerning the Power of Attorney, the Claimant had doubt concerning the authenticity of the same, and argues that "the Power of Attorney did not give the name of the shipowner or the name of a vessel. Accordingly, as the Respondent (II) (Charterer) had agreed to the carriage of logs from Indonesia to Taiwan for JST, the Respondent (II) (Charterer) was responsible to the Claimant as a carrier".

The Claimant further asserted that "according to the Power of Attorney, although the Respondent (II) (Charterer) should have hired a vessel which was under 15 years old for JST, the Respondent II (Charterer) hired the Vessel which was at that time 20 years old. The fact that the Vessel sank soon after its departure and caused the total loss of the Cargo definitely suggested that the Respondent (II) (Charterer) chartered the Vessel which was not suitable for carrying the logs. Thus, the Respondent (II) (Charterer) failed to perform its duties under the present consignment contract. The Respondent (II) (Charterer) lacked the precautionary care (which they should have exercised) in selecting the Respondent (I) (Shipowner) to assure that the Respondent (I) (Shipowner) was sufficiently trustworthy in carriage of the Cargo and that the Vessel was suffi-

ciently seaworthy."

7: Evidences

As evidences, the Claimant submitted Exhibits A-1 to A-4, and the Respondent (II) (Charterer) Exhibits B-1 and B-2.

Reasons

1: Regarding the authenticity of the Power of Attorney and the status of the Respondent (II) (Charterer)

From the content of the Power of Attorney, it is clear that JST granted the Respondent (II) (Charterer) the full authority to act on their behalf in chartering ships for JST for loading the Indonesian Round Logs (totally around 5,000 m^3).

The Claimant should have made inquiries with JST as to the authenticity of the Power of Attorney, but failed to do so.

The Claimant argued that there was concluded a carriage contract between CVI and the Respondent (II) (Charterer), but failed to submit evidences to support the same.

Based on the foregoing, it is judged that the present Power of Attorney was authentic and the Respondent (II) (Charterer) chartered the Vessel for carrying the Cargo acting as an agent for JST based on the Power of Attorney. Therefore, it is judged that the Claimant who had acquired the subrogated right for claiming damages for the loss of the Cargo from JST had no right to claim against the Respondent (II) (Charterer) damages for the loss of the Cargo.

The Claimant pointed out the violation by the Respondent (II) (Charterer) of the consignment contract as evidenced by the Power of Attorney. However, since this arbitration is based on arbitration under Article 20 of the Bills of Lading, this falls outside the scope of the present arbitration. Therefore, the assertion by the Claimant regard-

ing this matter shall not be the subject of examination.

2: The responsibility of the Respondent (I) (Shipowner) concerning the loss of the Cargo

The arbitrators required the Respondent (I) (Shipowner) to submit their Defense and Statement concerning the Claimant's pleadings and gave opportunities to attend the hearing. Not only did the Respondent (I) (Shipowner) fail to comply with the request but they also failed to respond to any and all arbitration procedures.

Therefore, the examination is based on the pleadings by the Claimant, by the Respondent (II) (Charterer) and the evidences submitted by them to find if the Respondent (I) (Shipowner) was responsible for the loss of the Cargo.

(1) The status of the Respondent (I) (Shipowner)

The Bills of Lading lacked the headings, did not describe the name or the tradename of the carrier, and Article 16 (Identity of Carrier) printed on its back stated that if the ship was not owned by, or charged by demise to ······ this bill of lading should take effect only as a contract with the owner or demise charterer, . . . , and the present Bills of Lading were assumed to have been issued by ······ (hereinafter referred to as "FSC"). The Claimant stated that the Respondent (I) (Shipowner) or the Respondent (II) (Charterer) used the Bill of Lading of FSC. The Respondent (II) (Charterer) asserted that the signatory ······ of the Bills of Lading was an agent for the Respondent (I) (Shipowner) and therefore the Respondent (I) (Shipowner) was the issuer of the present Bills of Lading. However, no evidence to support their assertions had been presented or submitted.

In the Voyage Charter Party the Respondent (I) (Shipowner) is specified as the owner of the Vessel to bring the Vessel to Kendari between March 25, 1979 and April 10 of the same year, cause the 3,500 m^3 logs to be loaded (10% More or less at Master's option) and carried to Taiwan.

The said Charter Party also provided that the notice of readiness be submitted to CVI.

On the face of the Bills of Lading were described that the Vessel should have loaded 1,200.053 m^3 and 1,999.89 m^3 (total: 3,199.943 m^3) of Indonesian Round Logs by April 12, 1979 at Kendari, Indonesia, the destinations were Taichung and Keelung, Taiwan respectively, the shipper was CVI, the consignee was "TO ORDER BANK ·······" and Notify Party was JST.

Based on the above facts, it is assumed that the contract of carriage evidenced by the Bills of Lading and the contract of carriage under the Voyage Charter Party were deemed to be the same, and the Respondent (I) (Shipowner) was thereby found as the carrier of the Cargo under the Bills of Lading.

(2) Responsibility of the Respondent (I) (Shipowner)

Article 24 of the Bills of Lading stated the following.

24. Clause Paramount

This bill of lading shall have effect subject to the provisions of the Japan International Carriage of Goods by Sea Act, 1957, which shall be deemed to be incorporated herein, and nothing herein contained shall be deemed a surrender by the carrier of any of its rights or immunities or an increase of any of its responsibilities or liabilities under that Act. If any term of this bill of lading be repugnant to that Act to any extent, such term shall be null and void to that extent but no further.

The Japan International Carriage of Goods by Sea Act, 1957 which has been incorporated under the present Bills of Lading by reference in the above provision is assumed to be Kokusai Kaijo Buppin Unso Ho (the Law concerning Carriage of Goods by Sea: Law No. 172) enacted in 1957 (hereinafter referred to as "the Law"). Article 5 of the Law provides the following in respect of the "Duty to exercise due diligence in connection with the seaworthiness".

Article 5 (1) The carrier shall be liable to make compensation for damages such as loss of, damage to or late arrival of the goods carried arising from the carrier's own failure or the failure of persons whom he employs to exercise due diligence respect to the following matters at the time of commencement of the voyage:

1. To place the ship in a seaworthy condition.

2. . . .

3. . . .

(2) The carrier may not be discharged from the liabilities provided for in the preceding paragraph, unless he shall prove that he has exercised due diligence as provided in the same paragraph.

The Respondent (I) (Shipowner) should have proven that they had exercised due diligence to place the Vessel in a seaworthy condition at the time of commencement of the voyage from Kendari to Taiwan in accordance with Article 5 (2) of the Law, but failed to do so. The Respondent (I) (Shipowner) therefore is responsible to the Claimant for damages suffered by the loss of the Cargo under Article 5 (2) of the Law.

3: Cost of Arbitration

Cost incurred in this Arbitration case is ¥984,000 which shall be reasonably borne by the Respondent (I) (Shipowner).

4: Having carefully examined the documents submitted by the parties and the assertions made by the parties at the hearings, the Award is given.

Dated this 18th day of September, 1985 at The Japan Shipping Exchange, Inc., Tokyo, Japan

Arbitrator : Kazuo MIYATAKE

Arbitrator : Kazuo FUJISHIRO

Arbitrator : Mitsuhisa SATO

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