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CONTENTS

Court Decision I

[Outline translated tentatively from Decision in Japanese]

Decision of Kobe District Court dated July 20, 1987
Docket No.: Kobe Showa 60 nen (Wa) 1329.

Parties Concerned

Plaintiff : Japanese Bank

Defendant Y_1 : Taiwanese Shipping Company

Defendant Y_2 : Japanese Shipping and Fowarding Agent

Issue

Is an Agent liable in claim in tort to a bona fide Bill of Lading holder, if it is the Agent, who, upon the explicit instructions of the Shipowner, delivers cargo to an importer in Japan in return for Letters of Undertaking rather than Bills of Lading ?

Holding

–Yes. The Court found that only the Agent is liable for the non–delivery of cargo to the bona fide Bill of Lading holder, and the Shipowner himself is not responsible as far as the claim in tort is concerned.

Presentation of Plaintiff's Allegations:

P–1) The Plaintiff in this action is a Japanese Bank, with its head office in Osaka.

The two Defendants in this action are a Taiwanese Shipping Company (hereinafter referred to as "Defendant Y_1"), which is based in Taipei, and a Japanese shipping and forwading agent (hereinafter referred to as "Defendant Y_2") for the Defendant Y_1, which is based in Kanagawa, Japan.

P–2) The Defendant Y_1 issued three Bills of Lading for three different car-

riages of goods by the vessels, "TAICHUN", "FUCHUN" and "WANCHUN" and the Plaintiff obtained possession of these three Bills of Lading on the 6th and 22nd September, and the 8th October, 1984, respectively.

P–3) The cargo which these three Bills of Lading refer to arrived in Kobe, and the Defendant Y_2 deliverd the goods to a third party, C Co. Ltd. (herein after referred to as "C") who was the importer of the goods to Japan.

The goods were actually delivered on the 7th and 14th September, and the 4th October, 1984 respectively; however C never presented the three Bills of Lading.

P–4) The Defendant Y_2 was aware that the three Bills of Lading had been issued, and therefore the delivery of the goods to C without receipt of the Bills of Lading amounted to negligence in tort against the Plaintiff, as the bona fide B/L holder.

Thus the Defendant Y_2 should be liable for any loss suffered by the Plaintiff with respect to the non–delivery of the goods in question.

P–5) The Defendant Y_1 continually and exclusively used the Defendant Y_2 as sole agent in Japan for the Defendant Y_1's business activities regarding the carriage of goods by sea to and from Japan.

In other words, Defendant Y_2 should be considered identical in its function to a branch office in Japan of the Defendant Y_1 and therefore the Defendant Y_1 should be considered to be an employer under the Japanese Civil Code, Article 715, the result being that the Defendant Y_1 should be held responsible for the Defendant Y_2, delivering the cago to C.

In addition, if, as the Defendant Y_2 claims, it actually delivered the goods to C without the B/L, upon the explicit instructions of Defendant Y_1, then both Defendants, Y_2 as well as Y_1, should be jointly liable in tort in favour of the Plaintiff.

P–6) The losses suffered by the Plaintiff due to the non–delivery of the cago are:–

Invoice value of the goods :

Ist carriage : US $ 14,400.–

2nd carriage	:	US $ 28,560.–
3rd carriage	:	US $ 36,260.–
Total	:	US $ 79,220.–

The exchange rate for the above should be based on the rate applicable when the Defendant Y_2 delivered the goods to C without the B/L, whereby the total amount of losses in Japanese currency should be ¥ 19,461,242.–.

The Defendants must also pay the Plaintiff 5% interest per year, starting from the 8th October, 1984 until actual payment is rendered.

Presentation of Defendants' Response and Pleadings

D–1) The Defendants admit the facts quoted in the plaintiff's allegation in Item P–1).

D–2) The Defendants admit that the Defendant Y_1 issued the B/L to an original shipper. However, the Defendants claim that they did not know that the plaintiff was in fact the holder of the B/L.

(See the Plaintiff's allegation in Item P–2.)

D–3) The Defendants concede the plaintiff's allegations in Item P–3) to the effect that the containers contaning the goods in question arrived in kobe, that C was the importer of the goods in question, and that the Defendant Y_2 delivered the goods to C on the respective dates without receiving the B/L.

D–4) The Defendants deny the plaintiff's allegations in Item P–4). The Defendant Y_2 as the shipping and forwarding Agent, is not theoretically required to deliver the goods to a B/L holder, but The Defendant Y_2 is only obliged to deliver the goods to the party indicated by the B/L issuer, in this case, the Defendant Y_1. Therefore, the Agent only undertakes the duty of delivering the goods to those whom the principal nominates. In other words the Agent, in this case, the Defandant Y_2, is only responsible to the principal (i.e., the Defendant Y_1), and not to anyone else (i.e., the Plaintiff).

Although the cargo should ideally have been delivered in exchage for the B/L, the Defendant Y_1 gave explicit instructions, as well as advance permission, to the Defendant Y_2, to the effect that the cargo could also be delivered to a

licensed stevedoring company, if such a company presented a Letter of Guarantee or a Letter of Undertaking in place of the B/L to the Defendant Y_2.

As a result of these instructions by the Defendant Y_1, the Defendant Y_2 delivered the goods to C and obtained in return a Letter of Guarantee from S Transport Co., which was in fact a licensed stevedoring company (hereinafter referred to as "S"),

Thus, there is no negligence or fault on the part of the Defendant Y_2 with respect to the delivery of the goods to C.

D–5) The Defendant Y_1 denies the plaintiff's allegation in Item P–5.

Although the Defendant Y_1 is the exclusive and sole Agent in Japan for the Defendant Y_1, the Defendant Y_2 is an independent body incorporated in Japan, and thus, there is neither a financial nor a personnel relationship between the Defendant Y_2 and the Defendant Y_1.

In addition, the Defendant Y_1 has no authority to supervise any individual or employees working for the Defendant Y_2. Therefore, the Defendant Y_1 should not take any responsibility as an employer for the acts of the Defendant Y_2 or its employees.

D–6) The Defendants do not admit the incurrence of the losses alleged by the Plaintiff in Item P–1.

The exchange rate to be used when converting from US dollars to Japanese yen should be that of the date when the Court hearing is completed as regards this matter.

D–7) The Defendants claim that the Plaintiff knew and recognized that the Defendant Y_2 would deliver the goods to C.

When C intended to import the goods they requested that the plaintiff open a Letter of Credit whereby the plaintiff, on behalf of C, paid for the total amount of the goods in question to the Exporters/Shippers of the goods.

Such payment occurred in compliance with the terms and conditions specified in a Loan Agreement between the Plaintiff and C, which included a security provision in favour of the Plaintiff, having a value of more than twenty million yen.

Thus, the Plaintiff, having paid the Exporters/Shippers the full amount of the goods, expected to recover full payment from C on a periodic basis, through C's forthcoming receipt of the payment for the resale of the goods to some other party, or parties, in Japan.

The first time the Plaintiff actually presented the B/L to the Defendants was on the 5th August, 1985, almost eleven months after the Plaintiff had actually received the B/L. Not once during this eleven month period did the Plaintiff demand from the Defendants the delivery of the goods in question.

The reason for this was that the Plaintiff was well aware that the goods would eventually be delivered to C and in fact had already been deliverd.

D−8) It would be unfair and unjust for the Plaintiff to demand delivery of the goods by presenting the B/L on the 5th August, 1985, 11 months after the actual delivery of the goods to C.

D−9) Even if it is determined that the Plaintiff does have a right to claim from the Defendants for losses of the goods, the Plaintiff failed to minimize its losses through the various terms and conditions specified in its Loan Agreement with C.

Therefore, the Plaintiff is not entitled to claim against the Defendants.

Plaintiff's Response to Defendants' Items D−7 through D−9 above :

P−7) The Plaintiff did not admit or recognize the delivery of the goods to C by the Defendant Y_2 (see the Defendants' claim in Item D−7).

P−8) The Plaintiff denies the Defendants' allegations in Item D−8.

P−9) The Plaintiff denies the Defendants' allegations in Item D−9.

Court's Reasoning

It is found by the Court that :

C−I. The Defendant Y_1 issued the B/L to the Shippers of the goods, and the Plaintiff (Bank) received those B/L from the Shippers and now holds them.

C−II. The cargo in question arrived in Kobe, and the Defendant Y_2, without receiving the B/L, delivered the cargo to C.

Taking into consideration all the evidence presented, the Court now considers the following facts to be true :–

1) The Kobe business office of the Defendant Y_2 actually took care of the discharge and delivery of the goods in Kobe.
   The Defendant Y_2, of course, knew that B/L had been issued, but nevertheless delivered the goods to C without receiving the B/L, and instead received the Letter of Guarantee arranged and submitted by C.
2) The Defendant Y_1 agreed with the Defendant Y_2' proposal that the Defendant Y_2 would have authorization to deliver the goods in question in exchange for a Letter of Guarantee in the event that the goods arrived at the port of destination prior to the B/L, etc.
3) The Kobe branch office of the Defendant Y_2 obtained, in addition to the Letter of Undertaking issued by C, a Letter of Guarantee from S to the effect that S would undertake whatever responsibility and liability might arise from the delivery of the goods to C without the B/L.
   Thus, S together with C agreed to be held responsible to the Defendant Y_2 with respect to the goods for which the B/L had been issued.
4) C was unable to pay the Plaintiff (Bank) the full amount of the goods in question in return for the B/L. As a result, the Plaintiff, as the holder of the B/L, tried to claim against the Defendant Y_2 to compensate for its losses.

C–III. The Court considers that a B/L, as a negotiable document, expresses, in its wording, all rights to receive goods. Therefore once such a document has been issued, any and all rights that a shipper has would be expected to be transferred to the holder of the B/L, whereby the holder of the B/L is at anytime entitled to claim for delivery and receipt of the goods from the carrier.

It is therefore illegal for a carrier and/or its agent to deliver goods without receiving a B/L, as this might possibly damage the right of the holder of the B/L to take actual receipt of the goods himself.

The fact that a carrier or its agent has delivered the goods to a non B/L holder in exchange for some letter of guarantee and/or undertaking does not relieve

or rectify the illegality of the carrier's and/or the agent's action as far as the B/L holder is concerned, although such a Letter of guarantee and/or undertaking may be recognised as to its legal effect only between the issuer and the receiver thereof.

The fact that the Defendant Y_2 delivered the goods to C without receiving the B/L, injured the Plaintiff's right of ownership to the goods in quesion, and as a result is considered by this Court to have constituted an action in tort against the Plantiff, who was the holder of the B/L. This right exists whether or not the Plaintiff knew about the delivery of the goods to C.

The fact that the Defendant Y_2 was authorized by the Defendant Y_1 to deliver the goods to a person whom the Defendant Y_1 nominated does not protect the position of the Defendant Y_2, since such authorization would bind only the relationship between the Defendants Y_1 and Y_2, and would not release the Defendant Y_2 from its duty as an independent professional entity to any third party, i.e.,a B/L holder.

C–IV. The lapse of 11 months from the time of the delivery of the goods to C until the presentation of the B/L by the Plaintiff to the Defendants does not violate the principle of fairness.

C–V. The Court, however, concedes the plea of the Defendant Y_1 to the effect that the Defendant Y_2 is an independent body incorporated in Japan and that therefore, the fault and/or negligence of the Defendant Y_2 does not effect the position of the Defendant Y_1. Consequently the Defendant Y_1 does not have to compensate the Plaintiff.

C–VI. The date on which the loss of the cargo occurrred is to be considered to be that of the actual delivery date of the cargo to C. Accordingly, the exchange rate of that same day is also to be applied. Consequently ¥ 19,458,702.– and 5 % interest per annum after the 8th October, 1984 until actual payment is rendered, is the total suffered by the Plaintiff.

C–VII. There is no evidence to prove that there was some negligence on the part of the Plaintiff itself in failing to minimize the loss.

Conclusion of the Decision (in part)

Ⅰ. The Defendant Y_1 has to pay the Plaintiff (Bank) ¥ 19,458,702.– and 5 % interest per annum thereon after the 8th October, 1984 inclusive, until actual payment is completed.

Ⅱ. The Plaintiff's claim against the Defendant Y_1 has been hereby dismissed.

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Comments

By Tameyuki Hosoi (Attorney–at–Law)

There are a few additional points which the reader might find interesting. As mentioned before, the District Court found liability only on the part of the Agent, and not that of the shipowner.

The reason for this is probably related to the fact that the Plaintiff claimed only in tort, and not in contract, in the litigation against both the Defendants.

It is also perhaps partly due to the fact that the same attorney represented both the Defendants Y_1 and Y_2. As a result, it seems likely that once liability was found, the Defendants' attorney was not concerned with how liability was allocated between the two Defendants.

One would expect that in the near future, the Defendant Y_2 will seek compensation from either the Defendant Y_1 as its Principal, and/or the licensed stevedoring company, S as the issuer of the Letter of Undertaking.

Nevertheless, it is probably safe to assume that future agents in Japan will be more careful about delivering cargo if they have not first received a bill of lading.

On the other hand, however, this may result in many ports being cluttered with those goods that cannot be received as a result of the absence of a bill of lading.

It seems that a court and/or a law must strike a happy medium between considering the protection of the rights of a bona fide bill of lading holder, whilst at the same time, not greatly hampering the free flow of cargo from port to port.

[Outline translated tentatively from Decision in Japanese]

Decision of Tokyo District Court dated July 28, 1987

Docket No.: Tokyo Showa 61 nen (wa) 1954

Parties concerned

Plaintiff X_1 : Panamanian corporation

Plaintiff X_2 : Japanese corporation

Defendant : Panamanian corporation

Text of the Judgment

1. The action is dismissed.
2. The costs of proceedings are borne by the Plaintiffs.

Issue

Panamanian sub–bareboat charterer and Japanese bareboat charterer demanded against Panamanian shipowner that they had no obligation to refund the provisional payment of insurance due to the stranding. Whether Japanese courts have competence on this action.

Facts

I : Judgment demanded by the parties

〈I〉 Gist of the Claims

1. On the total amount ¥ 116,241,582 paid to the Plaintiff X_1 by the insurance company A (a Japanese corporation), who was a joint defendant before the severance of the action, during the period from February 25, 1977 to July 31, 1978 as the provisional payment of insurance due to the stranding of the cargo boat, the Attica, the Defendant shall confirm that the Plaintiffs have no obligations of refundment.

2. The costs of proceedings shall be borne by the Defendant.

〈Ⅱ〉 Response by the Defendant to Gist of Claims before Merits

The same as the text of the judgment.

Ⅱ : Assertions by the Parties

〈Ⅰ〉 Grounds for the Claims

1. The Defendant contends that he has recourse to the Plaintiffs X_1 and X_2 on the total amount ¥ 116, 241,582 paid to the Plaintiff X_1 by the insurance company A, who was a joint defendant before the severance of the action, during the period from February 25, 1977 to July 31, 1978 as the provisional payment of insurance due to the stranding of the cargo boat, the Attica (hereinafter referred to as "the vessel").
2. Therefore, the Plaintiffs demand that the Defendant shall confirm that they have no obligations of refundment.

〈Ⅱ〉 Assertions by the Defendant before Merits

This action is not acceptable because of failing to meet the requirements of action in the following points.

1. Japanese courts have no competence on this action.
2. The arbitration agreement exists on this dispute.
   (1) The Defendant agreed, in the bareboat chaterparty contracted with the Planitiff X_2, on the vessel belonging to the Defendant, that any dispute arising from the chaterparty should be referred to the arbitration in London to be settled.
   (2) As the Plaintiff X_2 contracted the sub–bareboat charterparty of the vessel with the Plaintiff X_1, the latter shall bear directly the obligation under the chaterparty between the Defendant and the Plaintiff X_2 and shall be bound by the arbitration agreement mentioned above.
   (3) The assertion of the Defendant as stated in Grounds for Claims I is

founded on the reasons that the Plaintiff X_1, as a sub-chaterer, has the obligation to redeem to the Defendant the provisional payment, and that the Plaintiff X_2 has the obligation of redemption under the clause in the main chaterparty that he shall guarantee the Defendant from all obligations the sub-chaterer bears to the Defendant. Consequently, the dispute on these points shall be settled according to the arbitration agreement aforemensioned.

〈Ⅲ〉 Admission and denial by the Plaintiffs of the Assertions by the Defendant before Merits and Assertion by the Plaintiffs

1. If a defendant is a foreign corporation having its head office in a foreign country, and if any of the SAIBANSEKI [(1)] or forums provided in the Japanese Civil Procedure Code is within Japan, it is reasonable to make the defendant subject to the competence of Japanese courts. Therefore, by the following jurisdictional causes, a Japanese court has jurisdiction over this action.

   (1) The Defendant is a corporation conveniently registered in the Republic of Panama and solely controlled by Manager C (hereinafter referred to as "C") whose domicile is in Tokyo. Therefore, the office of C International Limited (hereinafter referred to as "C International") represented by C is deemed as the office or place of business of the Defendant. As the office or place of business of C International is in some ward, Tokyo Metropolis, the Defendant has its office or place of business in Tokyo.

   (2) Even if the Defendant does not have its office or place of business in Japan, the followings are recognized. The provisional payment on which the Defendant has recourse to the Plaintiffs was done in Japan (Tokyo). If there remains any part of payment which is to be adjusted and paid back to A by the Plaintiff X_1, the obligation is in Japan(Tokyo). Therefore, assuming that the obligation of the Plaintiffs alleged by the Defendant is truly existent, the place where the

obligation exists is Japan and Japan is the place where the property covered by this action is.

(3) As the Plaintiffs brought to Tokyo District Court this action subjectively consolidated with the other action against A by the Plaintiff X_1, this action has close relation to the action against A.

That is, the payment Plaintiff X_1 received from A was the provisional payment of insurance. Properly speaking, after the Plaintiff X_1 is compensated by the Defendant for the damages caused by the accident concerned, such payment is to be adjusted and, if any, the remaining is to be paid back to A. Nevertheless, the Defendant demands that the Plaintiffs shall pay the remaining to himself. In determining whether this claim is reasonable or not, it is necessary to consider what character the provisional payment has, whether the Defendant is able to make a claim for unjusted enrichment against the Plaintiffs, and whether the Plaintiff X_1 has still the obligation to adjust the provisional payment. These problems have close relations each other and are to be totally determined. It is clear that Japanese courts have competence on the claim made by the Plaintiff X_1 against A. Therefore, the court of competance which is internationally most suitable for determining them totally and appropriately in the light of *naturalis ratio* is only Tokyo District Court.

2. It is admitted that there is an arbitration clause alleged by the Defendant in the clauses of the chaterparty contracted between the Defendant and Plaintiff X_2. However, it does not apply to this dispute, because it is not concerned with the matter arising from the charterparty between the Defendant and the Plaintiff X_2, but with the persuit by the Defendant of the liability of the Plaintiff X_2 who shall guarantee the Defendant from the obligation of the Plaintiff X_1 to redeem on the provisional payment.

It does not stand reason that the Plaintiff X_1 shall be bound by the arbitration clause in the clauses of the chaterparty contracted between the Defendant and the Plaintiff X_2.

Ⅲ : Evidence (omitted)

Reasons

〈Ⅰ〉 It is clear, in the light of the whole Assertions by Parties and the Gist of Claims itself, that in this action the Plaintiff X_1, a Panamanian corporation, and the Plaintiff X_2, a Japanese corporation demand that the Defendant shall confirm non-existence of any obligation of the Plaintiffs.

〈Ⅱ〉 Thereupon, we proceed to determine whether Japanese courts have competnce on this action.

As to which country has competence on the civil action whose defendant is a foreign corporation as this action, there is no statute directly providing for the answer in Japan, nor are treaties to be depended on. Further, generally accepted and definite principles of international laws are not established. Threupon, in this case, it is appropriate to decide the competence of courts in accordance with *naturalis ratio*, on the basis of the idea that fairness of the parties concerned and justice and quickness of proceedings are expected. Then, even though some articles of the Japanese Givil Procedure Gode on the domestic territorial jurisdiction do not provide for the international jurisdicton, they are intened to actualize the proper allocation of jurisdiction on civil actions and to realize the idea that fairness of the parties concerned and justice and quickness of proceedings are expected. Therefore, when any of the SAIBANSEKI or forums provided in the Code is within Japan, it is reasonable to make the defendant subject to the competence of Japanese courts, as long as do not exist special cirumstances that affirming the competence in such manner is contrary to *naturalis ratio*.

〈Ⅲ〉 From the point of view above, we determine below whether Japanese courts have competence on this action.

1. The article 9 (2) of the Civil Procedure Code provides for the forum of the place where an office or a place of business is. However, in the whole

evidence submitted in this action, we can not find the fact that the Defendant is the corporation cotrolled by C and has its office or place of business in Tokyo. [Following facts aer found in the whole evidence.

① Except for some brokers, it is only C or two employees of C International managed by him who negociated with the Plaintiff X_2 on the Defendant's account regarding the issue of the responsibility over the accident concerned.

② The office of C International is in Chuo Ward, Tokyo Metropolis.

③ In the documents sent to the Plaintiff X_2, the adresses of the Defendant and C International in Nassau, Bahama are common.

④ Mr. O, an employee of the plaintiff X_2, heard that the vessel was designed by C and that he caused his company to possess it because he could not sell it.

However, on only the fact③, it is impossible to say that the office of C International stated in the fact② represents the office or place of business of the Defendant. Further, in the whole evidence are found the fact that C, who is a consultant of ship design and maritime affairs, negociated with the Plaintiff X_2 with indicating his qualification as the agent of the Defendant, and that both C and C International have never participated in the conclusion of the charterparty between the Defendant and the Plaintiff X_2 and also the receipt of freights thereunder (there is no evidence sufficient to reverse these findings.). On the contrary, there is no evidence to show that C International independently, that is, without any direction and controll of the others, conducts the affairs of the Defendant in the office stated in the fact②. Therefore, the fact① is not sufficient to support the argument that the office of C International stated in the fact② is the office or place of business of the Defendant. Futhermore, as for the fact④, since there is no evidence to support its correctness, we hesitate to be convinced that the hearsay is true.]

2. The article $8^{(3)}$ of the Civil Procedure Code provides for the forum of the

place where the property is. The subject of this action is to determine whether the Defendant has the claim for redemtion on the payment of insurance against the Plaintiffs. The claim has no relation with the payment itself of insurance by A to the Plaintiff X_1. The place where the claim exists is to be determined seprately from the place where the payment was done or where the obligation of the Plantiff X_1 to pay back to A is. Therefore, the assertion of the Plaintiffs on this point is not successful, nor are recognized the grounds supporting that on the claim of the Plaintiff X_1 the place where the property located is withn Japan. Indeed, on the monetary debt, the place where the FUTU-SAIBANSEKI[4] or genera forum of the debtor exists is considered as the place where the property located. Accordingly, as far as the Plaintiff X_2, the place where the property located is within Japan. However, if it is admitted to apply correspondingly the jurisdictional causes described in the article 8 of the Civil Procedure Code in order to determine the international jurisdiction on the action to confirm non-existence of the debt like this suit, the debtor can always bring an action to a court in the country where his address is regardless of the contens of the claims alleged by the creditor, on the contrary, the creditor is compelled to defend the action in the country irrelevant to him in his life and to the contents of the claims alleged by him. This consequence is seriously inconsistent with the fairness of the parties concerned. Therefore, it is not reasonable to affirm the competence of courts on the action to confirm non-existence of the debt in accoradnce with the place where the property exists as described in the article 8. In that reason, we are unable to admit that Japanese courts have competence on this action on the ground that Japan is the place where the property is.

3. The article 21[5] of the Civil Procedure Code provides for the forum concerning the consolidated action. But, as the international jurisdiction is unlike the domestic territorial jurisdiction, it is not admitted in principle that because of the subjective consolidation of actions the forum of the

consolidated action under the doctrine described in the article 21 is considered as the jurisdictional cause. Because, if affiming the jurisdiction in such manner, the defendant is compelled to defend the action in the country irrelevant to him in his life and to the contents of the claims against him and the disadvantage sufferred by the defendant in this case is likely much greater than in the domestic case.

Indeed, even in case of the subjective consolidation of actions, it is consistent with *naturalis ratio* to affirm the competence of Japanese courts, when there are special circumstances that such affirmation accords with the idea that fairness of the parties concerned and justice and quickness of proceedings are expected, such as in cass of KOYU/HITUYOTEKI–KYODO–SOSHO(6). However, this action by the Plaintiffs against the Defendant and the action against A constitute only a TUJO–KYODO–SOSHO(6) and nothing shows that there is a special circumstance to affirm the competence of Japanese courts on this action. [By synthesizing the whole assertions of the Plaintiffs and the Defendant, it is recognized that, in this action by the Plaintiffs againts the Defendant, it is one of the key issues whether the payment of insurance by A to the Plaintiff X_1 was the provisional one presupposing the future adjustment, and that the judgment on such issue would affect the judgment as to whether the claim by the Plaintiff X_1 against A is accepted. Accordingly, when the two actions are separately examined and judged, we can not deny the possibility that the judgments on such issue may be inconsistent with each other. However, even if being inconsistency, there remain the problems such as adjustment and redemption to be settled under the judgemment concerned. Therefore, it is not found in this action that there is a circumstance that inconsistency between the judgements makes the settlement of such problems difficult. In short, it is not yet recognized that there is a special circumstance mentioned above.]

4. Besides, there are no causes to affirm the competence of Japanese courts on this action.

〈Ⅳ〉 Accordingly, the judgement is given as the text mentioned above. This action which is illegal because of failing to meet the requirements of action is dismissed and the Plaintiffs bear the costs under the article 89 of the Civil procedure Code.

Notes by translater

(1) SAIBANSEKI means a relation which constitutes the ground for determining which jurisdiction parties of an action are subject to. SAIBANSEKI is classfied into FUTU–SAIBANSEKI or general forum and TOKUBETU–SAIBANSEKI or special forum. FUTU–SAIBANSEKI of a person is decided by his address and that of a corporation is decided by the place where its principal office or place of bisiness is. An action shall be subject to jurisdiction of a court in the place where FUTU–SAIBANSEKI of a defendant is.

(2) Art. 9 (Forum of the place of office) of C. P. C. provides : "A suit against a person maintaining an office or place of business may, in so far as it only concerns with the affairs of such office or place of business, be filed with the court of the place where the office or place of business is located."

(3) Art. 8 (Forum by the locatlon of property) of C. P. C. provides in part : "A suit concerning a property right against a person not domiciled in Japan or whose domicile is unknown, may be brought before the court situated in the place where the subjectmatter of a claim or the security therefor, or any property of the defendant attachable is located."

(4) FUTU–SAIBANSEKI : see note (1)

(5) Art. 21 (Forum of joint claims) of C. P. C. provides in part : "In case several claims are made in one suit, such suit may be brought before any court having jurisdiction over one of such claims in accordance with the provisions of Articles I to 5 inclusve or Article 7 to the preceding Article inclusive."

(6) KYODO–SOSHO (if translating literally, joint action) means an action in which several plaintiffs and/or defendants perticipate. TUJO–KYODO–SOSHO (normal joint action) may be separately and relatively settled since

the effect of judgment to one of the plaintiffs or defendants does not affect the others. On the contrary, KOYU/ HITUYO– TEKI–KYODO–SOSHO (inherently necessary joint action) is an action whose judgment is not given unless several plaintiffs and/or defendants shall jointly perticipate in it, such as action on partition.

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Comments

By Tameyuki Hosoi (Attorney–at–law)

This is an interesting, but slightly peculiar case.

A Panamanian corporation (Plaintiff X_1) and a Japanese shipping company (Plaintiff X_2) sued a Japanese insurance company (Defendant Y_1, i.e. A in this case quoted herein) and another Panamanian entity (Defendant Y_2, i.e. Defendant Y in this case quoted herein) in the Tokyo District Court, seeking a decision to confirm that those Defendants would have no credit rights against the Plaintiffs at all.

Defendant Y_2 argued, among other defences, that the Japanese Court had no jurisdiction over them because (1) they were a foreign company having no business office in Tokyo, and (2) there was a charterparty, including a London arbitration clause which should (directly or indirectly) bind both Plaintiffs to restrain them from bringing any dispute before a forum other than arbitration in London.

The Plaintiffs pleaded, among other things, that (1) Defendant Y_2 was, in fact, controlled by a certain foreign manager who lived in Tokyo and represented another business office in Tokyo, which should be considered to function as Defendant Y_2's office as well, that (2) even if Defendant Y_2 had no office in Tokyo, Defendant Y_1 was a pure Japanese company and Plaintiffs' claims against Defendant Y_1 were closely related to claims against Defendant Y_2, and that (3) Defendant Y_2 should therefore accept Japanese jurisdiction in compliance with the spirit and substance of the provisions of the Japanese Code of Civil Procedure, Art. 21.

The Court separated the case against Defendant Y_2 from the one against De-

fendant Y_1, and considered the case against Defendant Y_2 specifically in terms of whether the Court should have international jurisdiction over Defendant Y_2.

The Court concluded that it had no jurisdiction over Defendant Y_2 for the various reasons stated in the English translation of the judgement quoted herein, and dismissed the claims against Defendant Y_2.

The case was then appealed by the Plaintiffs to the Tokyo High Court where the parties eventually reached a compromise settlement and concluded the matter on the whole.

The peculiar aspect of this case may be, first of all, its background.

The manager in question had initially brought his claim before an arbitration panel in London, but had lost. Instead, an award was given in favour of claims raised by the Japanese company. A leave to appeal under British law was granted. However, the English Court recognized the arbitrators' award to the Japanese company, that is, the manager lost again.

The English court's judgement was thereafter enforced against a ship actually belonging to the manager, and the Japanese interests were able to recover their claims completely.

Nevertheless, the manager continued to repeatedly file further claims against the Japanese interests for various reasons.

It was in such circumstances that the Plaintiffs filed this lawsuit in the Tokyo District Court in the expectation that the suit would be the last judicial procedure and settle the dispute with the manager once and for all.

The second peculiality of this case is that the Tokyo District Court separated the case against Defendant Y_2 from the one against Defendant Y_1, although any decision on either one of the cases would not theoretically solve the matter as a whole.

It is said that, despite the dismissal of the Japanese interests' claims by the Tokyo District Court, a final settement was reached in the Tokyo High Court, presumably because the decision of the District Court gave confidence to Defendant Y_2 that he could rely on the fairness and the procedures of the Japanese judges, thus preparing the way for Defendant Y_2's acceptance of the idea for compromise suggested by the High Court Judges.

Court Decision III

[Outline translated tentatively from Decision in Japanese]

Decision of Tokyo District Court Dated August 25, 1988

Docket No.: Tokyo Showa 61 nen (Wa) 7282

Parties concerned

Plaintiff : (Israeli corporation)

Defendant : (Japanese corporation)

Issue

Whether this action is rejected because of the arbitration agreement in the agency Agreement. What is the law governing the arbitration agreement.

Text of the judgment

1. This action is rejected.
2. The costs of proceedings are borne by the plaintiff.

Facts

I : Judgments Demanded by the Parties

〈I〉 Gist of the Claims

1. The Defendant shall pay to the Plaintiff the sum of ¥ 156,000,000 and the interest on the sum of ¥ 54,000,000 at 6% per annum from April 1, 1985 and the interest on the sum of ¥ 72,000,000 at 6% per annum from June 1, 1986 until the final payments.
2. The cost of proceedings shall be borne by the Defendant.
3. Declaration of provisional execution.

〈Ⅱ〉 Response to the Gist of Claims

(Response prior to Merits)

The same as the text of the judgment.

(Response on Merits)

1. All the claims by the Plaintiff are dismissed.
2. The costs of prossedings shall be borne by the Plaintiff.

Ⅱ. Assertions by the Parties

〈Ⅰ〉 Grounds for the Claims

1. The Plaintiff is a corporation duly incorporated under the laws of the Republic of Israel, which is engaged in export, import, sales and brokerage of various merchandises manufactured within and without the country.
2. The Defendant is a corporation engaged in manufacture and sale of electronic machineries and devices.
3. The Plaintiff and the Defendant have, on march 25, 1983, agreed in a written document titled "Agency Agreement" on the following items (1) and (2), and agreed orally on the items (3) through (5).
   (1) The Defendant appoints the Plaintiff a sole agent in Israel of the Defendant's products, whereas the Defendant has the Plaintiff handle exclusively the sale of the Defendant's products in Israel and the Plaintiff endeavors the sales expansion of the Defendant's products in Israel.
   (2) The Agreement remains effective for three years starting from March 25, 1983, which is renewed automatically for another one year, unless either party notifies the other party of terminating the Agreement in writing as delivered by a registered mail not later than 60 days before the expiration of the above period.
   (3) The method of sales of the Defendant's products by the Plaintiff is such that the Defendant can sell the Defendant's products directly to the distributors or customers appointed by the Planintiff (hereinafter referred to as the appointed distributors).

(4) If any product is sold under the method of (3), the Plaintiff shall be entitled to receive from the Defendant as a commission the difference between the amount of the products sold to the appointed distributors by the Defendant and 80% of the price in the price list of such Defendant's products.

(5) With respect to individual transactions between the Defendant and the appointed distributors, the Defendant shall notify the Plaintiff of all the contents of the transactions and correspondences between them, and shall obtain instructions from the Plaintiff before concluding the transactions.

4. Transactions between the Defendant and A company who is not the party to the case.

(1) The plaintiff appointed A Company an appointed distributor based on the Agreement between the Plaintiff and the Defendant, and decided to use the method mentioned above for the sales to A Company.

(2) However, the Defendant has started transactions with A Company without obtaining specific intructions from the Plaintiff since around November 1983.

(3) The Plaintiff has thereafter repeated inquiries to the Defendant on whether there has been any transactons with A Companw, to which the Defendent replied only that there was little transactions, and submitted almost no information on the transactions despite of having received repeated inquiries from the Plaintiff.

(4) Moreover, the Defendant concluded on March 19, 1985, with A Company a distributorship agreement which stated that an exclusive sales right of the Defendant's products in Israel is to be given to A Company, thus ignored the exclusive right possessed by the Plaintiff.

(5) On the one hand, the Plaintiff gave notice to the Defendant around April 1985 that A Company was removed from the appointed distributors.

5. The Defendant sent to the Plaintiff on August 6, 1985, a written notice confirming the validity of the Agency Agreement, and agreed to extend the period of the Agreement for another year until March 24, 1987.
6. However, on December 19, 1985, the Defendant informed in violation to the notice, that he would terminate the Agreement as of March 25, 1986, whereas he refused to submit thereafter the materials of transactions between the Defendant and A Company and indicated the intention of not paying to the Plaintiff the promised commissions.
7. The amount of commission receivable by the Plaintiff from the Defendant was about ¥ 150,000,000 for the five months from April 1983 to August of the same year (monthly average of about ¥ 3,000,000), and because the amount of transactions between the Defendant and A Company was on an increasing trend thereafter, it is certain that a credit of commission of at least ¥ 54,000,000 has been accrued to the account of the Plaintiff over the 18 months from October, 1983 to March, 1985.
8. The Plaintiff suffered the following damage out of the above non–performance of the liability by the Defendant :
   (1) Lost profit of ¥ 72,000,000.

   If the Defendant had kept the actions as called for by the Agreement during the period of 24 months from April 1985, when the Plaintiff removed A Company from the appointed distributors, to March 1987, the Plaintiff should have been able to obtain a profit in excess of at least ¥ 3,000,000 as a monthly average as aforementioned, and the total amount of profit that the Plaintiff should have been entitled amounts to ¥ 72,000,000.

   (2) Attorneys' fee at ¥ 20,000,000.
   (3) Damage to reputation and other intangible damage in an amount of ¥ 10,000,000.

   Therefore, the Plaintiff demands the Defendant to pay, under the contract of commission payment between the Plaintiff and the Defendant, ¥ 54,000,000 as the commission and the interests accrued from

April 1, 1985 unti the final payment at 6% per annum as provided by the Commercial Code of Japan, as well as a total amount of ¥ 102,000,000 as the damage due to non-performance of the liability by the Defendant and the interests on ¥ 72,000,000 of the above total amount accrued from June 1, 1986 until the final payment at 6% per annum as provided by the Commercial Code of Japan.

〈 II 〉 Assertions by the Defendant prior to Merits.

1. The Article 11 of the Agency Agreement contains the following defintion :

   "Any dispute, controversy, claim or question arising out of or related to this Agreement, or the breach thereof, shall not be brought into the court of law but shall be judged by arbitration according to the law."

2. The commission agreed orally as described in the ground 3 (3) through (5) for the claims is the consideration to the service provided by the Plaintiff as the agent, which falls under the "dispute or claim related to the Agreement" even if the Agency Agreement does not carry an express statement to that effect.

3. The requirements for an arbitration agreement from the standpoint of private international law would include :

   (1) To be an agreement causing a third party to make judgments, excepting the concerned parties and a court of law.

   (2) The objects subjected to the judgment by the said third party should be the solution of private disputes.

   (3) To be an agreement in which the concerned parties shall subject to the judgement by such third party.

   If these generally accepted concepts in private international law are applied to Article 11 of the Agreement, the words "by arbitration" indicate an arbitration by a third party other than the concerned parties and a court of law, and the word "judge" is a word that could be translated to "Hanketsu" (declaration of judgment or court decision), which signifies

that the judgment by that third party is equivalent to a court decision. Therefore, it is doubtless that these words represent the intention of the concerned parties that they will submit to the judgment. The Article 11 of the "Agency Agreement" can, therefore, be considered as an arbitration agreement satisfying these requirements.

4. The laws that govern the arbitration agreement stated in the Article 11 of the Agency Agreement are the laws of Japan for the following reasons :

(1) An arbitration agreement is an agreement, of which governing laws are determined by the article 7 ※ of "Horei" or "Law concerning the application of the laws in general".

(2) This case concerns an agreement between an Israeli corporation and a Japanese corporation, and the form of the agreement is the standardized form having been used by the Defendant regardless of whichever country the other party has been organized as a corporation. In addition, the representative E of the Plaintiff has been residing in Japan as his base of living for more than ten years and managing an EJ Company in Japan as its representative director, while the Plaintiff was, in reality, simply an Israeli corporation of the said company. If the facts alleged in the grounds for claims are true, the Plaintiff has been doing nothing but receiving the commission while the exports of the products have been made to other Israeli coporation called A company. The payments of the commission have all been made personally to E in Japan. When all of these accounts are put together, it is obvious that the Agreement was intended to be governed by the laws of Japan.

(3) If the said intention is ambiguous, the governing laws should be the laws of the place of the act, that is, the laws of Japan because the

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※Article 7. (Formation and effect of juristic act) As regeards the formation and effect of a Juristic act, the question as to the law of which country is to govern shall be determined by the intention of the parties.

2. In case the intention of the parties is uncertain, the law of the place where the act is done shall govern.

arbitration agreement to be governed by the laws of the place of the arbitration dose not exist independently from the "Agency Agreement" and the said "Agency Agreement" has been concluded in Japan.

The Japanese Code of Civil Procedure admits an arbitration agreement to be legitimate and effective even if it is a simple submission to arbitration which specifies neither arbitrators, nor agreement on how to select arbitrators, nor a place of arbitration.

5. Therefore, the dispute in this case should be referred to an arbitration in accordance with the Article 11 of the Agency Agreement and this action lacks the requisites for a lawsuit, and therefore, is illegitimate.

〈Ⅲ〉 Response by the Plaintiff to the assertions by the Defendant prior to Merits.

1. On the assertions 1 through 3 by the Defendant.

While it is admitted that the Article 11 of the Agency Agreement contains the stipulations that are asserted by the Defendant, the remaining part of the assertions is disputed generally. Precisely speaking, the Agency Agreement was made by using a copy of standard form which consisted of printed clauses including the arbitration clause, whereas no examinations were necessarily made on each article when it was signed. Therefore, the said arbitration clause does not constitute the contents of the agreement, but is only a kind of referential text.

2. On the assertion 4 (1) by the Defendant.

With respect to the governing laws for the judgment of validity of an arbitration agreement, there are different opinions, one to follow the laws at the place of the court and another to follow the laws at the place of the arbitration. If based on the laws at the place of the arbitration, the Japanese laws can not be the governing law as long as no place of the arbitration is determined in the Agency Agreement.

3. On the assertion 4 (2) by the Defendant.

The fact that the representative E of the Plaintiff has been residing in Japan as his bace of living is denied. E was living in Israel with his family at the time when the Agency Agreement was concluded, having the Israeli nationality, possessing a house in Haifa in that country and leasing apartment houses in Tel-Aviv. He was also running multi-national corporation groups in Israel, Asia, Europe and the United State of America. It is a fact that, at the time of concluding the Agency Agreement, he was staying in Japan periodically for the purpose of visiting the manufacturing factory of a Japanese corporation that was managed by himself, but that does not establish a fact that he was residing in Japan as the bace of his living. The fact that exports of the merchandise by the Defendant had been made to A Cpmpany, an Israeli corporation, is admitted.

A Company has possessed its office at the place of the principal office of the Plaintiff, using the same room as used by the Plaintiff, its business was managed by the same managing director as for the plaintiff, and such devices as telex machine and telephone were shared of their use with the Plaintiff.

While the fact that the commission was paid in Japan is admitted, the payment made by the Defendant to the Plaintiff was only once in the amount of ¥ 5,000,000.

The Agency Agreement has its main purpose in giving the Plaintiff a position of the exclusive distributor in Israel, and the intention of having the laws of Israel as the governing laws is recognized, from the viewpoint of maintaining the consistency with the relevant laws and regulations of Israel where the sales activities are performed by the Plaintiff.

4. On the assertions 4 (3) by the Defendant.

Although the fact that the Agency Agreement was executed in Japan is admitted, the remaining portion is disputed.

Since the said arbitration clause neither stipulates the place of the arbitration and the arbitral institution, nor determines how to proceed the arbitration procedures including the selection of arbitrators, it is incapable

of realizing the purpose in the sense of the generally accepted social concept, and is an impracticable clause, and therefore, invalid.

5. The assertion 5 by the Defendant is disputed.

〈Ⅳ〉 Admission and denial by the Defendant of the grounds for claims

1. The fact alleged in the ground 1 for the claim is of ignorance.
2. The fact alleged in the ground 2 for the claim is admitted.
3. Although the fact that the Defendant has prepared and executed an agreement titled Agency Agreement with a person using a name of XE is admitted, it is not known whether XE is of the same legal personality as the Plaintiff. Although the fact that, in the fact alleged in the ground 3 (1), the Defendant has appointed XE a sole agent in Israel is admitted, the fact that the sales of the products of the Defendant in Israel are to be performed solely by the agent is denied.

   The fact alleged in the ground 3 (2) for the claim is admitted as long as the agreement was the one that has been reached between the Defendant and XE.

   All the facts alleged in the grounds 3 (3) through (5) are denied.
4. The fact alleged in the ground 4 (1) for the claim is denied.

   The fact alleged in the ground 4 (2) for the claim is admited.

   Among the fact alleged in the ground 4 (4) for the claim, the fact that a sales agreement titled a distributorship agreement was concluded between the Defendant and XE is admitted, but the facts that it is of an exclusive sales right and that the exclusive right entitled to the plaintiff has been ignored are denied.

   The fact alledged in the ground 4 (5) is unknown.
5. The fact alleged in the ground 5 for the claim is disputed in that the Defendant had agreed, out of the fraud by XE, to extend the effective period of the agency agreement for one year until March 24, 1987, but the agreement has already been cancelled as having been made out of the act of fraud.

6. The facts alleged in the ground 6 through 8 for the claim are all denied, and all of the assertions are disputed.

Ⅲ. Evidence (omitted).

Reasons

〈Ⅰ〉 Execution of the Agency Agreement and existence of the arbitration clause.

The facts, as alleged by the Defendant, that the Defendant has appointed XE a sole agent of the Defendant's products in Israel on March 25, 1983, under the document titled the Agency Agreement between the Defendant and XE, with its effective period as agreed as described in the ground 3 (2) for the claim and that there exists the arbitration clause as asserted by the Defendant as the Article 11 of the Agency Agreement, are not disputed by either party.

According to the evidence and the whole arguments, it is admitted that the legal personality of the Plaintiff and XE as claimed by the Defendant is identical, and there are no evidences sufficient to overrule the above finding.

〈Ⅱ〉 Legitimate constitution of the arbitration agreement.

We shall now examine whether or not the arbitration clause is valid as an arbitration agreement.

1. The governing laws for the judgment of validity of the arbitration agreement.

An arbitrator is, in the first place, entitled to a power of making an award based on an arbitration agreement executed between the disputing parties. Therefore, an arbitrator acts on the power given by private persons, rather than as a national organization which acts on a national will, thus his award is simply an act under the private law. Since an arbitration agreement is an agreement between the concerned parties, by which the solution of the dispute is attempted to be solved by the autonomy of

the parties, it is appropriate to interpret that the concerned parties can designate the governing laws on the arbitration agreement as in general agreements. Therefore, the court finds it appropriate that the governing laws for judging whether the arbitratibn agreement has been valid must be selected from the provisions of the article 7 of "Horei" which adopts the principle of the parties' autonomy as a rule in legal actions.

The Plaintiff asserts on this point that there is another way of applying the laws at the place of the court or laws at the place of the arbitration as the governing laws, other than by depending on the parties' autonomy principle. However, not only there is no express assertion on the ground as to which of the above should be applied for the present case, but also there is originally no inevitable relation with the place of arbitration procedure in an arbitration which is different from a law suit, hence an application of the laws at the place of arbitration itself has no justifiable reason. In addition, application of the laws at the place of court as the governing laws not only cause an ill effect of the so-called "Forum Shopping", but is unfit for the characteristic of an arbitration, an autonomous means of solving disputes. Based on these reasons the above assertion by the Plaintiff can not be adopted.

2. Decision of the applicable governing laws by the article 7 of "Horei".

While, as described above, the governing laws for the judgment of validity of the arbitration agreement must be selected based on the article 7 of "Horei", it is not sufficiently evidenced that the both parties have made explicit effort of selecting the governing laws, even after referring to the whole text of the Agency Agreement including arbitration clause and referring to the whole evidences presented in the present case.

However, even though no explicit selection was made on the governing laws as described above, the case should not be accounted to an immediate application of the laws at the place of act as the governing laws, depending on the article 7 of "Horei" on the reason of the parties' intention being ambiguous, but the further study should be taken of the intention

of the parties taking into consideration various contractual circumstances, such as, the contents of the agreement, its character, the concerned parties, the purposes and other various specific environments. When this view is applied to the present case, the court finds the following facts :

(1) Although the Plaintiff, being one of the concerned parties to the arbitration clause, is an Israeli corporation, there is no dispute between the parties that its representative E was periodically staying in Japan, and according to the evidence, the representative E is the representative director of EJ Company, and his address is registered as at Tokyo.

(2) The Defendant, another party to the subject arbitration clause, is a Japanese corporation engaged in the manufacture and sale of electronic machineries and devices.

(3) There is no dispute between the parties that the Agency Agreement including the arbitration clause was executed in Japan, and according to the above evidence, the representative E himself has signed the agreement in a capacity of a president of the Plaintiff.

(4) Furthermore, while, according to the above evidence, the Agency Agreement is recognized as an agency agreement having the Defendant a seller and the Plaintiff a sole agent, with a provision that "the Defendant appoints the Plaintiff the only sole agent in Israel and the Plaintiff accepts such appointment", there is no dispute between the parties that the payment of the commission from the Defendant to the Plaintiff relating to the Agency Agreement, as described in the ground 3 (4) for the claim, has been made in Japan.

Incidentally, although there is no provision in the Agency Agreement itself of payments of the commission, it is appropriate to judge that such commission has a nature of consideration for the services rendered by the Plaintiff as the agent based on the Agency Agreement.

When these facts covered by the Items (1) through (4) are put together, it is presumable that both the Plaintiff and the Defendant had the intention

to apply the Japanese laws as the governing laws and implicitly selected the Japanese laws as the governing laws.

The Plaintiff asserts that the main purpose of the Agency Agreement is to give the Plaintiff the position of the agent in Israel, and therefore, the intention of the parties is the Israeli laws to be applied as the governing laws from the viewpoint of maintaining the consistency with the relevant laws and regulations of Israel where the sales activities are performed by the Plaintiff. However, in the light of the whole arguments (particularly, the fact of the Plaintiff himself asserting in the grounds for the claims that the Plaintiff did not directly sell the Defendant's products in Israel, but instead, appointed A Company the appointed distributor, with whom the Defendant carried out direct transaction), it is impossible to take importantly the point of sales activities by the Plaintiff, thus the above assertion by the Plaintiff is difficult to adopt. There is no other evidence sufficient to overrule the presumption on the parties' intention of having implicitly selected the aforementioned Japanese laws as the governing laws.

Such being the case, it is appropriate to consider that the governing laws to judge whether or not the arbitration clause has been validly constituted are to be the laws of Japan based on the Article 7 (1) of "Horei".

3. Judgment on the validity of the arbitration agreement under the laws of Japan.

In the laws of Japan, whether or not an arbitration clause can be valid is considered to be judged by indication as to whether or not the parties had the intention to cause an arbitration to judge a certain dispute, that is, the intention of submission to arbitration (or, in other words, the intention of depending not on a law suit but the decision by third parties). Under such a condition, it is obvious that the intention to solve a certain dispute, that is, "any dispute arising out of or related to this Agreement", by resorting to an arbitration, but not by a law suit, is stated sufficiently clealy in the arbitration clause.

According to the above evidence, it is recognized that the arbitration

clause was inserted as one of the articles of the agreement, consisted substantially of three pages covering twelve articles, and that, according to the whole arguments, both the Plaintiff and the Defendant are engaged in international commercial activities whereas both the Plaintiff and the Defendant are believed to have sufficient knowledge about the definition of arbitration. Based on these facts, the subject arbitration clause is admitted as an indication of the intention of submission to arbitration by the concerned parties, but should not be treated simply as a referential text.

Therefore, the arbitration clause should be said legitimately constituted as an arbitration agreement under the laws of Japan.

In addition, the subject arbitration clause, as is self-explanative, lacks specifying the arbitral institution and the procedure. However, since the minimum indispensable factor for the constitution of an arbitration agreement is the intention of submission to arbitration as described above, a provision for determining the arbitral institution and the procedures are to be considered an optional selection in an arbitration agreement, not a minimum necessary factor for the constitution of an arbitration agreement. Therefore, the arbitration clause should not be made invalid simply because it lacks the above provision.

〈Ⅲ〉 The relationship between the present disputes and the arbitration agreement :

As can be understood from the ground for the claim, asserted by the Plaintiff, the present disputes relate to whether there is a right to claim a commission payment based on the agreement on commission payment between the Plaintiff and the Defendant in relation to the Agency Agreement, whether there is a right to claim a remedy due to non-performance of the liability under the Agency Agreement, and whether there is a right to claim interests accrued on each of the above right.

As described above, the agreement on commission payment in the present case is not contained as a provision in the Agency Agreement *per se*.

However, the commission has a nature of consideration for the services rendered by the Plaintiff as the agent under the Agency Agreement, and it is appropriate to interpret the above agreement on commission payment as the realization of the contents of the Agency Agreement or its special contract.

Therefore, the disputes arisen from the above agreement on commision payment can be said a dispute related to the Agency Agreement.

Furthermore, as has been admitted previously, the arbitration clause defines "any dispute, controversy, claim or question arising out of or related to this Agreement" to be the dispute to be submitted to an arditration. Therefore, the court finds it appropriate that the dispute in the present case should be solved by an arbitration before presenting it to this court.

〈Ⅳ〉 In accordance with the above conclusion, the ground for the claims presented by the Plaintiff lack benefit of a law suit and are unlawful, and therefore can not be escaped from being rejected, not necessitating the court to make judgments on the remaining portion. The court, therefore, decides as written in the text of the judgment, applying the Article 89 of the Code of Civil procedure (principle of bearing costs of proceeding).

Ⅸ International Congress of Maritime Arbitrators in Hamburg

The IX International Congress of Maritime Arbitrators (ICMA) will be held from 18th to 21st September, 1989 in Hamburg by the German Maritime Arbitration Association (GMAA) under the Patronage of the Hamburg Chamber of Commerce.

The topics of the IX ICMA are as follow :

Ⅰ. Substantive Law

1. Consumption Claims under a Time CP (particularly considering the type of the vessel, its trading as bulk or container vessel, age of the vessel, draft problems, weather conditions, vessel laden/empty).
2. Cargo Claims under Voyage CP and Time CP : Title to sue (charterer or shipper or consingnee ? Subrogation of underwriter), exemption clauses, duties of the master under fio–contracts (and similar cases e. g : "Under the supervision of the master" and unseaworthiness of the vessel), claims under the NYPE Inter–Club–Agreement.
3. Liability for dangerous Cargoes and excluded Cargoes in Charterparties (recent experiences, what is "dangerous" ? New methods of transporting bulk cargoes, new products).
4. How do Arbitrators judge on Decisions taken by the Master (e.g. regarding insufficiency of stowage under fios–contracts, not entering a possibly dangerous port, judging on ice conditions ?).
5. Arbitration under Sale and Purchase as well as under Ship Contracts.
6. Principles for assessing Damages for Breach of a Charter Contract in complicated Cases (illustrative examples : market rate where there is no market, average daily income during three (?) voyages).
7. Other recent Decisions on Voyage Charter Problems.

8. Other recent Decisions on Time Charter Problems.
9. Other recent Decisions on Safe Berth/Safe Port Clauses.

(The last three items should and could be dealt with in very short papers.)

Ⅱ. Procedural law

1. Recently established Procedural Rules on Maritime Arbitration and Experience gained in applying them (e.g. regarding small claims).
2. Thoughts of a Maritime Arbitrator on the UNCITRAL Model Law.
3. Philosophy and Purpose of Arbitration: What still needs to be improved ?
4. Abandonment Frustration of Arbitration Agreements and the Power of the Arbitrations in this Context.
5. Conciliation in Shipping Matters : Provisions, Thought, and Experience.

Detailed Programme and information for Papers are available from the following secretariate.

Congress secretariate :

Ⅸ INTERNATIONAL CONGRESS OF MARITIME ARBITRATORS

c/o Hamburg Messe & Congress GmbH. Congress Organisition P.O.Box 302480. D–2000 Hamburg 36. Federal Republic of Germany Tel : 40/3569–2244/–2247. Telex : 212609. Telefax : 40/3569–2343

Secretariate for Papers :

German Maritime Arbitration Association

Alsterarkaden 27. D–2000 Hamburg 36. Federal Republic of Gemany. Tel : 40/373426

Introduction for 'KAIUN' (Shipping)

(No. 727 April~No.738 March)

The Japan Shipping Exchange, Inc. has been publishing the monthly magazine named 'KAIUN' (Shipping) in Japanese since 1921.

This magazine has been valued and is working as an opinion leader in shipping circles and other concerns in Japan.

Undermentioned are the contents of its recent issues, from April in 1988 to March 1989 edition.

We hope you will find information you are seeking in the following articles.

OPINION

[April] **Page**

The early conclusion of taxation agreements with concerned countries is sought in order to eliminate the burden of taxation which has been unilaterally imposed on Japanese intersts.

The original purpose of BIFFEX (the Baltic International Freight Futures Exchange) was as a hedge against market fluctuations. Speculation was never one of its aims. At present, however, and since its activities began in May 1985, there are no participants who are genuinely involved in the trade. This has resulted in a lack of flexibility and objectivity.

The freight futures market has tended to show movements which reflect the will of some speculators.

On the other hand, lack of participation is attributable to the fact that the main field dealt with is the dry bulk market such as for grain and coal.

In these circumstances, local interests from the Pacific area find that they have no role to play in the maket.

Furthermore, there is a general failure to understand properly how it should be used.

The importance of information has been overlooked by the shipping industry in Japan.

* *Has there been any acceleration in the re-structuring of the Trans-Pacific services of the Japanese liner companies ?* 86

by Ohki Godo

Forty years after the Second World War, it is clear that, as compared with America and Europe, there has been a considerable delay in the restoration of Japanese shipping industry.

[May]

* *Mixed Crew of Japanese flagged vessels and immigration control policy* 19

by Miyawaki, Tetsuya

The Justice Ministry explains Japanese law is fully applicable to all Japanese flagged vessels, whether or not they are chartered overseas.

According to the ministry's opinion on the exception regarding crew, we see a lot of conflicts of law and complete application of Japanese law is hindered.

Taking advantage of the defect of this ministry's view, Maru Ship has been misused as a means of getting lower costed labor.

* *Fading Liner Shipping in the free world* 24

— Is it acceptable ? *by Takahashi, Hiroshi*

It was not an unavoidable affair but a human default that the bankruptcy of U.S. Lines which caused a lot of damage and trouble to the shipping public around the world and Showa Line's withdrawal from the trans–Pacific trade as a victim of big contry's egoism.

Isn't there in the U.S. only a policy based on survival of its own shipping and

view, ignoring coexistence and mutual prosperity and cooperation with trading partners in the rest of the free world ?

* *Reflection of the 43rd government-sponsored newbuilding programme-further discussion needed focussing on mixed crews and foreign currency loans* 54

by Goto, Tadao

The difference of crew costs between Japanese and non-Japanese is almost impossible to reduce due to the appreciation of the Yen. However, it is hard to get shippers' understanding for the situation the industry is faced with if nothing changes.

If we accept the low freight shippers are requesting while we stick to Japanese crews, shipping companies' management will be brought to a standstill. To solve the manning problems, at first the management should consider the possible way for survival of their own companies, and then should consult with the government.

If Japanese flagged vessels with mixed crews are realized, the coverage of the programme will expand to such vessels. This will enable shipping companies to meet lower freight levels which are requested by shippers without deteriorating their management.

[June]

* *Change of thinking sought for survival of shipping* 21

As Japan has developed through international trade no one advocates the unnecessity of shipping. Still now some people expect government to subsidize the shipping industry. But we can't hear voices asking for goverment aid for Japanese ships even from the oil industry notwithstanding the unrest of the Persian Gulf these days.

In these circumstances the request for government's countermeasures against the appreciation of the yen should be turned down because it is not only shipping which has suffered from the strong yen and because the policy of subsidy to industries is itself criticised by foreign countries.

Now we should change the attitude to goverment subsidy and ask for a coop-

eration fund for the purpose of dispatch of Japanese seafarers to developing countries and free provision of their technology.

* *A viewpoint needed for restration of Japanese shipping* 10

by Kurihara, Nobuhiko

All Japan Seamens's Union may not admit immediately the introduction of mixed crews into Japanese flagged ships which would bring about a great change of shipping policy. But the proposal is based on right acknowledgement for the current situation of the industry in the whole Japanese indusry, namely the inferior industry : it is not accepted that as we are transporting cargo for Japan from overseas, shipping is worthy of being subsidized by goverment. When we consider what to do by ourselves as the industry which has lost in superiority, the proposal of mixed crewing deserves a deep consideration.

* *Exploration of ways of survival of trans-Pacific route* 14

I usually think shipping industry has much relied on goverment and financial organizations in short to long-term strategy. (A)

Even if one judges that improvement of facilities, soft and hard, to the extent similar to those of APL enables the company to survive, one must carry it out by all means. Otherwise one can't survive. (B)

Shipping companies are facing the stage of more profitable system of collection cargoes away from the notion of expansion of fleet. (C)

I wonder whether or not even a few Japanese lines in comparatively good financial situation can provide services equivalent to those of APL and Sea Land. (D)

[July]

* *Mixed Crewing International Competitiveness* 20

by Kaba, Akira

Opponents to mixed crewing do not understand the peculiarity of the maket of seafarers and fierce competition in the international shipping.

Mixed crewing has been worldwidely accepted and established in the shipping industry. Stemming development of this system would not only encorage flag-

ging–out to the place where the mixed crewing is accepted but also result in declining Japan's shipping.

Mixed crewing will secure jobs for the Japanese seamen because it can revive the competitiveness of the Japanese shipping and bring back the demand for the Japanese seamen.

* *A Crisis of Japan's Shipping and Mixed Crewing* 27

by Bujoh Masanaga

A shipping policy such as mixed crewing and offshore registry is one to promote FOC all over the world.

* *Various Conditions for survival of Japaneses Seafarers* 35

by Yamamoto, Masaru

It can't be denied that the current circumstance where Japanese seamen have been put was unpredictable in uncertainty of the fluctuating maket industry.

I dare say, however, that such a difficult situation the seamen have been facing is also brought by the seamen themselves because they depend too much each other relying upon the traditional skill and knowledge and do not try to struggle with a new phase.

All Japanese Seamen's Union shall seek the way by which Japaneses shipping companies will be able to survive and ensure the jobs for the Japanese seamen : they should accept to work with foreign crews and then think how to protect and support the crew in such a condition of the vessel with mixed crews.

[August]

* *Mixed Crewing and Maru Ship* 24

by Tsuboi, Gengoh

Mixed crewing on Japanese flagged vesseles is an unavoidable choice for the Japanese shipping industry. If we do not acknowledge the system of the mixed crewing, we will face the progressive reduction in the number of Japanese flagged vessels and in the end the Japanese fleet will disappear.

Norway has created the NIS system and England permits registry in the Isle of Man. Japanese shipowners have made full use of Maru Ship system. Each

country has had its own system, the aim of each of which is the same.

Isn't it important to develop the Maru Ship system to a more rational system, accepting rather than condemning ?

* *Problems of Seafarers* 31

by Suzuki, Noboru

The shipping industry has promoted reduction of a large volume of seafarers. Problems on them have reached a critical stage.

Among others the problem of reserve seamen still remains crucial. It is inevitable that the approach toward resolving this problem should be done on the national level, if Japanese seamen are necessary in order that Japan continues to exist as a maritime nation.

* *Presentation on the trans-Pacific trade by the Council for Rationalization of Shipping and Shipbuilding Industries, which no decisive measures are found* 100

by Ohki, Godoh

The situation surrounding trans-Pacific trade is so complicated that I do not think that the problems will be resolved in line with the CRSSI advice.

I think to have the fleet balanced and freight improved through negotiation among all interests is the best way to achieve stability in this troubled trade.

[September]

* *New development of Shipping in a New Marine Age* 28

by Ohno, Hiroo

It is true that the sea has played an important role in the development of a trading nation. When it comes to its relation with people's everyday lives, however, Japan is far from being a maritime nation.

* *Seamen as Fundamentals of Shipping* 40

by Shinohara, Tetsuro

The key point for maintenance of ships is the system of people on shore who lead and supervise crews.

Traditionaly these people are seamen with deep experience who have stepped up from third officer to first. Recently, the demand for the Japanese third

officers has drastically decreased. Therefore, the systematic education for seamen in the future is difficult.

In these circumstances, Japan's shipping is faced with a crisis that not only seamen but also excellent ship managers will be lost.

* *Far East and Europe trade challenged by the North American Land Bridge* 46

by Ohki, Godoh

Recently, American President Lines announced that they could provide a new service to connect the Far East and Europe by the North American Land Bridge and are thus able to shorten the transit time between Japan and Europe by 25 to 26 days. They said that it compares favorably with the westbound route for European service via Suez Canal.

The European conference will be able to compete with this new attractive service provided by APL, only if it keeps the same transit time while pushing down the freight rate and maintaining the transport volume capacity.

If the time comes that cargoes bound for Europe are transported via North America, the European conference would be greatly influenced.

[October]

* *Transformed Shipping Maket and Manegement Strategy* 10

by Bujo, Masanaga

To change the emphasis on strategy from costs to an increase in the freight level is a hard choice, but necessary. This new strategy, namely fair competition consists of strict operation of port state control, ratification of the UN Liner Code, promotion of limited maket formed by an agreement between two countries, differentiation of services by ratification of Hamburg Rules, reservation of loading goverment related materials and subsidy of seafares' costs, etc.

* *Employment for Lifetime ? or on Voyage Basis ? -on the Employment System of Seamen, as Strategy for Shipping Management* 17

by Hagiwara, Masahiko

* *New Development of Shipping in a New Marine Age* 54

by Ohno, Hiroo

It goes without saying that ocean recreation is an attractive field of diversification where shipping companies can make full use of their speciality.

For entering into the recreation business, they are required to have know-how completely different from operation of vessls, to let people play around and enjoy themselves.

In this point shipping companies would probably be rather behind other industries.

[November]

* *Modernization of Seamen's Job System and Mixed Crewing* 10

by Banno, Yasuhiro

When it comes to the way that both Japanese seamen and vessels can survive in the international shipping, it is for seamen to have international mind and special skills and for vessel to be operated under mixed crews of Japanese seamen as key men and the rest of foreign seafares.

Mixed crews on modernized ships bear more cost merits than that of conventional vessels and the mixed crewing itself is a useful means for cultivating international mind of seamen.

For that purpose it is called for to introduce mixed crewing on modernized ships which offer the opportunities to learn special skills.

To expand job places of the high value-added Japanese seamen educated through such a system to FOC vessels is the way of survival of Japanese seamen.

* *Employment for Lifertime ? or on Voyage Basis ?*

— on the Employment System of Seamen, as Strategy for Shipping Management (2) 15

by Hagiwara, Masahiko

A social insurance system which had spread after the War matured through payment of premiums by both employers and their employees. Seamen's insurance is no exception either.

In this social circumstance shipping companies had difficulties to shift the em-

ployment system of seamen from on lifetime basis to on voyage basis.

Considering on the working system of the sea-service with provided paid holidays, the productivity of Japanese seamen lowered to two thirds. International competitiveness of Japanese flagged vessels manned with Japanese seamen deteriorated considerably.

The appreciation of the Yen after G 5 in 1985 is to bring about a crisis of the breakdown of both management and workers.

Now a clear answer would be presented for the question of an alternative from for lifetime or on voyage basis.

* *A Doubtful Choice for Stabilization of the Transpacific Trade*

by Ohki, Godo

What is the true meaning of Transpacific Discussion Agreement set up by five leading liner companies in Japan and the U.S. in order to tackle the problems facing them.

However magnificent the agreement may be, the fierce and bogged down competition on the trade will not disappear as long as the current U.S. Shipping Act is effective.

[December]

On the transpacific trade 70-80 % of the cargoes exported from the Far East and South East Asia are FOB cargoes, transporters of which are appointed by consignees in North America such as major departments or makers. Therefore, Japanese lines have taken disadvantages at this point.

However, they need to do thier best while acknowledging this fact. The first priority should be given to secure cargoes exported by oversaes Japanese companies.

Transport of small lot cargoes with high speed and frequency or in 'just–in–time' concept are needed for the transport industries.

In the cricumstance where such high quality and multiplicity are asked for, Intermodalism has progressed.

It is important to promote healthy development of the industry while utilizing its vitality. For that purpose we have discussed about its regulation in line with introduction of free licensing system instead of restriction of the business.

* *Tasks and Prospects for Seamen's Education* 30

by Amemiya, Yoji

Movement of modernization of seamen's system, coupled with setup of educational facilities of seamen by the Ministry of Transport has led the current education of seamen to a different direction from history of higher quality of school education.

This school education is specialized for seamen for modernized ships instead of comprehensive education for seamen.

However, there is almost no recruitment by shipping companies which have owned modernized ships for the first graduates under this new curriculum. This reality revealed one of defects involved in the short–sighted curriculum.

* *Can Cruise business become a new strategy ?* 58

by Ohki, Godo

An editorial of September 24 '88, on the Asahi entitled 'coming era of luxury cruisers' concluded expecting that All Japan Seamen's Union which advocates national flagging deals flexibly with mixed crewing.

The cruising business is said to be difficult in making profits. I expect that Japanese lines enter successfully into such severely competitve business.

[January], 1989

* *Tasks and Prospects for Seamen's Education* 102

by Amemiya, Yoji

Japan's education on merchant shipping is faced with the crossroads, whether it will go back completely to a traditional Seamen's education.

The system of educational institutions on merchant shipping and seamen should be suited for the seamen in an advanced country.

The critical situation of Japanese seamen under the current extraordinary shipping maket must not influence directly the scene of education and study on merchant shipping and seamen.

[February]

* *Two questions to a report presented by a working group of the Council for Rationalization of Shipping and Shipbuilding Industries (CRSSI)* 58

by Enomoto, Kisaburo

I don't accept the critisism against flagging–out and mixed crewing which the shipping has adopted as a means for a desperate effort for survival. Why are only shipping companies denounced for their strategical cost reduction and what is the persentage of a seafare's cost to the total ? Considering on its ratio I wonder how it is effective to make utmost efforts for a reduction of costs of seafarers through mixed crewing for restration and maintenance of Japanese shipping's competitiveness.

[March]

* *Is Mixed Crewing an All-Purpose Solution for Revitaliring the Japanese Shipping* ? 17

by Koyama, Ken-ich

I don't thnik that the introduction of the system of mixed crewing will be able to solve all of the probelms we have.

What is need for the industry is that each company has its own discretion to tackle the problems.

In order to retain autonomy of management of companies the industry must make an effort to reduce intervention of the government as much as possible and reexamine an industrial labour union, namely All Japan Seamen's Union.

Among transportation industries both shipping and the national railway had plunged into financial difficulties. The national railway, however, has revived

through privatization of the company and restructuring the labour union from industrial ones to company units.

For the purpose of restoration of the Japanese shipping it must change the seamen's union at first and then solve the manning problem by selecting the best means for each company from among various ways which are now suggested.

* *The End of the Big Six Era.* 60

by Ohki, Godoh

After World War II the Japanese Shipping companies built ships by almost 100 percent loans provided by banks. Because of such a history the industry is going to be restructured under control of banks.

I hope the shipping companies are away from control of their banks and grow by themselves as soon as possible.

INTERVIEW

[JULY]

* *Mr. C. M. SAYRE*

Director-Logistics

E. I. DU PONT DE NEMOURS & COMPANY (INC.) 48

I'm not sure that 1984 Act is concerned itself with the possbility of excessive competition. In fact,I think there are some expressions in the Act to make the competition preserve in the U.S. trade. I don't make the link that many people make between the Act and a rate situation.

I honestly belive the liner industry is too much concerned with relationship with competitors. Focus should be given to how well you serve the customers.

* *Mr. Miyake, Hiroshi*

President

Tokai Shipping Co., Ltd 74

Since the exchange rate of Yen against Dollar reached ¥180, it is impossible to operate vessels manned by Japanese seamen in terms of costs and we asked them to get off ships at the expiry of their terms. At present we have no ves-

sels manned by Japaneses crews. The ratio of Yen costs of the total is about 20 %. The ratio of Dollar costs, therefore, is increasing.

[August]

* *Mr. Banno, Yoshio* 36

Prideent

Nippon Liner System Co., Ltd.

There is no prospect for liner sections to get better soon. In these circumstances, to deal with this problem became an urgent task for both YS Line and Japan Line.

Both line felt that we could make a fresh start through separation and merger of our liner sections. We thought separation and merger would strengthen our marketting activities and result in a thorough reduction of costs and by doing so we can continue to exist as a liner company. We hope the company will be accepted as reliable, despite its small size.

* *Mr. Ohkawa, Kenro* 74

President

Kobe Kisen Kaisha

Diversification would depend on the manpower.

[October]

* *Mr. Doi, Kazukiyo* 26

President,

All Japan Seamen's Union

I absolutely reject the introduction of mixed crews onto Japanese-flagged ships.

The MoT is shirking its responsibility for the crisis which ocean-going shipping faces with the excuse that the introduction of mixed crews is a problem to be resolved between management and labour who must overcome the difficulties by their own effors. For so long as it continues to blame the crisis in shipping as mere labour problems, the MoT is in no position to advocate further reduc-

tions among Japanese seafarers.

I think that the best way to ensure the maintenance of Japanese–flagged vessels with proper standard of safety and reliability is through the operation of a core fleet of modern vessls with as small crews as reasonably possible. Any shortage can then be filled by chartered vessels operating under foreign flags and manned by foreign seafarers at a lower cost.

[January], 1989

* *The business performance gets ten times by flagging-out* 72

Mr. Westye Hoegh, Chairman

LEIF HÖEGH & CO. A/V

We had difficulties in the management from 1984 through 1987. However, during fifteen months from the end of 1985 to the beginning of 1987, we changed registry of twenty–five ships from Norway to Liberia, Panama and Bahama and also seafares from Norwegian to Filipino, Indonesian and Yugoslav and so on.

With a reduction of off–shore costs employees ashore decreased by 50 to 250. Not only a recovery of the market but also such an effort contributed to great improvement of profits after write–off.

[February]

* *Mr. Matsuki, Toshihiro*

Director Forest Products & General Merchandise Group

C. ITOH & CO.,LTD 34

Imports of forest product remain brisk. A ratio of log and lumber to the total of imported wood increased 24 % in 1988 from 8.8 % during the period between 1971 and 1980.

The appreciation of the yen against dollars changes a structure of import wood and this trend will continue for a while.

* *Dr. Martin Stopford*

Senior Shipping Economist

The Chase Manhattan Bank, N. A 38

Nowadays responsible bankers are very cautious of proceeding newbuilding transactions.

[March]

* *The Age of Free Competition among P. I. Insurers*

Mr. J. C. W. Riley 46

Our basic strategy is to select the service areas and concentrate services on our club members in each area.

Now in terms of tonnage 60 % of the fleet we insure comes from the Far East maket.

Until now there was no room for us to insure Japanese flagged vessls, but from now on we can do.

Although there is potential overtonnage, competition itself encourages each club to make utmost efforts to provide better services. This situation brings further development of the industry and it also gives shipowners a favourable effect.

NEWS FLASHES

[July]

(Liner) Trial transport through a newly developed SLB system by Nissin. NYK acquires an American company to strengthen inland transport in the U.S 42

(Tramp) The annual performance for the year to March in imported cargoes improves by expansion of domestic demand 43

(Coastal Shipping) Environment of low freight rates and difficult replacement keeps chemical tanker oprators troubled 44

(Seamen) A course of experiment after C stage finalized.
Conflict between management and labour over introduction of mixed crews 45

[August]

[September]

minimum of Japanese seamen necessary for the current 46 shipping companies belonging to 2 oceangoing shipowners' labour relations agencies if mixed crews with 4 Japanese seamen per ship are introduced into Japanese flagged vessels 42

(Shibuilding)

* CRSSI reported to MoT about a countermeasure of shipbuiding in future which focused on technology development 43
* There is no prospect for a speedy settlment of the dispute between World–Wide and Hyundai concerning cancellation of the shipbuilding contract and the price rise. In Japan after the first oil crisis, similar cases often occurred when with sharply rising wage costs and dearer materials, shibuilders requested the buyer to raise prices. An arbitration award delivered in Japan will be rememberd 44

[October]

(Liner)

* Discussion agreement on Japan–Taiwan Routes in order to set up a minimum guide line on the freight 39
* Japan and China sign the contract for ferry service between Kobe and Tientsin 39

(Tramper)

* Nippon Yusen sets up Toho Shipping through taking over Shinto Shipping Operation 40
* Taiheiyo Shipping orders a newbuilding for the first time for 8 years 40

(Seamen)

* Regular meeting of the Seamen's Union starts on November 8 with its slogan of firm opposition to mixed crewing 41

(Shipbuilding)

* Kanasashi Zosen applies to a court for procedure of restructuring of its debts. The total debts are Yen 39.7 bn 42

[November]

[December]

[January], 1989

REPORTAGE

[December]

REPORT

[November]

* *Increasing Cruising Business*

— the newest report on newbuilding of cruisers and newly starting cruising business 23

Nowdays a cruising boom has occurred in Japan. A different kind of cruisers are being built from big oceangoing cruisers to small harbour cruisers in the dawn of new passengership era.

Oceangoing shipping companies among others, are one of those industries which have delayed their structural changes compelled by the appreciation of the Yen. Now they make a great effort for entering into cruising business as one of diversification of businesses.

It is expected that increasing interests in marine leisure will awaken potential demand for cruising in Japan and the cruising market is formed in a rather shorter period than we think.

Following companies are reported ; Mitsui OSK Lines, Showa Line.

[February], 1989

* *Direct joinning, with International P.& I. Club Pool* 24

by Takada, Shiro

In order to hold FOC vessls which consist of two–thirds of oceangoing vessels controlled by Japanese Shipping, Japan P.& I. Club cannot help competing with foreign P. & I. Clubs more fiercely.

The circumstance similar to that of Japanese shipping has pushed us to join directly with the pooling system by the International P. & I. Club.

* *The Japanese Shipbuilding Industry Standing on a Springboard for its Restration* 50

There are still many issues to be solved, enhancement of international competitiveness and an ability to develop technology, and promotion of coperative relationships with South Korea and Western Europe. Among others whether

industry can recruit young people is of crucial importance.

* *Japanese people who enjoy cruising increase steadily* 26

by Nakada, Tohru

The number of ports–call in Japan by foreign passenger vessels last year reached seventy by nineteen ships, including luxurious cruisers such as the Queen Elizabeth ll and the Sagafjord, etc.

Passengers getting on and off board in Japan are estimated more than 16 thousand in number, 6 thousand of them are Japanese.

On the other hand, 28 million people enjoyed crusing last year around the world according to a study by tourist industries. Most popular cruisers are the Pegasus, the Qeen Elizabeth ll, the Coral Princess and the Royal Viking Star, etc,in the Aegean. As for itineraries 4–5 day cruises show the highest popularity.

SPECAL REPORT Air cargo transportation

[April]

* *The rapid growth and development of air cago transportation* 10

by Kaneko, Haruhiko

A ratio of air cargoes exported from Japan dropped to 20 % from 35 % to the previous year but has gradually recovered just under 30 %. Recently features of the cargoes according to destinations have been appearing.

At present, growth of exported air cargoes from Japan is expected to about the same extent as the increase in demand in the U.S., particulaly for higher value added merchandise.

At the same time, air cargoes departed from Asian NICs will expand their share of the market.

* *A large increase of marchandies imports from the firm trend of the appreciation of the yen* 14

by Yoshida, Hisashi

The shift to air transport seems to continue under the influence of a structural

change in exported merchandise, namely an increase in high tech merchandise.

Incresed profitability from the appreciation of the Yen against the Dollar has further encouraged the shift to air trasportation.

The rate of increase in imports air has surpassed that of the whole trade.

* *The current situation of air couriers and their future tasks* 22

by Noma, Seiji

TALK

[May]

* *Dry Bulk Market is steadily continuing to climb* 10

I'm afraid that if the newbuilding price of a Panamax stays at around 2.8–2.9 billon Yen, this may trigger newbuilding. The Panamax maket seems to be climbing around the ninth stage to compare to mountain climbing. (Ushioda)

What makes this bullish market differ from the previous mini boom is a smaller operating volume of newly built vessels. I don't thik this market trend will end up short term like the last boom, even if no one expects it to last for three or four years. (Yamashita)

It is generally said that now is not an age when we give the first priority to expansion of share, but we have to consider how to make appropriate profits. We, the shipping industry also must catch up with the times, or we can't survive. (Wakasugi)

I strongly hope for the continuing existence of financial system like a current government–sponsored newbuilding programme. However, improvement of various conditions of the programme including loan interests is expected. (Oguni)

[July]

* *Restration of British and Japanese Shipping* 14

T. Bridgman (President, John Swire & Sons (Japan) Ltd.)

vs.

S. Iwamatsu (Vice Chairman, NYK Line)

Iwamatsu : Difficulties now we have were solely caused by the appreciation of Yen, So, I think that our shipping division will be able to make a profit if we can reduce Yen costs and increase Dollar costs.

Bridgman : Presonally, I think that each division of a company must stand on its own feet and compete for new investment funds on the equal basis.

[August]

* *How do we push to restructure the trans Pacific trade ?* 10

— *by Miyamoto, Haruki ; Komiya, Kazuhiko ; Nemoto, Jiro ; Tenpohrin, Susumu ; Nakayama, Eisuke* —

Carriers firmly demand shippers to pay for freight which meets high value-added transport. Unless carries keep to the principle of no discounting, restructuring will be impossible. (Tenpohrin)

Nowadays the conference has not filled the role of maintaining freight. Adversely it has lowered freight. Going back to the starting point, we need to rethink what the conference is and what the merit of it is. (Nakayama)

An important strategy for survial is logistics service, that is, one to integrate information network among sea, inland and the Far East. (Nemoto)

Both Japanese and foreign lines should stop useless competition. To do so it is necessary to create a reliable relationship among them. (Komiya)

Japanese lines have no consciousness of costs and they have discounted freight without limits by I.A. in order to get a lage share, say foreign lines. (Miyamoto)

[September]

* *Impact of Ceasefire in the Iran-Iraq War* 10

— *Toichi, Tsutomu ; Miura, Hiroshi ; Takase, Hitoshi* —

It is expected that Iran and Iraq will give the first priority to restoring the stability of their national lives.

Surely it is easy for finacially troubled countries like Iran and Iraq to make a short term revenue increase through raising oil prices, but in the long term this

policy will bring about political and economic probelms. They will take the strategy of a gradual price hike. (Toichi)

People in these countries were forced to endure poor living standards during the war. Terefore, first, food, clothes and domestic electric appliances, etc. will be imported to improve living conditions. Secondly, construction materials for damaged buildings and, lastly, large scale projects for restoration will be planned. However, it will take some time to accomplish such large projects. (Miura)

I think the ceasefire in the Gulf war will not bring the expected benefits to the tanker market for the time being. People seem to be paying more attention to the dry cargo market which is expected to see demand stimulated by reconstruction. (Takase)

[January], 1989

I think there is a good outlook for 1989. Symptoms of the problems which are likely to occur in a year, generally speakng, have already appeared around this time. However, potential factors which will trigger the problems are not seen.

As expanding economy has continued for two years, there is concern for inclination toward a recession, but at present the wholesale and consumer prices show no increase.

As far as industrial structure is concered, further improvement of level of incomes will bring about an increase of service industries. In the circumstance 'network' industries grow.

We should view that economy has changed to have no boundary rather than to hollow the manufacturing industries. Nowadays Japan has opposed free trade of agicultural products. This attitude will be never addmitted by other

countries. (*Kanamori*) Assuming there is no rapid decrease of seaborne cargo volume, if Japanese shipping gains international competitiveness through mixed crewing, probelms to be solved are where to place the core function of a company, how to conduct marketing and management, etc.

When we can find right answers for these questions, there is still room for Japanese shipping to grow. (*Ogawa*)

* *International transport and technological innovation in the 21 st centry* 64

As a back ground of making a superhigh speed vessel plan there is also a task to secure young talent for shipping and shipbuilding industries which are regarded as indispensable in the world economy.

I am confident that a development of superhigh speed vessels is a project suitable for logistics of the 21 st century. (*Nanbu*)

Distribution service is a section of service where an improvement of productivity is difficult. However, productivity helped with technological innovation increases remakably.

We have already experienced this fact through containerisation. Therefore, the positive promotion of technological innovation in hardware will be expected. (*Tokieda*)

Development costs of airplanes are very large. The world total volume of demand for cargo planes is not enough for promoting the development of new cargo planses.

As practical means it is considered that the first priority will be given to a reduction of costs through remodelling of a jumbo passenger plane into a cargo plane. (*Kuroyanagi*)

Demand for small–lot, speed and fixed dates in transport has increased.

In this circumstance more speedier delivery of information on logistics is required for forwarders.

Nowadays shippers do their business worldwidely. Information network must be extended so as to cover their activities. (*Matsuo*)

[February]

* *A fear of a boundless reduction of Japanese seafarers in terms of their costs. — What should they do now ? —* 10

There are many opinions that call for a reduction of total costs of not only seafares but also employees on shore if hard management is attributable to high costs.

Briging up the young generation of the seamen in Japan is an urgent task for the Japanese seafares to hold non–cost competitiveness over the future in competition with Southeast Asian seafares.

Management must take responsibilities for preservation and transmission of seamen's skills including recruitment (*Banji*).

The cost of Japanese seafarers is 6–7 times higher than that of counterparts in Southeast Asia. This increases the number of FOC vessels.

Japanese seafarers themselves have no countermeasures aginst such an opinion. There is no other means than support by goverment for carrying out effectively both prevention of flagging–out and security for a certain number of their job places. (*Ishifu*)

Where do true causes of a crisis of the oceangoing shipping lie ?

In a move toward the futher appreciation of the Yen and deregulation of the industry, government, or the ministry of transport hasn't hammered out an effective policy on the shipping including seafares. This is the biggest problem. (*Masuda*)

Working conditions of a majority of coastal shipping seamen who join with no labour unions are too bad to gather recruits. As a result fishing boats are short of manpower while seamen can't find their places on oceangoing shipping even if they wish.

We can't expect from a claptrap of government policy resurgence of the shipping nor voices that Japanese seafarer is a must. (*Sakaguchi*)

TECHNOLOGY

[June]

* *R & D for the Automatic Vessel in the next generation (Highly Reliable and Intelligent ships)* 26

by Hiroshi Ohshima

Highly Reliable and Inteligent ships to be researched and developed at the Japan Marine Machinery Development Association will have more sophisticated system called Highly Automatic Navigation System to make decisions by itself like a human brain. The vessel equipped with the System will decide by herself to select the most adaptable and economical route in the ocean to her destination, in contrast to the automatic system in this generation which needs human judgment to do so like legs or hands in the body.

They are studying another automatic system operated in the port. Such system will automatically set the vessel for safe and economical manoeuvering, mooring or anchoring in the port area, getting on or off the berth and loading or discharging her cargo without labor.

FINACIAL RESULTS

[July]

* *The major Japanese operators*

  They remain still gloomy in spite of improved losses 77

* *The major Japanese shipbuilding companies*

  Expansion of domestic demand and remaining depression of the shipbuilding sector widen the difference of their performances 82

PEOPLE

[February], 1989

* *Mr. NAKADA, Ryuzo*

He was installed as the above mentioned port on January 1. He handled overseas activies of the Japan Shipping Council and the Japan Container Association while he was on the position of a manager of export transport division of Mitsui & Co.

He emphasized that the Port of Charleston as one of ports on the East Coast still playing an important role as center of physical distribution has also a significant role as a gateway to the Sun Belt areas as Ohio, Kentucky, Indiana and Tenessee.

TAXATION

[March], 1989

Although the oceangoing shipping seems less influenced by the introduction of the consumption tax, it is clear that new system changes the way of accounting. If you don't understand the system you might suffer losses resulting from your ignorance.

MARINE INSURANCE

[August]

HALF–YEAR FINANCIAL RESULTS

[December]

Performances of major oceangoing shipping lines which have been beaten by the dull market and the strong yen stopped downstream and their total financial results during the first half of 1988 business year turned into black for the first time in three years.

Expansion of domestic demands and rationalization efforts have helped major shipbuilders to improve their finacial results.

TOPICS

[December]

More than two week–trial trasport by experimental containers was carried out with success for a long distance between Sasebo/Kobe/Keelung/Kobe. The living rate was almost 100 %.

Regular Features

[April]

[May]

If you would like to read any of the above articles, translation services are available.
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