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# International Arbitration in Japan in the 1990s

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## 1. Introduction

Arbitration in Japan covers not only commercial and maritime disputes but also other disputes such as those in labour, construction or the family. However the scope of this paper is limited to commercial and maritime arbitration in which I have experience.

In the past arbitration in Japan has scarcely been used for resolving international business disputes relating to international transactions. Most of these international business disputes have been resolved by arbitration in such business trade centers of the world as London, New York and Paris.

It is submitted that this is mainly due to the fact that the quality of Japanese legal service including arbitration has not been so much attractive not only for foreign parties but also for Japanese business people to refer their international business disputes to arbitration in Japan.

At present it is estimated from the economic trend of the world that by the end of the 90s three major free trade areas will emerge in North-east Asia including Japan, Europe and North America[1].

Under this circumstances Japan is now emerging as one of the world's business centers in North-east Asia and will establish its leading position in the near future.

Accordingly most of Japanese who are involved in arbitration understand

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This paper is a revised version of the writer's speech which was delivered at the 75th Anniversary Conference of the Chartered Institute of Arbitrators in London.

1. See, Naisbitt & Aburdene, Megatrends 2000, p.5 (Avon Books 1990)

that Japan will be sure to be required in the 90s to furnish customers of Japanese markets with such legal service including arbitration as is necessary and attractive for those clients.

Actors in the market will be sure to require that the quality of legal service including arbitration in Japan should be equivalent to those which the other world business center provide for their customers.

In this paper it is briefly discussed what renovation this customers' demand will force upon arbitration law and practice in Japan.

## 2. Renovation of arbitration Law

It is generally accepted by all foreigners and Japanese who are involved in arbitration in Japan that Japanese Arbitration Law, which is German-origin, century-old and unworkable, should be renovated as soon as possible.

As one of responses to such voices against Japanese existing arbitration law, a draft of new arbitration law was proposed by a group of leading scholars in the field of civil procedure law at the end of 1988[2].

This draft arbitration law is primarily based on the UNCITRAL Model Law, but is more elaborate than the Model Law since it takes into consideration various national arbitration laws including those promulgated after the Model Law in Canada or Australia.

Although the draft arbitration law has incorporated many concepts and thought from the UNCITRAL Model Law, its basic framework of applicability is different from the UNCITRAL Model Law.

The UNCITRAL Model Law applies only to international arbitration while the draft arbitration law also applies to domestic arbitration held in Japan and its application is not limited to international arbitration.

In addition the draft arbitration law is more detailed and elaborate than those of the UNCITRAL Model Law since it has more provisions regarding the function of local courts in supervising or facilitating arbitration.

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2. See, Ogawa, Proposed Draft of Japanese New Arbitration Law, 7 J. Int. Arb. No.2, p.33 (1990)

At the moment the Japanese Government has not taken any official steps for promulgating a new arbitration law due to its congested schedule of legislation. But it is believed that a new arbitration law will be enacted basing on this draft arbitration law during the 1990s.

In relation to the draft arbitration law, it should be noted that there remain certain problems in the application of the draft arbitration law for international arbitration if it is enacted in its present form.

The draft arbitration law lacks some international elements relating to arbitral proceedings. For example, it has no provision on the representation of the parties by foreign lawyers, the arbitrator's nationality and the language used in arbitration procedure.

The first issue should be settled by a statutory provision, but the remaining two elements should be covered by applicable arbitration rules of an arbitral institution. This means that even if Japanese arbitration law is renovated in the near future, another renovation of Japanese arbitration practice will be essential.

### 3. Representation of parties by foreign lawyers

The issue whether a foreign lawyer who is unlicensed in Japan can represent his or her client in an international arbitration proceeding in Japan is decided by the governing law of the arbitration proceeding under Japanese conflict of laws rules.

Regarding the governing law of the arbitration proceeding in Japan there is no statutory provision but it is the prevailing opinion among Japanese commentators of conflict of laws that the parties to the arbitration proceeding in Japan can choose it by their agreement unless the parties' choice is against the public policy of Japan, and if the parties' agreement is not expressed, the law of the place of arbitration, that is Japanese Law, will govern the arbitration proceeding.

1) Where the governing law of the arbitration proceeding is Japanese law

The existing arbitration law has no provision on this point, but Article 72 of

the Lawyers' Law prohibits, as unauthorized practice of law, the participation for remuneration of an unlicensed lawyer in an arbitration proceeding.

This follows an opinion that a foreign lawyer who is not licensed in Japan may not represent a party, foreign or Japanese, in an arbitration in Japan unless it is clearly ex gratia or the person happens to be the representative officer of the party corporation[3].

2) Where the governing law of the arbitration proceeding is not Japanese law

Even if the parties do not choose Japanese law as their governing law of the arbitration proceeding and choose a foreign law which permits the representation of party to arbitration by a foreign lawyer, it could not be against the public policy since the representation of party to arbitration by a foreign lawyer could not give any damage to the party and any serious damage to Japanese society. In this case Article 72 of the Lawyers' Law is therefore not applicable.

Although the foregoing is the case under the present arbitration law, it would be better that a statutory provision will permit a foreign lawyer to be able to represent his or her client even if the parties choose Japanese law as their governing law of the arbitration proceeding in the near future.

## 4. Improvements of Japanese Arbitration Practice

1) Availability of reference works in English on arbitration in Japan

It is so often pointed out by foreigners who are involved or interested in arbitration in Japan that reference works in English on Japanese arbitration law and practice are hardly available, and this fact has disturbed to make Japanese arbitration law and practice familiar with those who do not understand Japanese language, although most of Japanese do not have any intention of keeping such information secret.

A list of reference works in English on arbitration in Japan is attached at the

3. Taniguchi, Commercial Arbitration in Japan, ICCA Congress Series No.4, p.35 (Kluwer 1989)

end and is hopefully of some help for eliminating this information barrier.

In order to improve this situation The Japan Shipping Exchange, Inc., who started its maritime arbitration in 1920 after the maritime arbitration in London, is continuing its best efforts to supply more information on arbitration in Japan through its English bulletin.

2) Variety of Arbitrators' Nationality

There is no provision under Japanese law, or the arbitration rules of arbitral institutions in Japan, which restricts a non-Japanese person from becoming an arbitrator in Japan. However it is rare to find a non-Japanese person selected as an arbitrator in Japan.

In order to improve this situation, it is strongly required for The Japan Shipping Exchange, Inc. and Japan Commercial Arbitration Association to endeavour to increase their panel members of non-Japanese origin.

3) Introduction of English as arbitration language

In the past Japanese has been used as the customary language for arbitration in Japan, although there is no such restriction under Japanese law and the arbitration rules of arbitral institutions in Japan. The reason is simply that the majority of those appointed as an arbitrator in Japan have been Japanese.

However it is true that such predominance of the Japanese language is not convenient for most non-Japanese parties and English is much more suitable for those involved in international business transactions.

Accordingly The Japan Shipping Exchange, Inc. and Japan Commercial Arbitration Association are required to prepare to use English for their arbitration procedure, if all parties request it.

## 5. Conclusion

The quality of arbitration practice in Japan will be improved in the earlier part of the 1990s up to the level of arbitration in other major world business centers and Japanese arbitration law will also be renovated during the 1990s.

It therefore is forecasted that Japan will be able to furnish its financial and trade clients with legal service, including arbitration, which have an internationally-approved quality by the end of the 1990s.

This will be sure not only to intensify world-wide competition among

arbitration centers, but also to promote the future progress of international arbitration since there is no progress without competition.

## 6. A List of English Reference Works on Arbitration in Japan


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# Logic drifting in the Appellate MCIA

By Tameyuki HOSOI*

In our daily lives, it does not surprise us to learn that peoples of a different culture apply differing logic to the same fact situation resulting in a finding which to us, is seemingly illogical. To my surprise however, I have found seemingly illogical findings of fact right here in our own backyard.

## Collision between Submarine and Leisure Fishing Boat

The incident you may recall involved the "NADASHIO", a Japanese Navy Submarine which collided with a Local Leisure Fishing Boat the "FUJI MARU NO.1" (the "FUJI") in Tokyo Bay on the afternoon of July 23rd, 1988. The "FUJI" capsized and sunk with the result that 47 passengers and crew members aboard the "FUJI" were either killed or injured, and to the astonished public, this was a horrifying incident.

The incident was first brought to the Yokohama District Marine Casualty Inquiry Agency (the "Yokohama District MCIA"), which determined as a matter of fact, that the submarine crossed the course of the "FUJI", with the "FUJI" on the starboard bow of the "NADASHIO" and as such, found that the submarine was greatly at fault and the "FUJI" only partly to blame for the incident.

The "NADASHIO" appealed to the Appellate Marine Casualty Inquiry Agency (the "Appellate MCIA") of Tokyo, which partly reversed the lower MCIA decision and concluded that both vessels were equally to blame.

In addition, the appellate level determined, as a finding of fact, that one of the leading causes of death and injury to the 47 persons on board the "FUJI", was the fact that the "FUJI" had 48 persons on board at the time of the incident in contravention of the vessels maximum capacity which was limited to 44

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persons including the vessels crew. Astonishingly, the Appellate MCIA implied that had 48 persons not been on board the "FUJI" (thereby exceeding the vessels legal capacity), the tragedy of 47 deaths and injuries would not have occurred. I find this analysis entirely lacking and without logic.

## Functioning of the MCIA

Under the Japanese Constitution, all judicial authority is vested in the courts and as such, the MCIA is an extra-judicial governmental administrative body, deriving quasi-judicial authority from the Ministry of Transport. It has authoritative power inter alia, to decide whether or not the license of a seaman should be suspended or limited when that seaman is involved in a marine incident. The MCIA is also vested with investigative powers to determine the cause of a marine incident.

The parties to a proceeding under the jurisdiction of the MCIA are entitled, to a certain extent, to appeal the matter to a High Court proceeding in Tokyo if they do not accept the decision of the Appellate MCIA.

Generally speaking, a decision of the MCIA or its appellate body, is highly regarded in the maritime industry, and in many cases findings of fact by the MCIA are used to structure out of court settlements despite the fact that an MCIA decision does not have binding judicial authority. As such, the role of the MCIA in many maritime incidents cannot be overlooked.

## Significance of the recent Appellate MCIA Decision

(1) As a finding of fact it was determined that slightly prior to the collision, a third vessel, a yacht was located to the port bow of the "NADASHIO".

The skipper of the yacht was determined to be unattentive for some time, and as such, he did not notice that his yacht was on a collision course with the "NADASHIO". Therefore, the "NADASHIO" was forced to take emergency actions to avoid a collision with the yacht, despite the fact that the "NADASHIO" had both the right and duty to proceed in a hold-on basis.

It would appear however, that the "NADASHIO" was on a collision

course with not only the yacht, but also with the "FUJI", both of which were generally proceeding towards each other at approximate right angles to the "NADASHIO".

The Yokohama District MCIA applied Rules 15 through 17 of the Regulation for Preventing Collisions at Sea to the situation where the "NADASHIO" and "FUJI" were on a collision course and as a result, determined that it had been the "NADASHIO" that should have taken actions to avoid the collision since she saw the "FUJI" on her starboard side. On the other hand, in rendering its decision, the Yokohama District MCIA did not appear to pay much attention to the presence of the yacht and its influence in the happening of the incident.

The Appellate MCIA however, approached this issue from a totally different perspective, namely, they did not apply the above Rules to the relation between the "NADASHIO" and the "FUJI", because they considered that there were three vessels crossing one another in which case Rule 15 would not be applicable as the Rule applies in general to a situation where only two vessels are involved.

A critic might wonder if this interpretation of the regulation is correct and appropriate in the circumstances. The case has been appealed by "FUJI" to the Tokyo High Court, and we are curious to learn how the Court will decide on this issue in the future.

(2) Also in doubt is the finding by the Appellate MCIA that the overloading of the "FUJI" led to the happening of the incident. The Appellate MCIA stated that 47 passengers and crew members were either dead or injured as a result of the "FUJI" having 4 more people aboard than her legal capacity of 44 permitted.

The "FUJI" had originally been built as a commercial fishing boat and was thereafter modified to sail as a leisure fishing boat. The Appellate MCIA recognised in their decision, that the "FUJI"'s stability had improved after the modification, as the vessel's center of gravity had been lowered. Despite reaching this conclusion however, there is no finding of fact in the decision to the effect that the overloading of 48 persons on the

"FUJI" in any way adversly affected the vessel's stability or navigational capability.

According to the Appellate MCIA, the fact that the 48 persons were on board the vessel was one of the primary factors leading to the 47 deaths and injuries. In other words, the Appellate MCIA held the belief that, had just 44 persons (the vessels legal capacity) been on board, the 47 deaths and injuries would not have occured. Once again I find the Appellate MCIA's logic hard to follow.

Mr. Y. Tsurusaki, a lawyer and friend of mine, raised this very point in one of the issues of the Japan Shipping Exchange Inc. (Kaijiho Kenkyukai Shi No. 100, P. 48), and he questioned whether the panel (5 senior officers) comprising the Appellate MCIA might have neglected to take into account a "proper and appropriate" causal relationship between the causes and the incident as the result.

In general, there are many factual causes related to a maritime incident—not all of which are causally related to the incident. For example, had there been no water at the site of the collision, no one would have drowned; if the commercial fishing boat had not been modified to become a leisure fishing boat, no passengers would have been on board at the time of the incident. We do not however, consider such factors to be causally related to the incident, and as a legal finding of fact, surely it is appropriate to require a causal connection between the facts and the incident.

I am disturbed by the inadequate reasoning of the MCIA panel. We can only hope that their faulted logic will be rejected by the learned judges of the Tokyo High Court and that in place of the MCIA panel's decision, there will be a decision based upon fundamental legal and logical reasoning.

## Arbitral Award in Disputes arising from Bareboat Charter Party for MV TOMOE 6 *1

The Claimant A: Owners (Panama)
The Claimant B: (Japan)*2
The Respondent: Charterers (Singapore)

Regarding the disputes between the above mentioned parties arising from Bareboat Charter Party dated September 6th, 1984, the undersigned arbitrators appointed in accordance with the Rules of Maritime Arbitration of The Japan Shipping Exchange, Inc. (hereinafter referred to as "the Rules"), hereby render the following award having closely examined the case.

### Award

1. The Respondent shall pay to the Claimant B the sum of Yen 66,333,333 and the interest thereupon at the rate of 6% per annum from June 20th, 1987 through the date of completion of payment thereof.
2. The Claimant A shall pay to the Respondent the sum of Yen 736,601 and the interest thereupon at the rate of 6% per annum from June 20th, 1987 through the date of completion of payment thereof.
3. The rest of the claims of the Claimants and that of the claims of the Respondent shall be dismissed.
4. The cost of the arbitration shall be .....
5. The Court of competent jurisdiction shall be the Tokyo District Court.

### Facts and Claims

### I. Statements made by the Parties

The Claimants

1. The Respondent shall pay to the Claimant B the sum of Yen 66,333,333 and to the Claimant A the sum of Yen 237,309,922 plus the interest on the respective sum at the rate of 6% per annum from June 20th, 1987 through

*1 This text is partly omitted.
*2 The Claimant A is affiliated with the Claimant B and they are represented by the same person.

the date of completion of payment thereof.

2. The counter claim of the Respondent shall be dismissed.
3. The cost of arbitration shall be paid by the Respondent

The Respondent

1. The claims of the Claimants shall be dismissed.
2. The Claimant A shall pay to the Respondent the sum of Yen 5,520,078 plus the interest on the sum at the rate of 6% per annum from May 23rd, 1987 through the date of completion of payment thereof.
3. The cost of arbitration shall be paid by the Claimants

## II. Undisputed Facts

1. A bareboat charter party including the following terms and conditions was entered into between the Claimant A and the Respondent on September 6th, 1984 (in The Japan Shipping Exchange, Inc. Form adopted in June, 1947 and revised in September, 1977, hereinafter referred to as "the Contract") for the motorboat owned by the Claimant A (a chemical tanker, 4,462 G.T., hereinafter referred to as "the Vessel".)

Clause 1.

(2) Period: 10 years from the date of delivery of the Vessel.

(3) Time of delivery: September 10th, 1984.

Clause 2. [Seaworthiness]

(1) The Owners undertake that the vessel is tight, staunch and strong, and legally equipped and installed, and in every respect seaworthy at the time of delivery. The Charters shall redeliver the vessel to the Owners in the same or as good order and condition as when delivered on the expiration of the Charter.

(2) The Charterers shall not be entitled to make any claim against the Owners with respect to the equipments provided by themselves.

(3) The Charterers shall not be responsible for the ordinary wear and tear of the hull, her machinery and equipments and outfits.

Clause 3. [Bottom inspection]

(1) The Owner shall, at the time of delivery and the Charterers shall, at the time of redelivery, inspect the bottom of the vessel at their own expense respectively.

(2) Should any damage be discovered upon the bottom inspection and repaired, the cost of such repair shall be paid by the party ordering the inspection.

Clause 8 [Repairs, survey and expenses]

(1) The Charterers shall pay for the costs and expenses of periodical survey, intermediate survey, repair, navigation and master, officers and crew, and all other costs and expenses necessary to the use and maintenance of the vessel during the currency of this Charter.

(2) Time used in periodical or intermediate survey shall count as the period of this Charter.

(3) The Charterers shall have the vessel surveyed according to the regulations during the period of this Charter. Even in case the date of such survey comes after expiration of this which should have been done under this Charter and hire for the time of such repair.

(4) In the event of execution of legal survey and its incidental works, the Charterers shall give the Owners previous notice of place, date, method and others of such execution.

Clause 10. [Stores, etc.]

(1) The Charterers shall accept and pay for unbroached stores, provisions, fuel and water on board at the time of vessel's delivery, and the Owners shall accept and pay for such unbroached stores, provisions, fuel and water left on board on redelivery at the agreed prices between the parties at the respective ports.

(2) In case the Charterers or the Owners apply prepaid insurance and/or effective tonnage dues, such insurance and tonnage dues shall be paid by the day.

Clause 16. [Non-performance]

(1) Should one of the Parties fail to perform or fulfil this Charter, such party shall fully indemnify the other for all loss or damage thus incurred.

(2) If, in the case mentioned in the preceding paragraph, a party fails to perform or fulfil this Charter intentionally or by his own gross negligence, the other can immediately rescind this Charter without any pre-notice.

Special Clauses

1. Charterages (One Calendar Month)

| | |
|---|---|
| From the first year to the third. | Yen 15 million |
| From the Fourth year to the sixth. | Yen 13 million |
| From the seventh year to the tenth. | Yen 11 million |

1. The calculation of charterage shall start at midnight of September 16th, 1984.
2. The Vessel is a new chemical tanker, built for the purpose of bareboat chartering by the Respondent, and there are following facts in the background. On October 30th, 1984, the Claimant A transferred the claim for the charterages under the Contract and all the right thereof to the Sumitomo Trust and Banking Co., Ltd. (Matsuyama Branch) (hereinafter referred to as "Sumitomo"), in order to guarantee the liabilities of the Claimant B who had had loans of money from Sumitomo then and might have in the future. Then, the Sumitomo entrusted the Claimant A with the collection of the charterage. On the same day, the Respondent approved of this transfer of the claims for the charterage by the Claimant A to the Sumitomo, and N Co., Ltd. (hereinafter referred to as N) and Y made co-guarantee on the transferred charterages.
3. On September 10th, 1984, the Vessel was delivered to the Respondent as the bareboat charterer. The charterage for first 3 years was Yen 15 million per calendar month as above mentioned. The Respondent, however, proposed the reduction of charterages by reason of the continuous depression of shipping markets and progress of Yen appreciation against U.S. Dollar. In consequence of such proposal, the agreement was made to reduce the charterage to Yen 12 million per calendar month from February 1st, 1986. Further, by the same reason, the agreement was also made to reduce it to Yen 10 million per calendar month from August 1st, 1986.

4. On September 16th, 1987, the Sumitomo made a further transfer to the Claimant B of the claim for the Charterage of ¥66,333,333, which had not been paid by the Respondent for the period from December, 1986 to June 19th, 1987 and all the rights thereof plus the claim for the guaranteed liabilities of the said two who made the co-guarantee. The Sumitomo notified the Respondent of this transfer by the written notice of transfer of the claim as of October 6th, 1987.
5. On November 16th, 1987, the Claimants A and B and the Respondent made the following agreement on the venue of arbitration.

   The Claimant A, the Owner of the Vessel 'TOMOE 6' and the Claimant B, the final transferee of the claims for the bareboat charterage which were transferred to him by the Sumitomo, who had been transferred the same by the Owner, (hereinafter referred collectively to as 'X') and the Respondent the Bareboat Charterer of the Vessel 'TOMOE 6' (hereinafter referred to as 'Y') hereby agree that The Japan Shipping Exchange, Inc. (Tokyo) is determined as the venue of arbitration in relation to any dispute between X and Y derived from the Bareboat Charterparty of the Vessel 'TOMOE 6' between the Owner and the Charterer above-mentioned, in spite of the provisions of clause 17 of the Charterparty."

## III Pleading of the Partes

The Claimants

1. The Respondent has made no payments for the charterage since December, 1986. In addition to this fact, the Respondent demanded further reduction of the charterage of Yen 8 million for a calendar month starting from January, 1987. The Claimant A refused this unreasonable demand. The Respondent, however, would not pay the charterage for December, 1986 and onward. The Claimants had no alternative but to cancel the Contract, and so advised to the Respondent in writing dated May 21st, 1987 with the reasons for non-payment of the charterages.

   As the Vessel has had no intermediate survey since delivered to the Respondent, the Claimant A were to have the Vessel redelivered on the

completion of the intermediate survey. The Vessel was surveyed and repaired at Asakawa Shipbuilding Co., Ltd. (hereinafter referred to as "Asakawa") on May 21st, 1987 and the survey and the repair were completed on June 19, 1987.

2. Details of the Claims of the Claimants

a) The Sum of ¥66,333,333 for the charterages which have not been paid for the period from December, 1986 to June 19th, 1987 (Yen 10 million per calendar month).

b) The intermediate survey under the Contract should have been made at the costs and expenses of the Respondent (Article 8), but the Respondent refused to use the same bottom painting materials as the Claimant A had used at the time of delivery. Therefore, the Claimant A had arranged for the same painting materials (DRP A/F 200) himself and had made the bottom painting at the costs and expenses of the Claimant A. Accordingly, the costs and expenses of such painting, ¥2,511,200.

c) The Respondent should have redelivered the Vessel in its tight, staunch and strong condition, legally equipped and installed, and seaworthy (clause 2 (1)), but the Respondent redelivered the Vessel without having supplied some of the legal equipment and installation. The Claimant A had no alternative but to make supplies, and therefore, the cost for them, ¥2,228,270.

d) The Contract was cancelled due to the non-payment of the charterage by the Respondent, leaving seven years and three months of the chartered period originally agreed upon. Therefore, the Respondent shall be responsible to cover all the losses of the Claimant A incurred from repudiation and nonperformance of the Respondent to meet his liabilities (Clause 16 and The Civil Code of Japan, Articles 545 (3) and 415). The Claimant A entered into Time Charter Party of this Vessel with Uyeno Chemical Unyu Kabushiki Kaisha (hereinafter referred to as "Uyeno Chemical") on June 20th, 1987 for the charterage at US$3,500.00 per day. The details of income and expenses of the Time Charter Party for the Vessel are calculated hereunder:

1) Charterage (Income) (per month) US$105,000.00
(¥15,750,000 at the exchange rate of ¥150 against US$1.00)

2) Expenses:

| | |
|---|---|
| i) Master, Officers and Crew: | 24,200.00 |
| ii) Insurance for the Vessel(Incl.P.& I.): | 11,702.00 |
| iii) Repairs: | 11,000.00 |
| iv) Store and Lubricating Oil: | 9,800.00 |
| | US$56,702.00 |

The above expenses shall be borne by the bareboat charterer in case of Bareboat Charter Party. Accordingly, the profits of the Claimant A are:

US$105,000.00 − US$56,702.00 = US$48,298.00(¥7,244,700)

Accordingly, the decrease of the monthly income of the Claimant shall be:

¥10,000,000 − ¥7,244,700 = ¥2,755,300

Due to repudiation and non-performance of the Respondent, therefore, the Claimant A shall have a total monthly income decrease of ¥239,711,100 for the period of seven years and three months hereafter (¥2,755,300 for a month.)

e) The Claimant A made purchase of, at the time of redelivery of the Vessel from the Respondent, under the Clause 10 of the Contract, the following bunker, provisions, etc.

| | |
|---|---|
| 1. Bunker and Lubricating Oil | US$47,179.02 |
| 2. Provisions and Bonded Store | 5,714.67 |
| Total: | US$52,893.69 |
| (Ex. rate ¥135/US$1.00 | ¥7,140,648) |

The Vessel's owner, the Claimant A, has claims as above mentioned of ¥244,450,570, total sum of b) + c) + d), and the above claim of the Respondent (as given in e)) shall be deducted from the said claims of the Claimant A. After this settlement, the claims of the Claimants are calculated hereunder:

The sum of the Claimant B's claim is ¥66,333,333 (given in a) above).

The sum of the Claimant A's claim, after the above mentioned settlement, is ¥237,309,922.

The Respondent

1) As from January 1st, 1987, both low shipping market conditions and value of yen going up were taken into consideration, and under the agreement of the both parties, the charterage was reduced to Yen 8 million per month. In other words, at the end of October, 1987, the president of the Respondent, Mr. Y, made the request to the president of the Claimant A. Mr. X, for the reduction of the bareboat charterage of the Vessel to Yen 8 million per month, because the shipping market conditions hung low, the price of yen was very high, and other owners of similar type of vessels who had charter parties with the respondent then had accepted the reduction of the charterage to about Yen 8 million per month. Mr. X accepted the Respondent's request, and was supposed to sign on the written agreement after the Claimant A obtained a consent of his bank, Sumitomo, for this reduction.

However, the talks between Mr. X and the bank were prolonged, and the Contract had been in progress without the agreement being signed. The claimant A never refused the Respondent's request for reduction of the charterage, to Yen 8 million per month. Furthermore, the Respondent had to delay the payment of the charterage from December, 1986 because of the financial reasons, and the claimant A had been advised so by the Respondent. The Claimant A made consents to this advice by telephone every time the call was made for the delay in the payment of the charterage. Under such circunmstances, the Claimant A advised the Respondent, by his letter dated May 21st, 1987, without any prenotice in this respect, of the sudden cancellation of the Contract.

2) The Defense against the Claims of the Claimants

a) The Charterage

It is unjustifying for the Claimants to demand the bareboat charterage up to June 19th, 1987, on which date the Vessel was redelivered according to the Claimants. It was only because of the faulty tank coatings which brought about the serious damage to the Vessel that the term of the repair had to be so long to make repairs to the said damage after the Vessel was on dock at the Imabari Port on May 21st, 1987.The long term required for

repair shall be in the responsibility of the Claimant A, the Vessel's owner. Should there be only intermediate survey, it should take, at most, only four or so days if it had been made at the port of Yosau, Korea after unloading was completed there.Accordingly, the Contract should be deemed terminated on May 23rd, 1987.

The Respondent, in operating the Vessel, had had only such cargoes loaded in Vessel as deemed loadable under the present Charter Party, but because of the serious damage to the tank coating of the Vessel, though it was scheduled to have 6,000 tons of methanol loaded at the port of Al Juveille in April, 1987, it was judged not appropriate to have the methanol loaded into the Vessel's tanks, after it arrived on April 11th, 1987.Nearly ten days were spent to have the tank cleanings of the Vessel, and even after that, only three tanks, the total of 1,504 tons of methanol (according to the Vessel's measurement) were permitted to be loaded. Because of these, the Respondent had to undergo the loss of freight which could have been gained if the rest had been loaded, and the costs for the cleanings plus the loss of time of staying at anchor there.

The above derived from the defects of the Vessel, and the bareboat charterage should be reduced to the number of tanks usable or loadable from the period of April, 1987 onward.

In consideration of the above, the bareboat charterages to be paid are as follows:

| | |
|---|---|
| Dec., 1986 | ¥8,000,000 |
| Jan., 1987 | 8,000,000 |
| Feb., 1987 | 8,000,000 |
| Mar., 1987 | 8,000,000 |
| Apr. 1 to May 23, 1987 | 2,691,020 |
| (¥8,000,000 × 1,504t/6,200T × 41.6 days/30 days) | |
| | Total: ¥34,691,020 |

As regards the above charterages, the Respondent has counter claims to the Claimant A which shall be stated in details afterward, and they will be deducted from the above in their amount.

b) ¥2,511,200, Cost of bottom paintings.

The Respondent offered Ships' Bottom Paints of SR No.2 of Toa Paints Co.,Ltd. as the paint materials for the bottom paintings. The said paint materials have the same quality as the DRP A/F 200 which the owner of the Vessel requested. In spite of this fact, the Claimant A refused the Paints provided by the Respondent, and made purchase of higher priced paints and used them.

c) ¥2,228,270, cost of legal equipment and installation.

The additional equipment and installation was made, because the next voyage by the new operator was bound for U.S.A., and the claimant A's claim has no ground that the Respondent redelivered the Vessel without making necessary supplies and that the Claimant A had to make supplies.

d) The Respondent shall disapprove the Claimant A's claim for ¥239,711,100, of the loss of profit incurred from the non-performance of the Contract on the part of the Respondent, for the reasons given as follows.

i) The cancellation of this Charter Party was first proposed by the Claimant A on May 21st, 1987, and the subsequent agreement on the part of the Respondent put this cancellation into practice.This is an agreed cancellation, and shall not entitle the Claimant A to make any claims to the Respondent for the loss incurred from non-performance.

ii) Furthermore, if the Claimant A should have taken possible and necessary measures against the loss, it is deemed that the Claimant A should not have sustained any loss from the cancellation of the Contract.

(a) Charterage (Income)

The monthly charterage for the Time Charter Party, US$105,000.00 which the Claimant A set forth, is too low when compared with the price of the market conditions at that time. Rate for the Time charter Party of the Vessel is deemed appropriate at US$15.50 per month (US$15.50/DWT × 7,340.79 DWT = US$113,782.24).

(b) Expenses

As for the expenses, (1) the cost of crew members can be between

US$18,000.00 and US$19,000.00 monthly if Filippino and/or Burmese crew were hired, and (3) the cost of repairs should be US$2,000.00 or so monthly, and even if the cost of survey at the docks of US$70,000.00 to US$80,000.00, once in every two years, is added to them, devided into monthly amount, the total cost shall be deemed about US$5,300.00, which can be appropriate. (4) The expense for the stores and lubricating oil shall be deemed appropriate US$5,000.00 monthly. Therefore, if we approve the insurance premium as claimed by the Claimants, the total monthly expenses shall be between US$40,000.00 and US$41,000.00,which shall be deemed appropriate.

(c) In consideration of the above, the details of the income and the expenses for the Time Charter Party shall be calculated hereunder:

Income: US$15.50 × 7,340.79 DWT = US$113,782.24

Expenses: 41,000.00

Balance (Equiv. to bareboat C/P) 72,782.24

The amount equivalent to bareboat Charter Party shall be:

US$72,782.24 × ¥130 = ¥9,461,691. (US$1.00 = ¥130)

Therefore, if and when the Claimant A had taken possible and necessary measures against the loss to occur, the cancellation of the Contract shall be deemed not to have left to the Claimant A any loss.

3) The Respondent's Claims to the Claimant A.

a) At the time of redelivery of the Vessel, in the presence of the agent for the Claimant A and the Respondent, an inventory was taken of the store supplies, spare parts, etc., and the inventory list was prepared. The above inventory included such supplies and spare parts as were loaded at the time of delivery in September, 1984 and/or afterward at the expenses of the Respondent, the details being as follows:

i) Store supply ¥18,763,349

ii) Engine spare parts 7,386,060
iii) Store supply at Imabari (May 20th, 1987) 828,350
iv) Spare parts supply at Imabari (May 20th, 1987) 1,019,830
Total: ¥27,997,589

By the redelivery of the Vessel, the Claimant A should have paid to the Respondent the sum of ¥27,997,589, as per the inventory lists.

b) In addition to the above, the respondent holds the claims in U.S. Dollars to the Claimant A,the detail being as follows:

i) Accounts Payable by the Owner of the Vessel, Claimant A, at the time of redelivery: US$19,875.00

ii) After the cancellation of the Contract, the Respondent kept his crew members on board the Vessel at the request of the Claimant A till the crew of the Claimant A arrived, and the cost for it: US$12,640.47

iii) The prices of the followings left on board at the time of redelivery of the Vessel.

Bunker and lubricating oil: US$47,179.02
Provision and bonded store: 5,714.67
Sub-Total: US$52,893.69
Grand Total:i), ii) & iii) ..... US$85.409.16

When calculated at the exchange rate of ¥143 against a U.S. Dollar at the time of redelivery, the Yen value shall be:

US$85,409.16 × ¥143 = ¥12,213,509

However, the Claimant A approved only iii) under b), and refused to make any payments for the others. Accordingly, the Respondent shall demand the Claimant A to pay the balance of ¥5,520,078, the total claim of the Respondent ¥40,211,098 minus the Charterage Payable, ¥34,691,020.

Pleading of the Claimants on the Respondent's Counter-claims

(1) ¥18,763,349 for the Store supply at the time of the first embarking after the Vessel being built.

The store supply was made up to what was delivered to the

Asakawa, the shipbuilder, by Asakawa Sangyo Co., Ltd. Asaka's affiliate (hereinafter referred as to "Asakawa Sangyo") after it was sold to Asakawa Sangyo, by Sakamoto Sengu Co., the Respondent's brother company (hereinafter referred as to "Sakamoto Sengu").

The cost of the store supply was included in the building cost of the Vessel, and the total cost was charged to the owner, Claimant A, and the Claimant A made the payment of the Vessel in full.

Therefore, the store supply at the time of the first embarking was paid by the Claimant A, and the claim of the Respondent in this respect has no ground.

(2) ¥7,386,060 for the Engine spare parts.

The cost of maintenance of the Vessel in operation shall be borne by the bareboat charterer, together with other charges incurred during operation. (Clause 8 of the Contract).

Furthermore, the bareboat charterer shall not be entitled to demand for payments of the owner of the Vessel for the equipment and supplies supplemented later on. (clause 2. (2)). These Engine parts were required to make ordinary maintenance of the Vessel in operation, and their costs shall be deemed quite natural to be borne by the Respondent.

(3) Store supply at Imabari (¥828,350, May 20th, 1987) and Spare parts at Imabari (¥1,019,830, May 20th, 1987).

As explained in (2) above, the bareboat charterer, the Respondent, shall bear the costs for them.

(4) US$19,875.00, the Claimant A's Accounts Payable, at the time of Redelivery of the Vessel.

Out of these Accounts Payable, the only document prepared by other than the Respondent is the invoice for US$1,245.00 from Panama Bureau of Shipping Inc.

Accordingly, the Claimant A is prepared to approve the

counter-claim of the Respondent up to this amount; the counter-claims other than the above are too unendorsed to be approved and paid by the Claimant A.

(5) US$12,640.74, cost for the Crew members of the Respondent kept on board the Vessel at the request of the Claimant A.

It is only natural and their duty that the crew members arranged by the Respondent should stay on board the Vessel to watch over and control the work of the intermediate survey and the repair until they are finished, and to wait for the arrival of the new crew members arranged by the Claimant A in order to hand over the Vessel.

However, the bareboat charterer of the Vessel, the Respondent, despite the requests made by the Claimant A over and over again, even before the completion of the intermediate survey of the Vessel, let the crew members leave the Vessel, and sent them back to their native countries. It was only on June 10th, 1987, two days after the above incident, that the master, the officers and the crew arranged by the Claimant A arrived.

The Claimant A had made the requests to the Respondent that the old crew members should stay on board the Vessel and perform the handing-over of the Vessel to the new crew members.

On June 8th, 1987, the crew members arranged by the Respondent were said to be leaving the Vessel, and the Claimant A had no alternative but to request the employees in the dock yard to take inventory on the equipment and spare parts. Therefore, the claim of the Respondent has no ground.

## IV Evidences and Witnesses (Omitted)

## Reasons

### 1. The Claimants' Claims

1) ¥66,333,333, charterages to be paid by the Respondent.

a) The Claimant A declares that the charterage is Yen 10 million per calendar month from December, 1986, while the Respondent declares that the Claimant A gave consent to the Respondent to reduce the charterage to Yen 8 million per calendar month. So, we examine them hereunder.

The written agreements were made, for two reductions of the charterages in the past, between the both parties, and their autographs with seals were put on them. As regards the reduction of the charterage to Yen 8 million, there is an written document, but it has only the autograph with a seal of the Respondent, but non of the Claimant A. The Respondent declares that the Claimant A accepted the reduction to Yen 8 million himself and the Claimant A would put his autograph with a seal after obtaining the approval from the bank, Sumitomo, but the Claimant A had to take too long a time for it and leave the written document without his autograph. The Respondent further says that even without the autograph of the Claimant A he has accepted verbally the request of the Respondent. However, at the time, the Claimant A had transferred the claims for the charterages to the Sumitomo, and the parent company N of the Respondent and X personally guaranteed the transferred claims. With these in consideration, the Claimant A was not in a position to accept the request for the reduction of the charterages made by the Respondent, and as in the earlier two cases in the past, it was necessary for the Respondent to obtain the consent of the Sumitomo in advance of the reduction and it is considered that the Respondent himself must have been well aware of it. When all these are considered, we cannot recognize that the Claimant A has accepted the reduction to Yen 8 million.

Furthermore, the Respondent had entered into some Charter Parties for similar type of vessels with other ship-owners, the Respondent requested for his reduction of the charterage, and had their approval that the charterage should be reduced to about Yen 8 million per month, and so declares that the Vessel cannot be an exception. However, there

is no relationship whatsoever between the Claimant A and the said ship-owners as far as this Contract is concerned, and there is no reason why the Claimant A should accept the Respondent's request because the said ship-owners accepted the Respondent's request for reduction of charterage to about Yen 8 million per month. Even if the Respondent's request for the reduction of charterage comes from such circumstances as the unusual low shipping market conditions and the high value of Yen with the low value of U.S. Dollars, the Claimant A has already accepted two drastic reductions, and therefore, the Claimant A as well as the Respondent has suffered from the circumstances. In spite of these facts, the Respondent's requests, which can be termed as compelled demand, for the charterages to be reduced to Yen 8 million, which is about 50% of the charterage originally agreed upon, were made in no more than six months from the previous request for reduction. This is judged to force the affects of the low market conditions and other factors upon the Claimant A alone. We judge this attitude of the Respondent to be too unilateral, and to make little of the Contract. We, therefore, cannot recognize the Respondent's plea in this respect.

b) The date of Termination of this Contract.

The Claimant A states that the date of termination was June 19th, 1987 when the intermediate survey and the repair of the Vessel were completed, whereas the Respondent says that the termination was May 23rd, 1987 when the intermediate survey finished, and after that, the Vessel was in dock because of the serious damage due to the defective quality of tank coating materials, NK Flake 700Z, which needed repair, and so the Respondent declares that the cost for the period of days required for such repair should be borne by the Claimant A. We examine these hereunder.

The Respondent's declaration is that the Vessel lacks in the capability for the cargoes to be loaded into the Vessel, insufficient cargoworthiness in other words, and therefore the Claimant A is liable for the insufficient cargoworthiness. This cargoworthiness is included in the seaworthiness

of the Vessel. In "Seaworthiness" under Clause 2 of the Contract, it is clearly stated that "the owner should, at the time of delivery, guarantee the Vessel is tight, staunch and strong, and legally equipped and installed, and in every respect seaworthy...".Therefore, when the Vessel lacks in cargoworthiness, the owner shall be liable for the failure of seaworthiness of the Vessel. However, it is at the time of delivery, as stipulated in this clause, that the owner guaranteed the seaworthiness of the Vessel, and it is not for the whole term and period of the Contract. After the delivery of the Vessel, the charterer shall maintain and control the Vessel at the costs of the charterer (clause 8 of the Contract). When we discuss about this Vessel, it was delivered to the Respondent, on September 10th, 1984, as the newly built ship.On April 27th, 1987 at the port of AI Juveille, the Vessel was inspected and found that some of the tanks were inadequate for loading cargoes. However, for the period of about two and a half years, up until that time, the Vessel had loaded without difficulty with such chemicals as methanol, palmoil, tallow, benzen, etc. Furthermore, the intermediate survey of the Vessel was put off by one year under the permission of the classification society. We can recognize these facts. Judging from these facts, it is considered the Vessel had, at the time of delivery, the cargoworthiness. (At least, if the Respondent declares on the defective quality of the NK Flake 700Z, the Respondent should make a claim against the owner without delay, without waiting for the intermediate survey.) If and when there should be any hidden defects in the Vessel at the time of delivery, and these defects escaped the eyes of the inspectors, the above conclusions shall not be turned down because for the period of about two and a half years the Respondent had made no claims against the owner, the Claimant A, on the defective quality of NK Flake 700Z.

According to the survey of the arbitrators, the paints makers (including Nippon Kobunshi Kagaku Co., Ltd.) of these special coating paints or the shipbuilders, generally speaking, give guarantee for the period of one to three years. The Respondent is having several chemical

tankers in operation. When we consider that the Vessel was built from the beginning for the purpose of being chartered to the Respondent, it is normally admitted that the Respondent should have had the sufficient knowledge about the repair by the guarantee. The Respondent had not demand the repair, and this leads us to recognize that at the time of delivery, at least, the Vessel had the seaworthiness. According to the examinations so far, the plea of the Respondent shall be dismissed.

We consider that the Respondent's declarations have been fully examined so far, but, as the Respondent emphasizes that the NK Flake 700Z which the Claimant A had chosen and used for tank coating was defective, we would add our statement hereunder.

The Respondent bases his declaration that the NK Flake 700Z was defective on the fact that on the five tankers (TOMOE 7, TOMOE 8, EASTERN PRIDE, TOMOE 1, and TOMOE 6), out of those chemical tankers built during 1983 and 1984 in Asakawa, the NK Flake 700Z was used for their tank coating. The Respondent further says that, however, all these five tankers, soon after deliveries, required re-coating because of the damages being done to them, and particularly, TOMOE 1 had red rusts drastically in no more than a year after it was built. As far as the coating materials for the chemical tankers are concerned, it can well be said that there is no perfect material, not to speak of the NK Flake 700Z. The material degrades its quality as the years go by and as the strict cleaning operation (steaming and chemical spray) is made. The paints with same specifications, according to the nature of the cargoes or the degrees of cares such as touch-ups, have the life of them vary. Generally speaking, when a chemical tanker is loaded with mainly methanol, it will require re-coating in two to four years. When we discuss about EASTERN PRIDE which the Respondent pointed out, it was completed five months earlier than the Vessel (April, 1984) and in July, 1986 when it was docked in Japan it had its tanks recoated except slop-tanks, under the insurance coverage. The background for this is that the Vessel had the methanol loaded several times at the ports of

Eastern Europe, and the said methanol contained impurities which degraded the coatings. Furthermore, being in dock once in two years makes it difficult to predict when the ship will call at a Japanese port, and the owner should be in an agressive position to have the ship re-coated. In addition to these, the survey of the insurance company judged the damage within the scope of coverage. Therefore, with regards to EASTERN PRIDE, the NK Flak 700Z was not liable. As is seen from the above example, each ship has its own background or reasons for re-coating, and it shall not lead immediately to the defects of the NK Flake 700Z that the tank re-coating became necessary within a rather short period of time. For reference, there were as many as twenty-eight chemical tankers built in 1984 when the Vessel was built which used the NK Flake 700Z for their tank coating, and not all of them required re-coating within a short period of time. Judging from the above mentioned facts, we cannot recognize that the NK Flake 700Z was defective.

One more thing is, the Respondent declares that the NK Flake 700Z was taken up for the tank coating by and between the Claimant A and the Asakawa, the builder of the Vessel. However, in case of chemical tankers, it depends on what chemicals the tanker is going to load to decide on what coating shall be used, and therefore, the charterer as the operator of the tanker shall pay attention to, and decide on, the coatings. In case of the Vessel, the Claimant A has had little experience in operating the chemical tankers, and the Vessel having been built for being chartered to the Respondent for a long-term bareboat charter party for a period of ten years, it is hard to believe that the Respondent had nothing to do with the selecting of the paints.

According to the examination so far, we can not recognize the Respondent's declaration that this Contract terminated on May 23rd, 1987.

As mentioned above, the intermediate survey and the repair of the Vessel should have been performed at the cost of the Respondent

(Clause 8. (1)), but they were performed by the Claimant A. Therefore, the Respondent shall be liable for the charterage for the time and days required for intermediate survey and repair of the Vessel (Clause 8. (2) & (3)). The arbitrators recognize, after examining the contents of the intermediate survey and the repairs, they were completed on June 19th, 1987. (The Respondent declares the "Dock Order for ex 'TOMOE 6'" has stipulated in its Article 17 that the charterer, it is so agreed upon, shall pay only one tenth of the period for the intermediate survey and the repair to the damage of tank coatings, namely two days, and further declares that the Respondent shall be liable for the charterage up until maximum seven days including the two days from May 21st, 1987. However, the Article 17 has shown also the ratio to be borne by the dockyard and the paintmakers who have nothing to do with the Contract. Further, the ratio has not been finally decided upon as it is noted only as a "suggestion", and therefore it shows in no way the share of the charter period to which the Respondent should pay the charterage under the Contract.

Therefore, the charterages to be paid by the Respondent shall be the total sum of ¥66,333,333, calculated for the period from December 1st, 1986 to June 19th, 1987 when the intermediate and the repair were completed, at Yen 10 million per calendar month. The Respondent shall pay to the Claimant B the said sum in full. The interest for the amount shall be 6% per annum from June 20th, 1987.

The interest for the amount shall be 6% per annum from June 20th, 1987.

2) ¥2,511,200 for Bottom painting

According to the Contract, the charterers shall redeliver the Vessel to the owner in the same or as good order and conditions (Clause 2) as when delivered. Therefore, the Respondent should redeliver the Vessel after the bottom painting using the paints originally used for the Vessel (DRP A/F 200) or the equivalent paints in quality was completed. The Respondent states that the Bottom Painting Paints SP No. 2 of Toa Paint Co., Ltd.

which the Respondent offered for use has the same quality as DRP A/F 200, and that their price is lower because the royalty has been exempted as there was no prevailing patent.

We examine the declaration of the Respondent. The Respondent states that the Bottom Painting materials DRP A/F 200 and SP No. 2 are quite the same in their quality, but so far this has not been proved. According to the research of the arbitrators, there are differences in their lives and in the volume of consumed fuels in sailing after paintings, and it is found out that SR No. 2 has not come up to the standard of DRP A/F 200.

In accordance with the above, the Respondent should have had the bottom painting using DRP A/F 200 or the equivalent paints in quality and redelivered the Vessel, and therefore the Respondent shall pay the cost of the bottom painting in full, ¥2,511,200.

3) ¥2,228,270, cost of legal equipment and installation.

The Claimant A declares that the Respondent redelivered the Vessel without making supplies to a part of legal equipments and installation, whereas the Respondent says that the Claimant A made additional supplies himself because the Vessel was intended for the voyage to U.S.A. after redelivery of Vessel.

The arbitrators examined closely over the bills and invoices, and found that all of them covered consumables for the voyage to U.S.A. and did not cover the legal equipments.

In accordance with the above, the claim of the Claimant A shall be dismissed.

4) ¥239,711,100, the Claimant A's Loss incurred from the Cancellation of the Contract.

a) The Respondent states that the cancellation of the Contract was agreed upon by the parties involved, and that the Claimant A shall not be entitled to claim against the Respondent. We will examine this hereunder.

The cancellation of the Contract was made known to the Respondent by the Claimant A with his letter of May 21st, 1987. The

letter says "...Charterages as from December 1st, 1986 to April 30th, 1987 have not been paid... Under the circumstances, it is impossible, as a ship-owner, to maintain this company. We have come to the conclusion that in accordance with the Clause 16 and the item 2 of the Clause 16 of the Contract dated September 6th, 1984, it will be only to the interest of our company to have the said contract cancelled. ...We would request you to redeliver the Vessel after it is fully repaired at the dock at your own cost."

The contract was concelled, without any pre-notice, for the reason of the Respondent's non-payment of the charterages. The Item 2 of the Clause 16 stipulates that should one of the parties fail to perform or fulfill the Contract intentionally or by his own gross negligence, the other party can immediately rescind the Contract without any pre-notice. The non-payment of the charterages by the Respondent is regarded as "intentional non-performance or that by his own gross negligence".

Therefore, the cancellation of the Claimant A of the Contract is based on the Clause 16 of the Contract, and it is clear that it is not a cancellation by agreement.

The Respondent declares that at every date of payment of the charterages, the Respondent obtained Claimant A's permission for the delays in the payments of the charterages, and that they shall not constitute any breach or non-performance of the Contract. Without any evidence to prove the above, and with the Claimant A giving negative answer to these, we cannot recognize the declaration of the Respondent.

Furthermore, the Respondent declares, as a reason for the Claimant A's claims not being admissible, the President of the Claimant A admitted at the hearing before the arbitrators that on May 23rd, 1987 the both parties consulted and had the conclusion that the charterages to be paid by the Respondent and the costs payable by the Claimant A shall be offset, and that the Contract shall be dissolved. The Respondent further declares that as far as there is an agreement for dissolving the

Contract, the claims and the liabilities shall be settled under the said agreement, and the demand for payment for the loss incurred from the repudiation and non-performance on the part of Respondent shall not be admitted. However, the talks between the parties on that day were limited to the expressings of the opinions of the both parties as to the costs of the owners and the costs of the charterer, and not a word for the compensation for any loss. Accordingly, we cannot recognize that the agreement has been made as to the dissolving of the Contract as the Respondent declares.

We cannot recognize that the cancellation of the Contract was agreed upon, judging from the declarations of the Respondent.

b) ¥239,711,100, Compensation for Loss of income incurred from non-performance

The Claimant A regards the loss as the lost income of the charterages for the period of seven years and three months, and calculated the loss, based on the Time Charter Party which the Claimant A entered into with Uyeno chemical, after the Contract was cancelled.

We first discuss the said Time Charter Party made and entered into by the Claimant A.

The claimant A has no income of the charterages since December 1986, and if this continued, the loss will further grow, and the time charter party for the first year was not very unfavorable to the owner, the Claimant A, when the chartering markets of the chemical tankers then prevailing was considered. When all these are taken into consideration, we judge the Claimant's Time Charter Party to be indispensable to the Claimant A (the Respondent says that the Claimant had been trying, even before the cancellation of the Contract, to enter into the Time Charter Party, however, even if it is true, it is only right for the Respondent to make such efforts in the circumstances of this case.)

We examine the term hereunder.

The Claimant declares that the term remaining is seven years and three months which is the unpassed time of the Contract, but according

to the said Time Charter Party, it can be extended for a period of maximum three years at the option of the charterer Ueno Chemical, and when we consider the present unstable and unforeseeable economical environments where the shipping markets have been placed, it will be appropriate to determine the term as approximately three years.

Calculation for Income Decrease

1) Income Decrease for the First Year

Charterage: We recognize the monthly charterage of US$105,000.00 which was agreed upon by and between the Claimant A and Ueno Chemical.

Shipping Costs: The Claimant B says that the shipping costs shall be US$56,702.00, and we recognize it to be generally adequate for the Vessel which is 7,500 weight tons. According to the calculations of the Claimant A, the said amount of US$56,702.00 is applied for the first year and onward, we base our calculations on the said amount. (The Respondent declares that the monthly shipping costs shall be US$41,000.00, which shall be adequate, but the evidence presented by the Respondent himself at the time when the Respondent had demanded the reduction of the charterage shows the monthly shipping cost as US$69,000.00, and when the above is considered, US$41,000.00 is too low.)

The exchange rate between U.S. Dollars and Yen shall be, as calculated by the Claimant A, ¥150 against a U.S. Dollar.

Profits under the Time Charter Party (per month) (US$105,000.00 − US$56,702.00) × ¥150 = ¥7,244,700.

The balance of loss per year from the cancellation of the Contract, ¥(10,000,000 − 7,244,700) × 12 (months) = ¥33,063,600.

2) Income Decrease for the Second Year

Charterage: Judging from the chartering markets, we recognize US$4,200.00 per day to be adequate. When we calculate the profits for month on the above, they amount to more or less the same as the

charterage of the Contract, ¥10,000,000, and there shall be no loss for this year.

3) Income decrease for the Third Year

Charterage: As the chartering markets have advanced in the third year and onward, it shall need no calculation and there shall be no loss for this year.

As mentioned above, according to the calculations, the decrease is recognized only in the first year.

Therefore, the Respondent shall bear the loss of ¥33,063,600.

As we have discussed the items of above (2) - (4), the Respondent shall pay to the Claimant A the sum of ¥35,574,800.

## III We examine the Counterclaims of the Respondent.

1) ¥18,763,349, Store Supply and Equipment for the Vessel

The Respondent declares that the above supply and equipment have been donated to the Respondent by Asakawa, the shipbuilder of the Vessel for the rebate (Yen 50 million), whereas the Claimant A declares that they are included in the building costs of the Vessel. Therefore, we examine this.

According to the Respondent's declaration, it may be only natural and in line with the policies of the shipbuilders to offer the rebate to the bareboat charterer, because the owner is unable to get the loans from the bank until he has a firm charterer of the Vessel. As the matter of fact, the contract for building the Vessel was entered into when the confirmed promise of the bareboat charter party was presented.

We are not going to make any comments as to the good or the bad of the rebate, but it is not altogether unconceivable that there really exist rebates as the Respondent declares.

According to the survey of the arbitrators, it seems that some shipbuilders had made commitments to the firm charterers for the rebate in case the firm promise by charterers of chartering the ships to be built was an essential condition for a bank or other financiers to make loans. It is not clear, and unconfirmed, that the Respondent really had the commitments from Asakawa, the shipbuilder, for the rebate, but the Respondent's guarantee for

charterings in the past made it possible for Asakawa to build several chemical tankers at its shipbuilding place where the Vessel was built.

When we examine the Claimant A's declarations, it is not usually admitted to have store supply, etc., except legal equipment, included in the cost of building the Vessel. When the arbitrators made close checks on the store supply and equipment, the majority of them was found to be consumables which were solely for the voyage operated by the bareboat charterer, and unless there are special agreements, it is not proper to have these included in the building costs of the Vessel. (The Claimant A declares that in the past the cost of such store supply and equipment was included in the building costs of the ships at Asakawa, but there was no concrete proof thereof.)

Incidentally, the Respondent, states besides the above mentioned, that Asakawa donated to the Respondent the store supply and equipment, etc. as the rebate, while Asakawa, without making reductions in the shipbuilding costs when Asakawa and the owners decided the prices of the ships including the Vessel, offered to the owners to make the above supply and equipment installed at Asakawa's expense.

As the arbitrators, we have few evidences as to be clearly sure of the dependability of the above declarations. However, the store supply and equipment, etc. now in question are mostly those which are to be usually supplied by the bareboat charterer. Actually, the said store supply and equipment, etc were procured by the Respondent by ordering from Sakamoto Sengu, Akasaka Diesels Ltd. (Imabari Branch), and Daihatsu Diesel Shikoku Co., Ltd. and when we consider the above and the results of our survey, the total sum of the claims shall be paid by the Claimant A.

2) 1. Engine Spare Parts ¥7,386,060
2. Store Supply at Imabari (May 20, '87) 828,350
and
3. Spare Parts supply at Imabari (May 20, '87) 1,019,830

The Claimant A says that the above should be borne by the bareboat charterer, the Respondent, as those were required to make maintenance and control of the Vessel in operation (Clause 8) and that the additional supplies

should be borne also by the bareboat charterer and shall not be claimed to the owner (Item 2 under Article 2).

Therefore, the Claimant A declares that the above costs should be at the cost of the Respondent, whereas the Respondent declares that the above supplies and spare parts were what the Respondent had to have loaded themselves to make up for what had not been loaded at the time of delivery of the Vessel, and that these were not supplementary supplies. Therefore, the Respondent declares that they are outside of, and shall not be affected by, the Clauses 8 and 2, and accordingly, these costs shall be paid by the Claimant A.

According to the hearing of the both parties, at their meeting on May 23rd, 1987 they declared how the expenses and the costs for these should be borne between the both parties. In other words, the Respondent declared that the item under 1 should be purchased by the Claimant A at 70% of its cost, and the items under 2 and 3, at 100%, whereas the Claimant A mentioned that he would be prepared to purchase item 1 at 50% of its cost and items 2 and 3, if necessary, at 100% of their costs, but no final agreement was made. Therefore, the arbitrators examined the intentions of the both parties at the said talks and the details of the respective costs, and have come to the following conclusions. With regards to the item 1, as it was procured during the period of October 6th, 1986 to May 8th, 1987, 70% of the cost should be borne by the Claimant A, and with regards to the items 2 & 3, these were just procured on the previous day of the day (May 21st, 1987) when the cancellation of the Contract was advised to the Respondent, and with this in consideration the Claimant A shall purchase them at 100% of their costs.

Therefore, out of the claim of the Respondent, the total of $7,018,422, (1. ¥5,170,242, 2. ¥828,350 and 3. ¥1,019,830,) shall be paid by the Claimant A.

3) US$19,875.00, the claimant A's Accounts Payable at the time of Redelivery

As the results of the arbitrators' examinations of the evidences presented by the Respondent, it is found that US$1,245.00, Crew Accommodation Survey Fees (Panama), should be borne by the Respondent, bareboat charterer, for the expenses of the crew members, but as the validity of the certificate is January 5th, 1991, and as we consider that the majority of the certificate will

be enjoyed by the Claimant A, the expense of US$1,245.00 (¥178,035) shall be borne by the Claimant A in full.

Other accounts payable, for US$18,630.00, (from items 1 to 9, except item 8) are the costs for inspection of attachment II of Marpol 73/78, and the amount is judged to be quite reasonable. Therefore, they shall be paid by the Claimant A in full.

The exchange rate, however, is based on the rate of the termination day of the Contract, and is ¥144.70 against a U.S. Dollar (the averaged official rate).

Therefore, the Claimant A shall pay to the Respondent the sum of ¥2,875,913.

4) US$12,640.47, cost for the Crew Members the Respondent kept on board the Vessel at the Request of the Claimant.

The Respondent states that the Claimant A had tried to take up the Vessel from the Respondent without notice, and to charter it to have it operate a third party with a view to taking advantage of the market conditions which were then seemingly rising, and that the Claimant A, by keeping his intention secret, asked the Respondent to change the place of the intermediate inspection from a Korean port which the Respondent had scheduled to Imabari in Japan. No sooner had the Vessel called at the port of Imabari than the Claimant A ignored the Respondent's intention for a further voyage and cancelled the Contract and demanded the redelivery of the Vessel. The Respondent further declares that the Claimant A had no arranged his crew members to take the place of the Respondent's crew.

However, the cancellation of the Contract was due to the Respondent's breach of the Contract, as mentioned above, that the Respondent unilaterally neglected to pay the charterages, and therefore, the declarations of the Respondent shall not be justified. It shall be more proper to say that the charterer had duty to keep the crew members on board the Vessel until the termination of the Contract. The crew members arranged by the Respondent left the Vessel on June 8th, 1987. The said date is prior to June 19th, 1987, the termination date of the said Contract, and with this in consideration, we shall not recognize the Respondent's claim.

5) US$47,179.02 for (1) Bunker and Lubricating oil and US$5,714.67 for (2) Provision and Bonded store, left over on the Vessel at the time of redelivery

The Claimant A acknowledges that he is prepared to pay for these two expenses. However, the exchange rate shall be ¥144.70 against a U.S. Dollar, as mentioned in (3) above, the rate on the termination day of the Contract.

Therefore, the Claimant A shall pay to the Respondent the sum of US$52,893.69 or ¥7,653,717.

As we have examined the items of the counterclaims 1) - 5), the Claimant A shall pay to the Respondent the sum of ¥36,311,401.

Between the Claimant A and the Respondent, ¥36,311,401, the amount payable to the Respondent by the Claimant A, and the ¥35,574,800, the amount payable to the Claimant A by the Respondent, shall be offset. The balance of ¥736,601 shall be paid to the Respondent by the Claimant A. The interest for the amount shall be 6% per annum from June 20th, 1987.

**IV. Other Claims of the Claimants and the Respondent shall be dismissed.**

**V. The cost of the arbitration shall be . . . . .**

Accordingly, the undersigned Arbitrators rend the Award this day, after examining closely the claims and the counterclaims of the both parties, the hearing of the both parties.

September 21st, 1989
at The Japan Shipping Exchange, Inc.

Arbitrator Haruo Masuda
Arbitrator Ikuo Owada
Arbitrator Ken-ichi Shinya

# Conciliation Case Regarding a Bareboat Charter Party Covering a L.P.G. Tanker

## 1. Parties Concerned

The application for conciliation in this case was made jointly by the parties concerned in this case.

Owner: X, a U.S.A. Corporation ("the Owner")

Charterer: Y, a Liberian Corporation ("the Charterer")

Conciliators: Nobuo Takamiya, Kazuo Iwasaki and Noboru Saitoh

## 2. Summary of Facts

(1) Conclusion of Charter Party between the Owner and the Charterer:

i. A bareboat charter party covering a period of 15 years was concluded on June 28, 1973 between the Owner and AAA Shipping Company, not a party to the case. Before this, on May 11, 1973 a time charter party (memorandum) covering a period of 15 years had been concluded between AAA Shipping Company and BBB Gas Company, also not a party to the case.

ii. The Vessel was delivered to the Owner upon completion of its construction at MHI Dock on September 30, 1975.

iii. On August 15, 1975, the position of AAA Shipping Company as bareboat charterer under the afore-mentioned bareboat charter party was assigned to the Charterer, then on October 1, 1975, the Vessel was chartered out from the Owner to the Charterer thence to BBB Gas Company via AAA Shipping Company.

iv. The Vessel was registered under the Liberian flag and engaged in a shuttle service between the Persian Gulf and Japan.

(2) Background to the Dispute:

i. The Vessel was built in compliance with requirements set forth in SOLAS Convention 1960. In November 1975, IMO adopted a new Code applicable to L.P.G. tankers then existing or to be newly built thereafter, applying Code (2) specifically to vessels to be delivered on or before October 31, 1976; however, in Liberia, the Vessel's flag of registry, compliance with Code (2) is voluntary, not compulsory.

ii. Upon request from a shipowner, the Liberian government can issue a "Certificate of Fitness" after completion of a survey on the vessel concerned. However, the Vessel had neither obtained such a Certificate nor did the Owner have any intention to obtain it until its redelivery.

iii. According to i. above, the Vessel cannot call at the ports of countries where compliance with Code (2) is compulsory, but can trade between the Persian Gulf and Japan without the "Certificate of Fitness" mentioned in ii. above.

## 3. Points at Issue

(1) Who shall bear the cost of modification to enable the Vessel to satisfy the requirements of IMO Code and obtain a "Certificate of Fitness" from the Liberian Government?

(2) What period of time will be allowed to extend the time of the Vessel's redelivery, if such an allowance is permissible?

(3) Which of the Vessel's charter rate or the market rate should apply to the extended period of the Vessel's ordinary redelivery work on redelivery, when that work is carried on beyond September 30, 1990?

## 4. Conciliation Plans

(1) Regarding the cost of the modification:

Those items of cost on which the Owner can expect to enjoy a return for a long time in the future shall be deemed to be capital costs to be borne by the Owner, while the other items of cost which can be accounted for in a single fiscal year shall be deemed to be repair costs to be borne by the Charterer.

Accordingly, out of the total cost of modification of ¥155,100,000, the Owner shall bear ¥114,700,000 and the Charterer shall bear ¥40,400,000.

(2) Regarding the time of redelivery:

It shall be upon completion of the Vessel's ordinary redelivery work after completion of voyage No.38 Persian Gulf/Japan which the Vessel is scheduled to perform at present.

(3) Regarding the period of IMO modification work:

On the assumption that IMO modification work is done simultaneously with the Vessel's ordinary redelivery work up to the Vessel's time of redelivery, the extended time commencing from the day after completion of the Vessel's ordinary redelivery work shall be calculated on a daily prorata basis from the Vessel's monthly charter hire and borne by the Owner and the Charterer in the same ratio as they bear the cost of IMO modification work.

(4) Regarding conciliation fee:

It shall be shared equally by the Owner and the Charterer.

## 5. Others

Receipt of petition for conciliation: August 1, 1990.

Completion of Conciliation Plans: September 3, 1990.

## Introduction for 'KAIUN' (Shipping)

(No.757 October — No.762 March)

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

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