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ARBITRAL AWARD IN RE DISPUTES OVER THE TIME CHARTER FOR THE M/V "GII"

Claimants: Charterers (Korea)

Respondents: Owners (Japan)

As regards the disputes between the above parties which arose in respect of the non-delivery of the M/V "GII", the undersigned Arbitrators, appointed in accordance with Section 15 of the Rules of Maritime Arbitration of the Japan Shipping Exchange, Inc, award as follows after having carefully considered the case.

FINAL AWARD

1. The claim of Claimants shall be dismissed.
2. The costs required for the issuance of the arbitral award are JP¥1,197,000 and Claimants shall bear them altogether.
3. The Tokyo District Court shall have jurisdiction over this arbitral award.

CLAIM AND DEFENCE

Claim of Claimants

1. Respondents shall pay to Claimants the sum of US\$235,037.49 plus interest thereon at 6% per annum from 17 May 1997 until completion of payment.
2. The costs of arbitration shall be borne by Respondents.
3. Claimants submitted Exhibit-C Nos. 1 to 14.

Defence of Respondents

1. The claim of Claimants shall be dismissed.
2. The costs of arbitration shall be borne by Claimants.
3. Respondents submitted Exhibit-R Nos. 1 to 4.

FACTS

On 17 October 1996, Claimant Charterers and Respondent Owners entered into a time charter for the MV "GII" (hereinafter the "Vessel") on an amended NYPE form for a time charter trip for the carriage of a cargo of coal via South Africa to Korea. The Charter included following provisions:

- Delivery: Taiwan
- Hire not to commence before 20 November 1996
- Cancelling date: 5 December 1996
- Charter hire: US\$9,150/day

On 18 October 1996, Claimant Charterers entered into a voyage charter with a Korean shipper for the carriage of the cargo on board the Vessel. However, the Vessel suffered serious damage after a breakdown of the bulkhead between No 4 and No 5 cargo holds on 5 November 1996 while discharging a cargo of iron ore at Port Kembla in Australia. Respondent Owners could not deliver the Vessel on or before the cancelling date, i.e. 5 December 1996 because the Vessel had to be dry-docked for nearly 7 months for repairs. The Charterers, who allegedly suffered a loss by chartering in a substitute from the market in the wake of the non-delivery of the Vessel to the shipper, brought the instant arbitral proceedings to recover the loss from the Owners.

ARGUMENTS

Cause of accident

Claimants contend that the accident was caused by the fault/neglect of the Vessel's master/crew and the Vessel's unseaworthy condition. They allege inter alia: (1) the remote monitoring system displayed incorrect levels of ballast water being put into the hold while discharging the cargo of iron ore; (2) there was no alarm system independently installed of the monitoring and control systems so that the only precaution to prevent excessive pouring of water was to check on site; (3) there was no stipulation in the operation manual in English on the possibility of grave accidents such as breaking down of a bulkhead by excessive pouring of ballast water; (4) Nor master/crew was informed well of the possibility of such grave accidents; (5) the welded portion between the bulk head and the stall had been severely rotten. To prove those allegations, they rely on the accident reports issued by an Australian state-run organization.

They allege that Respondents, who had been the disponent owners of the Vessel for 4 years on time charter, should be regarded to have been in the position to supervise the master/crew at the time the accident occurred, particularly in view of the fact that the ballast-pouring was being done as part of discharge for which Respondents time charterers were responsible; alternatively, Respondent time charterers were in such a position to let the shipowners, master and crew of the Vessel as their aids to perform the obligations Respondents undertook under the instant Charter. Therefore, they conclude that Respondents should be responsible for the privity of the shipowners and fault/neglect

of the master/crew of the Vessel as they were the aids of Respondents.

Respondents deny their responsibility asserting that they were not the owners but the disponent owners of the Vessel and that they were not in the position to supervise the master/crew of the Vessel. They maintain that even if the accident may have occurred due to fault/neglect of the master/crew, Respondents should bear no responsibility in respect of that under the instant Charter.

Non-performance of Charter

Claimants contend that Respondents owed a duty under the Charter, article 14 to get the Vessel ready in a port of Taiwan for the service of Claimants on or before 5 December 1996 but failed to do so due to the accident to the Vessel which was brought about by lack of due diligence of Respondents. The gist of the contentions of Claimants is that where Respondent Owners missed the cancelling date in delivering the Vessel due to fault/neglect or lack of due diligence owed under the Charter, Claimant Charterers are entitled to damages incurred by such wrong. Claimants stress the importance of timely delivery of the Vessel in view of the fact that the Charter was for a time charter trip, which they claim had characteristics of a voyage charter, for the carriage of a specific cargo of coal from Taiwan to Korea via South Africa. They further point to the lay/can provision stated in the telex fixture dated 17 October 1996: "NOV 20/DEC 5 '96, ETA/D PK NOV 2/6, ETA/D KAOH NOV 20-24 AGW WP" as well as to the nominations of Kaohsiung as a delivery port and of a Korean port of discharge. They conclude that in view of those facts the duty Respondents owed was to exercise due diligence, not merely to proceed with reasonable dispatch, to get the Vessel ready by the cancelling date.

In order to support their assertions Claimants rely on Anglo-American authorities, particularly on *The Democritos*, [1976] 2 Lloyd's Rep. 149, where the judge acknowledged "an implied term that the owners will use reasonable diligence to deliver the ship in a fit condition by" the cancelling date (at 152). It would in effect grant damages for a breach of contract by way of lack of reasonable diligence. They also rely on *The Baleares*, [1992] 1 Lloyd's Rep. 215 where damages for non-delivery of the vessel by the owners were granted.

They further contend that the mutual exceptions provision in article 16 of the Charter, i.e. "dangers and accidents of the Seas, Rivers..." was inapplicable here because the accident occurred due to fault/neglect of the owners or master/crew of the Vessel; also that exceptions by "errors of navigation" were inapplicable on the same grounds.

They assert that Respondent owners should exercise reasonable diligence to deliver the Vessel in a fit condition by the cancelling date at any time after the conclusion of the Charter even during the Vessel was discharging cargoes on previous voyages; as they failed to exercise due diligence, they should be liable for damages thereby caused. They conclude that it should be equitable and conform with the principles of the law of damages to make Respondents to bear the loss who, in breach of the duty to deliver the Vessel by the cancelling date due to the causes attributable to them, inflicted loss to Claimants who are not responsible in this respect at all.

Respondents counter that the duty owed by the owners to deliver a vessel by the cancelling date is not an absolute one and that therefore the cancelling clause does not in itself provide a ground for a claim of damages. They deny commission of breach of reasonable dispatch which could give rise to a cause of action. They also assert that they should not be held liable because the accident was allegedly incurred by fault/neglect of ship's crew, for which liability was exempted under article 16 of the Charter. They further contend: in *The Baleares*, what was considered was not that the fact that the owners failed to deliver the vessel by the cancelling date gave rise to the right to claim for damages, but that an ETA given by the owners was unrealistic and unreasonable; in the instant case, the estimate of ETA was based upon realistic and reasonable grounds because, without the accident, the Vessel could have reached Kaohsiung well in time; the accident happened while performing discharge under another charter, which had been entered into before the conclusion of the current Charter; in *The Democritos*, it was held that (1) the duty to deliver the vessel in a fit condition by the cancelling date did not exist at all under the charter and (2) a term was implied that the owners should exercise reasonable diligence in delivering the vessel in a fit condition by that date - but it was not an absolute one; the duty of reasonable diligence implied in *The Democritos* could no way apply even by analogy to Claimants' contention that the delay caused by the accident to the Vessel which arose out of crew's fault/neglect on a previous voyage was attributable to lack of Respondents' reasonable care; neither subsequent authority nor major textbooks have so far supported the contention that the breach of the implied duty introduced there could give rise to damages in the situation as in this case.

Quantum of damages

Claimants maintain that they incurred loss because they had to charter in a substitute from the market so as to perform a sub-charter with the shipper originally nominating the Vessel. They claimed the balance of US\$235,037.49 as the difference between the estimated cost for the Vessel and the actual cost for the substitute.

About the shipper

Claimants maintain: the sub-charter stipulated lay/can as 12/27 December 1996; they chartered the substitute on 13 November 1996; they received an offer to cancel the Charter from Respondents on 6 November with notice of the accident and the prospect of repairs; on 8 November it became inevitable for Respondents to miss the cancelling date under the current Charter and subsequently for Claimants to miss the cancelling date under the sub-charter. As to the reasons Claimants had to charter in the substitute they assert (1) the shipper refused to cancel the sub-charter and if Claimants failed to deliver the vessel by the cancelling date they were forced to pay damages/penalty as stipulated in article 42 of the sub-charter; (2) Respondents refused to charter in a substitute alleging that they owed no obligation under the Charter to do so.

Respondents contend that the instant case is not the one where failure to deliver a vessel by the cancelling date gives rise to damages and further that there is no provision in the Charter which gives an option to the Charterers to require a substitute in the event of non-delivery of the nominated vessel.

Penalty clause in sub-charter

Respondents contend that there was an abnormal penalty clause (article 42) in the sub-charter which imposed an absolute duty on Claimants to deliver the Vessel by the cancelling date other than where they were exempted by bad weather. They assert that the instant dispute arose out of the gap between the normal cancelling clause in the current Charter and the abnormal one in the sub-charter, and that, as it would be the parties' freedom of contract and Claimants undertook to bear the special risk by agreeing to such a peculiar clause, the loss if any should rest entirely upon Claimants. They further argue that the clause is totally out of practice and common sense of shipping business and the loss arose under special circumstances, so to speak, so that there should be no reason Respondents must bear the loss.

Claimants admit that the clause was a rare and very severe one for the owners in that it imposed damages for failure to deliver the vessel by the cancelling date other than caused by bad weather. However, they contend that there would be no difference in case there was a cause attributable to owners in missing the cancelling date.

Foreseeability

Respondents maintain that Respondents could not foresee that the instant loss would probably result from the accident and that, in short, there was no proper causation between the act of Respondents and the loss allegedly suffered by Claimants.

Claimants counter that vessel operators usually know that if owners miss the cancelling date enormous encumbrance and loss would result on the side of shippers and sub-charterers, particularly in such a case as non-delivery of the vessel; it is also easily and naturally recognizable that an additional loss could arise where the sub-charterers had to charter in a substitute from the market; and the damages in the instant proceedings are “normal damages” which could normally arise in the wake of the breach of contract.

Applicable law

< The Charter has no provision as to applicable law. >

Claimants contend that the applicable law of the Charter should be Japanese law on the grounds that there is no agreement between the parties as to the applicable law and that the forum of arbitration is TOMAC of the Japan Shipping Exchange, Inc. However, they accept that in accordance with TOMAC practice the instant case may also be considered with due respect to UK and US authorities.

Respondents basically agree to Japanese law as the applicable law on the grounds: (1) the Charter was entered into in Tokyo; (2) place of arbitration is Tokyo (by TOMAC); (3) rider clause 55 incorporates Japanese Carriage of Goods by Sea Act, although the NYPE form looks to Harter Act in article 24. They also accept that due respect should be paid to UK and US authorities in view of the TOMAC practice and history.

DECISION AND REASONING

1. Applicable Law of Charterparty

Both parties agree in the instant arbitral proceedings that the Charter should in principle be construed in accordance with Japanese law, although there is no express provision as to the applicable law in the Charter. Article 7 of the Horei, a private international law of Japan also provides that “(1) as regards the formation and effect of a juristic act, the question as to which country’s law 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.” The effect of that provision has been held that in the absence of the applicable law provision in the contract, the law should be decided in accordance with the parties’ implicit intention. In view of the fact that the Charter was entered into in Tokyo with an arbitration clause which provides for arbitration in Tokyo by TOMAC of JSE, the Arbitrators decide that the applicable law of the Charter should in principle be Japanese law in accordance with Article 7 of the Horei.

However, where the Arbitrators recognize the lack of provisions in Japanese statute law and/or Japanese court judgments in deciding the instant case, the Arbitrators make necessary reference to UK and US authorities and/or arbitral awards in accordance with the tradition of TOMAC. Above all, it is the long-standing practice of Japanese maritime arbitration to decide the disputes based particularly on trade usage in order to draw practical solutions, as against litigation where issues are to be decided in accordance with the strict construction of law. The Arbitrators in the instant arbitration follow these principles.

2. Cancellation of the Charter and Claim for Damages

In shipping practice as well as in Anglo-American theory, the fact that the charterers cancelled the charter in accordance with the cancelling clause pursuant to the owners' failure to deliver the vessel by the cancelling date does not in itself entitle the charterers to damages from the owners. That is because a cancelling clause is only to give the charterers a unilateral option to cancel in the event the vessel is not ready for delivery by the cancelling date for any reason, but not to give rise to a cause of claim for damages. However, the Arbitrators recognize that the charterers would be entitled to damages for non-delivery of the vessel if the owners' breach of contract led to the non-delivery even where the charterers cancelled the contract unilaterally in accordance with the cancelling clause. While both parties agreed to terminate the Charter in the instant case before the cancelling date and Claimant Charterers did not exercise the option to cancel, it is apparent from the evidence that Respondent Owners could not have delivered the Vessel by the cancelling date. Therefore, if there was a breach of contract by Respondents in respect of non-delivery of the Vessel, they should be liable for the damage incurred by Claimants.

As regards this point, it is also accepted under Japanese law that where one party to the contract fails to perform his duty in contract due to a cause attributable to him, the other party should be entitled to terminate the contract and claim damages, if any. See Articles 541, 543, 545, 415 and 416 of the Civil Code. Accordingly, the Arbitrators proceed to consider whether Respondents committed a breach of their obligation either express or implied under the Charter, in missing the cancelling date.

3. Liability of Owners

Under English law as well as in shipping practice, owners are generally held liable for missing the cancelling date if (1) the estimate of the vessel's expected time of arrival

(ETA) or expected readiness for loading (ERL) written into the contract had not been made in good faith and on reasonable grounds; or (2) they failed to exercise due diligence to put the vessel onto the proceeding voyage at a reasonable time; or (3) they failed to commence the voyage with reasonable dispatch; or (4) where the above causes are combined. However, Claimants do not contend nor purport to prove in the instant case that Respondents committed any of the above breaches. What they contend is that Respondents committed a breach of their implied duty in the contract to “use reasonable diligence to deliver the ship in a fit condition by” the cancelling date, which they assert was held in *The Democritos*. On recognition of the fact that it has been held in that case that the owners owed such duty implied by the contract, the Arbitrators consider below whether Respondents should owe such duty in the instant case and if so whether there was a breach of that obligation.

Claimants contend that the main causes of the breakdown of the bulk head are: (1) the crew were at fault in pouring ballast water in excess of the limits into the hold while discharging the cargo of iron ore; (2) the bilge alarm as well as the remote monitoring system did not work; (3) the welded portion between the bulkhead and the stall had been severely rotten, thereby rendering the Vessel unseaworthy. Claimants assert that Respondents failed to exercise due diligence in respect of the act or omission of the master/crew and seaworthiness of the Vessel. They further contend that Respondent time charterers were in such a position to let the shipowners, master and crew of the Vessel as their aids to perform the obligations Respondents undertook under the instant Charter. Therefore, they conclude that Respondents should be responsible for the privity of the shipowners and fault/neglect of the master/crew of the Vessel as their aids.

Unseaworthiness Point

Under UK and US law, if the vessel’s class certificate bears no remarks as to her seaworthy condition it should constitute prima facie evidence of the vessel’s maintaining seaworthiness. The party who contests vessel’s seaworthiness should bear the burden of proving that the vessel was actually unseaworthy. Japanese law imposes strict liability on the owners to warrant vessel’s seaworthiness while at common law it is regarded an absolute duty. Where the Hague Rules apply, such duty becomes a duty to exercise due diligence. When the burden of proof was discharged by the charterers/shippers, the burden of proving that due diligence had been exercised in respect of seaworthiness will shift to the shipowners.

According to the accident reports, the Vessel had passed successfully the special and intermediate surveys by NK immediately prior to the accident. Therefore, it is inferred

that there was no remarks on the class certificate as to her seaworthy condition and that the Vessel was prima facie seaworthy directly before the accident happened. On the other hand, the Arbitrators recognize in the accident reports only a statement that the Vessel was rendered unseaworthy pursuant to the accident but no such indication as that the accident was induced by the Vessel's unseaworthy condition. Only to raise such allegations as lack of independent alarm or remote monitoring systems, the necessity to watch the water levels on site, or the rotten condition of the welded part of the bulkhead are not, in Arbitrators' view, enough to prove that the Vessel was unseaworthy at or before the time the accident happened.

The Arbitrators would rather attribute the cause of the accident to the fault of crew. At any rate, as Claimants fail to prove that the Vessel was unseaworthy, their claim based on this ground should fail. In the first place, Claimants do not contend that Respondents owed an absolute duty to make the Vessel seaworthy at that time because the accident had happened while the Vessel was discharging on a previous voyage which had been fixed before the current Charter was entered into (actually it was two voyages before the current Charter). What they contend is in effect that Respondents owed an implied duty to Claimants to exercise due diligence as to the Vessel's seaworthiness even the Vessel was on a previous voyage. In light of the above construction of law and also in accordance with general shipping custom, the Arbitrators decides that Respondents should not be responsible for the accident which had happened to the Vessel two voyages before the current Charter, even if it could have been caused by the Vessel's unseaworthiness. In any event, as Respondents could not be held to have failed to exercise such implied duty in respect of seaworthiness of the Vessel, Claimants' claim on this point should fail.

Crew Fault Point

Japanese law has no special provisions as to time charters other than those on contracts of carriage, i.e. voyage charters. The Arbitrators recognize no such difference as contended by Claimants in substance in the instant case between the obligations owed by owners under time charters and those under voyage charters. The issue must be whether Respondent disponent owners should be responsible for the alleged fault/neglect of the master and crew who are employees of the head owners. Under Japanese law as well as UK and US law, shipowners should be liable for damages where any loss was caused by fault/neglect of their employees, i.e. the master and crew, unless such fault/neglect are exempted by contract terms or by law. But at the same time it is accepted that charterers are generally not in the position to supervise and direct the ship's master and crew. The head owners of the Vessel at the time of the accident was an independent corporate entity from Respondents and its employees, i.e. master and crew of the Vessel, were under the

direction and supervision of the head owners and thus they were not the aids of Respondents at the time of the accident. Respondents could not have the right to direct and supervise the master and crew, and in particular as to the way of pouring ballast water into holds, which eventually led to the accident. Therefore, Respondents should not be responsible for the fault/neglect of the Vessel's master/crew.

In English theory, an exceptions clause in the charter has no application to the events occurring prior to the Vessel's engagement in the proceeding voyage. This theory is based upon the traditional ideas that a voyage charter begins with an approach voyage. While Claimants assert on one hand that the current Charter was in substance a voyage charter, they contend on the other that Respondent disponent owners should be responsible for fault/neglect of the master/crew of the Vessel even on previous voyages if it is being performed after the conclusion of the current Charter. It is extremely doubtful that the disponent owners should be responsible for the accident brought assumingly by fault/neglect of the master/crew on a previous voyage, but on the assumptions that the master and crew were the aids of the disponent owners and that they should be responsible for their fault/neglect while on previous voyages, it would be equitable to hold that the disponent owners should be exempted from liability by an extended application to the previous voyages of the exceptions clause (article 16) of the Charter, which would exclude errors in the navigation and management of the Vessel.

In any event, as the Arbitrators conclude that Respondents were not in the position to direct and supervise the master and crew of the Vessel and that thus they should not be held liable for damage allegedly caused by their fault/neglect, Claimants allegation on this point should also fail.

4. Principles of Equity in Sharing Loss

Finally, Claimants assert that it would be equitable and conform with the principles of the law of damages to make Respondents to bear the loss who, in breach of the duty to deliver the Vessel by the cancelling date due to the causes attributable to them, inflicted loss to Claimants who are not responsible in this respect at all. As seen above, the Arbitrators decide that Respondents committed no breach of duty nor are there any actionable causes attributable to them. Claimants' claim therefore lacks a cause of action. On the other hand, Claimants agreed to insert such a penalty clause into their sub-charter with the shipper as was abnormal and totally unheard of in shipping practice, thereby undertaking the risk of non-delivery of the Vessel other than where they would be exempted by reasons of bad weather. Thus Claimants could not be held free from

responsibility for the loss incurred. Accordingly, the Arbitrators hold that it would not violate the principles of equity in the instant case if Claimants alone would have to bear the loss incurred by the non-delivery of the Vessel to the shipper.

5. In summary the cause of action alleged by Claimants shall be groundless both under Japanese law and Anglo-American law.

6. The costs for rendering the award for the instant case shall be JP¥1,197,000. As the Arbitrators dismiss the claim of Claimants the costs shall be borne by them.

The Arbitrators hereby award as above after due consideration of the totality of the arguments, the documentary evidence and the hearings.


Dated 24 February 1999

TOMAC of the JSE

Arbitrator: Takeo Kubota

Arbitrator: Hiromitsu Fukuda

Arbitrator: Takakuni Miyake



ARBITRAL AWARD IN RE DISPUTES OVER THE VOYAGE CHARTER FOR THE M/V "JM"

Claimants: Agents for Owners (Japan)

Respondents: Charterers (Japan)

With respect to the disputes between the above parties which arose in relation to delay to the cargo on board the M/V "JM" on voyage charter, the undersigned Arbitrator, appointed in accordance with the Rules of the Small Claims Arbitration Procedure by TOMAC of the JSE, awards as follows after having carefully considered the case.

FINAL AWARD

1. Respondents shall pay to Claimants the amount of US\$20,000 plus interest at 6% per annum from the day following the arbitral award until the day such payment has been completed.
2. The costs required for the issuance of the arbitral award are JP¥110,250 and each party shall bear them equally.
3. The Tokyo District Court shall have jurisdiction over this arbitral award.

CLAIM AND DEFENCE

Claim of Claimants

1. Respondents shall pay to Claimants the sum of US\$20,000 plus interest thereon at 6% per annum from the day following service of the arbitration application until completion of payment.
2. The costs of arbitration shall be borne by Respondents.
3. Claimants submitted Exhibits-C Nos. 1 to 25.

Defence of Respondents

1. The claim of Claimants shall be dismissed.
2. The costs of arbitration shall be borne by Claimants.
3. Respondents submitted Exhibits-R Nos. 1 to 37.

FACTS

The owners of the M/V "JM" (hereinafter the "Vessel") and Respondents agreed to

charter the Vessel by a recapitulation letter dated 7 September 1999 (hereinafter the "Charter") for the carriage of steel coils from Japan to Taiwan. The Charter included following provisions:

- Cargo Quantity 4,000M/T Steel Coils
- Loading Port 1 Safe Berth, 1 Safe Port, Fukuyama, Japan
- Discharging Port 1 Safe Berth, 1 Safe Port, Kaohsiung, Taiwan
- Lay/Can 10/15 September 1999
- Freight Rate US\$10.00 per M/T Free In/Taiwan Berth Term Basis 1/1

On 9 September Claimants drafted a fixture note and forwarded it to Respondents for signature. However, the note included following provisions:

- Vessel to load balance cargo at Busan after Fukuyama in 2-3 days, but Owners to do best to reach Kaohsiung at quickest speed.

On the other hand, the Charter had provided:

- After loading coil at Fukuyama, Vessel can load balance cargo at Busan (holdwise separation), and Vessel to proceed to Kaohsiung as first discharging port.

Because of the discrepancy Respondents refused to sign the fixture note drafted by Claimants.

The Vessel arrived at Fukuyama on 11 September 1999. After completion of loading 3,973.9 tons of steel coils, the Vessel sailed Fukuyama on the following day. The Vessel loaded part cargoes at two Korean ports: Kwangyang (13-14 September) and Busan (15-16 September). The Vessel then proceeded to Keelung, Taiwan to discharge the part cargoes (20-22 September), before arriving at Kaohsiung on 23 September. Discharging of the steel coils was complete on 25 September. When Claimants instructed Respondent Charterers to pay the full freight, Respondents deducted the amount of US\$20,000 and paid the balance to Claimants on 20 October 1999. Claimants brought instant arbitral proceedings to recover the deducted amount by subrogation.

ARGUMENTS

Contention by Claimants

The parties agreed to the laydays/cancelling dates as 10/15 September and estimated ETA Kaohsiung to be 23 September. Under the Charter, the owners were entitled to take additional cargoes at Busan. However, on 10 September, it turned out the Vessel would

have to proceed to Kwangyang for part of the additional cargoes prior to Busan due to a manufacturing schedule of a shipper. The master then had to discharge the part cargo at Keelung due to the stowage plan before proceeding to Kaohsiung. It might constitute a breach of contract but the owners reported every detail as to the navigation to Respondents. The owners never agreed to ETA Kaohsiung at 20 September. In any event, the Vessel lost no time by calling at additional ports. Even on the assumption that the Vessel had been delayed, the liabilities of the carrier in respect of delayed delivery of the cargo should be limited to the difference between the price of the cargo at the date the cargo should have arrived and the price of cargo at the date of actual arrival. The amount of US\$20,000 Respondents deducted was outside the ambit and therefore the setoff was unlawful.

Contention by Respondents

The cause of the instant arbitration arose out of a breach of contract by the owners by way of an unreasonable deviation of the Vessel. The parties had agreed to ETA Kaohsiung at 20 September. Under the Charter Claimants clearly promised that the Vessel would call only at Busan as a sole additional loading port and to proceed directly to Kaohsiung from there. However, Claimants, in breach of this promise, let the Vessel call also at Kwangyang for further cargoes and discharge at Keelung before going to Kaohsiung, thereby considerably delaying arrival there. As a result Respondents incurred loss by way of damages paid to the consignees in Taiwan, and therefore deducted the same from the freight. In view of the fact that Claimants inflicted trouble on Respondents by the breach of their promise and nevertheless never admitted it, it should be impermissible that they can rely solely on their rights under the Charter.

DECISION AND REASONING

First, the Arbitrator considers whether the Vessel's estimated time of arrival (ETA) at Kaohsiung on or before 20 September was agreed between the parties as a condition of the Charter. On the evidence, it is recognized that the requirement from the consignee in Taiwan with whom Respondents had a contract of affreightment was that a cargo of 5,000 tons of steel coils should arrive Kaohsiung by 20 September. However, Respondents have failed to prove that they obtained consent from Claimants in accordance with this requirement. As evidenced by the recap letter faxed by Respondents' broker to Claimants' broker, the relevant provision was only that "after loading coil at Fukuyama, Vessel can load balance cargo at Busan, but Kaohsiung is the first discharge port." The letter was then transferred by the broker to Claimants stating, "after loading coil at Fukuyama, Vessel can load balance cargo at Busan (holdwise separation), and Vessel proceed to

Kaohsiung as first discharge port." From the above no inference could be made that Claimants confirmed ETA Kaohsiung at 20 September. The recap letter was drafted by Respondents' broker and thus should inevitably have included "ETA Kaohsiung at 20 September" had it been agreed between the parties as a condition of the Charter. On the other hand, it is normally understood that Claimants as a carrier could not have taken such risks as to agree to guarantee the date of arrival of the Vessel in consideration of the operational schedule of the Vessel. Accordingly, the Arbitrator decides that there was no agreement between the parties as to the ETA Kaohsiung on or before 20 September.

Next, the Arbitrator turns to the additional clause as to part cargoes. Claimants assert that they never agreed to such provision as "after loading coil at Fukuyama, vessel can load balance cargo at Busan and vessel to proceed to Kaohsiung *as first discharge port*," and that the actual terms were that "vessel to load balance cargo at Busan after Fukuyama in 2-3 days, but Owners to do best to reach Kaohsiung at quickest speed." However, on the evidence, Claimants received a recap letter stating the former provision on Tuesday, 7 September but did not contest it until Friday, 10 September. This lapse of time is such a delay that it should be deemed that Claimants had agreed to and accepted the former provision as a condition of the Charter. Also based on other evidence as to fax exchanges on 7 September, the Arbitrator holds that the term "vessel to proceed to Kaohsiung as first discharge port" was a condition of the Charter. On 10 September, upon learning that the Vessel would have to load additional cargoes at Kwangyang and to discharge them at Keelung, Claimants offered to obtain approval from Respondents. However, despite the fact that Respondents did not accept this offer, Claimants let the Vessel proceed to Kwangyang to load additional cargoes and to discharge them at Keelung. Claimants had apparently committed breach of the condition of the Charter.

The Arbitrator now considers the effect of the delay. The additional distance the Vessel had to sail is estimated about 170 NM and on this basis the Vessel must have lost about half a day. The time lost to enter into and depart from the 2 additional ports can be another half day. Therefore, the Arbitrator decides that a full day was lost in total. On the evidence, part cargoes originally intended to be loaded at Busan alone were actually loaded at Kwangyang as well as Busan and some of them had to be discharged at Keelung prior to Kaohsiung. In consequence, the total time required for loading and discharging of the entire cargo must have remained the same. Accordingly, the time lost in deviation of the Vessel to call at Kwangyang and Keelung was one day at most. In addition, in view of the decision as above that there was no agreement between the parties as to ETA Kaohsiung at 20 September, it was unlikely that the delay no more than a day could have fundamentally affected the Charter between the parties. It is recognized from the evidence

that the Vessel delayed arriving at Kaohsiung due to bad weather conditions and also the earthquakes hitting Taiwan, completing discharge on 25 September, but those causes were beyond the control of Claimants. Furthermore, documentary evidence and the results of hearings show that there was no deliberate or reckless act on the side of Claimants in respect of the delay.

Turning to the applicable law, it is appropriate that Japanese law should be applied in deciding the amount of damages. As there was no deliberate or reckless act by the owners in respect of the delay, Respondents cannot rely upon Article 13bis of the Carriage of Goods by Sea Act. Therefore, the measure of damages for late arrival of the cargo is the difference between the market value of the cargo at the place of discharge at the time the cargo should have been discharged, and the market value at the time of actual discharge. However, Respondents submit no evidence to discharge burden of proving that they as a carrier under the COA incurred loss by way of damages for the delayed delivery of the cargo to the consignee. In addition, the Arbitrator recognizes that there should be no difference of values incurred in such a short period (one day) in the instant case. Similarly, as to the cost of agents in Taiwan and travel expenses Respondents assert to have incurred in relation to the delayed delivery of the cargo, the Arbitrator cannot assume that Respondents could have incurred such sums of money solely due to the causes arising out of the breach by Claimants. Thus, the Arbitrator holds that Respondents had unlawfully deducted the amount of US\$20,000 from the freight due under the Charter.

Accordingly, the Arbitrator grants the claim in full to Claimants. As to interest on the claim amount, the Arbitrator awards that it should arise at 6% per annum from the date following this award until the date of complete payment. The costs for this arbitration shall be borne equally between the parties. As Claimants has already paid the arbitration costs in full, Respondents shall pay half the costs on top of the claim amount to Claimants.

The Arbitrator hereby awards as above after due consideration of the totality of the arguments, the documentary evidence and the hearings.

16 March 2000

TOMAC of the JSE

Arbitrator: Shuichiro Maeda



MEDIATION AS A PRE-STAGE TO ARBITRATION

- Is it the way ahead of ADR in Japan?

Takao TATEISHI*

Introduction

It is said that mediation was initiated in Asia where presumably people were and still are less confrontational than people in the West. If so, the original idea of mediation must be the one pivotal in dispute resolution rather than ancillary to litigation/arbitration.¹ It should firstly take the form of independently held mediation where amicable settlement is to be achieved with the aid of third party intermediaries.² And such other types of settlement as taking place during the course of litigation/arbitration should rank second. However, as far as Japanese dispute resolution is concerned, the mainstream has been the secondary choice, i.e. settlement by “intervention” in the course of litigation/arbitration. The first choice appeared later on in its history.³ Were drafters/legislators simply ignorant of the first choice for some time, or was the second choice a deliberately organised hybrid system because the Japanese, contrary to the hypothesis that they prefer amicable settlement by nature, did prefer to confront and could only later be persuaded to settle? I will look for an answer to this question, making an overview of the history of the Japanese mediation system.

Nowadays, on the other hand, not only in Asian countries but also in Western countries, claims people consider seriously about mediation as an alternative but independent means of dispute resolution. The trend now seems to select the first choice above. In addition,

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¹ Mediation is regarded as an alternative to litigation/arbitration, or alternative dispute resolution (ADR), but it can be pivotal once chosen. In this article, I use the term “mediation” very broadly so as to include the concept of independently held conciliation as well as mediation during the course of litigation/arbitration.

² The parties however retain the right of litigation/arbitration in the event mediation fails.

³ For this reason, Japanese law normally distinguishes those two procedures from each other and adopts different terms: *wakai* for mediation during the course of litigation/arbitration and *chotei* for independent mediation. Japanese people tend to prefer using the term “mediation” to refer to the former and “conciliation” to the latter. However, as mentioned above, I use the word “mediation” as to include both in this article.

here is a novel idea to place mediation as a pre-stage to arbitration - a so-called "Med/ Arb" scheme. However, at first glance, most disputes referred to mediation under the scheme may still have to be left over to arbitration and thus end up being prolonged and more costly. I will also discuss whether the two-tier scheme should be the way ahead of Japanese dispute resolution.

History of Mediation

At least as far back as in the Edo Era (1603-1867) mediation existed. The Tokugawa Shogunate introduced a system of mediation to be practiced during the course of civil litigation. It was called *naisai* (lit. internal settlement) where an *atsukai-nin* (lit. dealing person) who was a high-ranked municipal officer (*nanushi* or *kumigashira*) might go between the litigants and try to persuade them to reach an amicable settlement.⁴ It could be initiated either on request from the parties or at the recommendation of the court. If successful, which was usually the case, *naisai shomon* (settlement agreement) which had a binding force on the parties was issued.⁵ One of the main purposes of this mediation system is said to lie in "the maintenance of good relationships between the parties." It was also backed up with the notion that civil claims were to belong to private affairs and thus should be resolved in the private sector rather than by the court.⁶

Naisai was maintained for some time even in the Meiji Restoration Period until the Government introduced a new settlement mechanism in place of that in 1875. This was called *kankai* (lit. recommended settlement) where the litigants were basically obliged to ask for intervention by the court.⁷ Under the new system, disputing people had also the

⁴ Before the introduction of *naisai*, Shogunate promulgated *aitai-sumashi rei* (lit. ordinance of mutual settlement agreement). It declared that the courts were never to accept applications of claims in respect of monetary debts arising in trade and ordered the parties to agree to outside-court settlement. This ordinance was rather exceptional in that it was provisional and compulsorily directed litigants to mediate, as against the standard idea of mediation. The ostensible purpose of this ordinance is said to combat a rapidly growing number of suits but it in effect relieved heavily indebted *hatamoto* feudal lords of their financial burdens. See Noboru Koyama, *Minji Chotei Ho* (The Law of Civil Conciliation), New Edition, at 4.

⁵ Koyama, *supra*, at 5. Needless to say, it is the global standard that a settlement agreement has no binding force unless rendered by the court or other competent authorities, while arbitral awards although rendered by third parties are given such power by the law. Another major difference between mediation and arbitration is that mediation can be achieved solely upon agreement of the parties, while arbitration can be complete upon an award rendered by third party arbitrators, although it is initiated based on arbitration agreement between the parties.

⁶ Koyama, *supra*, at 8.

⁷ Koyama, *supra*, at 10.

option first to apply for mediation before filing suit. The main purpose of *kankai* was for “the mediator, who shall be very keen to get access to information as to the circumstances in which the applicant and respondent are placed, *to try to persuade both parties to settle into harmony.*”⁸ The settlement agreement was not, however, endowed with binding force.

Finally, the Code of Civil Procedure put into force in 1891 repealed *kankai* and provided for two separate mediation procedures of the court: mediation during the course of litigation and mediation-in-court prior to litigation. At the same time, the Code legalised arbitration for the first time there. Therefore, Japan then had four types of dispute resolution: litigation; mediation prior to litigation; arbitration; mediation during litigation/arbitration. While *kankai* enjoyed high levels of utilization, the new mediation systems were not so popular in the Meiji Era.⁹ One can reasonably see that a certain number of disputes during this time were resolved by arbitration in place of mediation as well as litigation.¹⁰

During that time separate laws pertaining to civil and commercial mediation to be conducted by conciliatory boards independent of the court were also formed but were finally consolidated into the Law of Civil Conciliation promulgated in 1951.¹¹ Under the Law, mediation prior to litigation came back under the exclusive jurisdiction of the summary and district courts with a few exceptions.¹²

Mediation Gains Momentum

As seen above, from a historical viewpoint, mediation started during the procedure of litigation and was later permitted as an independent mechanism. At about the same time, arbitration came into existence. Probably soon after, mediation in the course of arbitration became popular. However, mediation as ADR to arbitration is not yet developed in

⁸ Koyama, *supra*, at 11.

⁹ Supreme Court Reports, “History of Mediation in Japan,” VIII ⑧, at 14.

¹⁰ The first ever arbitration case was resolved towards the end of the 19th century. See “Quick Guide to Maritime Arbitration by TOMAC” at 1; also at www.jseinc.org/

¹¹ However, matters relating to personal status/family relations as well as labour disputes were outside the scope of the Law.

¹² Conciliation commissions set up within the courts practice mediation under the Law. However, such matters as to labour and construction disputes are currently mediated by conciliation commissions set up by relevant authorities under separate laws. Family disputes are mediated by conciliation commissions within the jurisdiction of the family courts under the Law of Adjustment of Family Relations.

Japan's commercial and maritime arbitration. As mediation during the course of arbitration in Japan has been frequent and successful,¹³ TOMAC was slow in adopting mediation as ADR: it was as late as in July 1992 that the Conciliation Rules were introduced independently of the Arbitration Rules.¹⁴ Those Rules are primarily for mediation of the dispute in respect of which no arbitration agreement exists but it has since been rare that disputing parties opted to mediate under those Rules.¹⁵

However, on a global basis, mediation as ADR to litigation or arbitration has recently been active. It is developed also in Western countries.¹⁶ It now does take place all over the world before a case goes to litigation or arbitration.¹⁷ In the background lies the fact that litigation as well as arbitration has become so expensive and delayed. Because of its fast and cheap aspects, mediation is actually gaining momentum. Even in common law countries, they see fewer actions simply because parties now realize that settling some of their disputes is to everyone's advantage.¹⁸

In Japan, too, ADR centers have recently been set up throughout the nation and started engagement in mediation as an alternative to litigation. Most such centers are under the auspices of local bar associations and under the rubric of "Arbitration Centers." However, those are in substance centers for mediation, because they accept applications for mediation where there is basically no arbitration agreement. Naturally, even if the parties reached settlement of their disputes in this procedure, the settlement agreement has no

¹³ During April 1985 and December 1995 arbitral awards were rendered in 27.6% of the cases terminated at TOMAC; 27.5% were withdrawn; 44.9% were settled by mediation initiated either by the arbitrator or the parties during the arbitral proceedings.

¹⁴ See "Outline of Conciliation System at the Japan Shipping Exchange, Inc"; also at www.jseinc.org/

¹⁵ JCAA has its Conciliation Rules introduced in 1972 but those Rules have since remained unamended due to low levels of utilization.

¹⁶ World arbitral bodies have adopted relevant Rules: for example, UNCITRAL Conciliation Rules was first adopted in December 1980; ICC Rules of Optional Conciliation was introduced in January 1988; WIPO has its Mediation Rules of 1994.

¹⁷ However, so far as maritime disputes are concerned, mediation as an alternative to arbitration is not well developed in England. The English Arbitration Act does not really deal with mediation. See Claire Morgan, "Dispute Resolution in England - the impact of ADR," *JSE-SRT Maritime Law Lectures 2000*, at 16.

¹⁸ *Ibid.* Morgan states: "According to court statistics, 40% less new High Court actions have been started since April 1999 when the [Woolf] reforms were introduced compared with the previous year. The number of ADR referrals, however, has trebled in that period. Maritime litigants in the English courts and their solicitors are being forced by the courts to take time out of litigation and at least look at mediation as an option for solving their disputes. Many of them like what they see: the prospect of a quick settlement at a fraction of the price of going to trial."

binding force upon the parties.¹⁹ Therefore, the centers have been anxious about the necessity of the parties to enter into arbitration agreement so as to ensure performance of the settlement agreement.

However, things could go right as well as wrong. According to the statistics of the Arbitration Center at the Tokyo Lawyers' Association (No 2), it accepted 1,295 applications for mediation from its inception in March 1990 until the end of December 1999. In 785 cases the other party responded, with 440 cases settled and arbitral awards rendered in only 29 cases (the rest were pending).²⁰ It is marvelous to note that the other party volunteered to come to the negotiating table in as much as 60% of the proceedings instituted despite the fact that they were not obliged to do so. Another notable fact is that the great majority of those who were willing to negotiate actually settled their disputes by mediation and did not bother to go further. As no case has been reported where the other party failed to comply with the settlement agreement, the issue of the lack of binding force seems like a minor problem at present.

Preference for Amicable Settlement

Why did they choose amicable settlement in such a large proportion of the cases? There can be several reasons. Among them are: (1) mediators at the Center are mostly retired judges and incumbent lawyers so that the parties tended to accept the settlement agreement as reasonable as the court judgment; (2) most were small claims so as to be settled more easily;²¹ (3) disputes are mostly related to personal matters rather than commercial ones so that the parties had a freer hand. One may also wonder whether the preference for amicable settlement of the Japanese played some role in it. However, the phrase "preference for amicable settlement" requires explanation.

The "preference for amicable settlement" is mostly taken out by commentators as one of the reasons why the levels of utilization of litigation/arbitration are low in Japan.²² It is

¹⁹ Mediation at those centers is not covered by the Law of Civil Conciliation or other relevant laws and a settlement agreement reached at the centers works only as a contract between the parties.

²⁰ Of the 440 cases resolved by settlement, 383 were "pure" settlement cases and in 57 cases terms of the settlement agreement were written into the arbitral award. On the other hand, 29 cases where arbitral awards were rendered were "pure" arbitration cases because they proceeded based upon arbitration agreement entered into between the parties after the referral of the disputes to the Center.

²¹ The number of small claims for payment up to Yen 3 million is 362 cases, or 77.2% of all so far resolved.

²² Most commentators have attributed Japanese people's preference for amicable settlement and the low levels of litigation/arbitration in general to either the cultural/historical backgrounds or legal/institutional

true that legal systems can affect people's behaviour. Thus those who live under a user-friendly legal system undoubtedly become more prone to bring actions.²³ The lack of judges and lawyers is also prominent in Japan,²⁴ although this fact has little to do with utilization of arbitration.²⁵ And also, Japanese people normally prefer to settle disputes before going to litigation/arbitration. However, when they disclose their preference for amicable settlement in negotiations, it does not necessarily mean that they prefer not to confront with the other party at all. Their preference for non-confrontation by their nature, if any, and their choice to settle their dispute by compromise are two different things. Japanese people can be more practical than sentimental at this stage. They would try to negotiate to settle the dispute so as to save time and cost and to maintain business relationships. Of course, where there is a bleak view of recovering the loss, it would benefit the parties if they could negotiate and reach an amicable settlement with a minimum sacrifice. They should be said to prefer amicable settlement mainly in this sense, although I am not to deny that some character to dislike confrontation may be contributory to a smaller extent at this stage of negotiation.

In a full-fledged face-off, i.e. arbitration, they seem to be resolved to fight. In my own

disincentives. The former can roughly be categorized into (1) a tradition to value harmony and consensus; (2) a low legal consciousness; (3) a non-confrontational character as a rice-cropping nation. The latter places the blame on lack of use-friendly legal systems and particularly on (1) the costs and time required; (2) the lack of lawyers and judges; (3) the procedural/arbitral rules which allow a surprising intervention of mediation.

²³ For example, the number of small claims brought in the summary courts throughout Japan more than doubled, from 200 to nearly 500, in the months of January and February 1998, pursuant to the revised Code of Civil Procedure in force from 1 January 1998. Under the new Code, small claims for payment of the sum not exceeding Yen 300,000 are to be adjudicated in a single day with no appeal basically granted against judgment. There was the same trend earlier in 1993 when the Commercial Code was revised. The courts saw a big jump in the number of cases where stakeholders brought suits claiming damages from representatives of their corporations.

²⁴ As of 1997 the numbers of lawyers and judges in Japan are very small. Only 16,398 lawyers and 2,899 judges in comparison with other advanced countries: US - 906,611 lawyers and 30,888 judges; UK - 80,868 lawyers 3,170 judges; Germany - 85,105 lawyers 20,999 judges; France - 29,395 lawyers and 4,900 judges.

²⁵ Arbitration can be conducted without representation by attorneys under Japanese law. On the other hand, in practice, non-lawyers can and do represent parties in international arbitrations in Japan where they engage not as their professions. However, if such persons as patent attorneys and non-lawyers do represent parties in arbitrations as their professions, that could be regarded a violation of Article 72 of the Lawyers' Law, which prohibits in relevant part non-lawyers from practicing law for remuneration and as profession. Foreign lawyers are permitted to represent parties in international arbitrations in Japan under the Foreign Lawyers' Law. In addition, patent attorneys will be entitled from early next year to represent parties in arbitration under the amended Patent Attorneys' Law.

experience in administering maritime arbitrations in Tokyo, Japanese parties to arbitration generally used to become practical later than earlier, mostly after a couple of hearings. However, today they tend to be practical from the beginning, though still confrontational. When deciding whether to settle their disputes during the procedure, they are normally very careful to weigh the possible award which would be granted, against time, money and business relationships which could be lost.²⁶ In short, where the Japanese manage to resolve their differences by amicable settlement at all, it is most likely the result based on their business judgment rather than due to a cause driven by a certain nature. With this definition, one can say that the preference for amicable settlement of the Japanese probably contributed to the success of the Arbitration Center at a Tokyo Lawyers' Association.

Two-tier "Med/Arb" Scheme

However, as mentioned above, mediation as an alternative to *arbitration* is currently unpopular in Japan. It is particularly so where an arbitration agreement exists between the disputing parties. Arbitration is only possible based on agreement between the parties.²⁷ In other words, parties to arbitration agreement presumably elected to resolve their disputes by arbitration rather than any other means of dispute resolution. Thus, it may not be surprising if parties to arbitration take some additional time before they realise that another type of dispute resolution, i.e. mediation as an alternative to arbitration, may be necessary at all.

Furthermore, negotiations normally take place between the parties when disputes arise. More than 99% of the disputes are said to be settled before becoming official claims in Japan. This negotiating process has virtually served as an alternative to arbitration - ad hoc ADR. One can assert that a third party mediator could recommend a more balanced settlement plan but it should be remembered that the main task of a mediator is to "assist" the party to reach a compromise. The initiative should rest with the parties and so it may be unconvincing to contend that institutional ADR can provide more satisfactory results. Parties to arbitration would also be hesitant to use ADR where there is no guarantee that the other party is obliged to respond or that settlement agreement reached has binding

²⁶ As mentioned earlier, the principle of *naisai* in the Edo Era was "to lie in the maintenance of good relationships between the parties." It is interesting to note that as far back as in the Edo Era good relationships were already given weight.

²⁷ For details, see Takao Tateishi, "The Enforcement of the Arbitration Agreement under Japanese Law," *The JSE Bulletin No 39*, at 1; also at www.jseinc.org/

force upon the parties. After all, ADR could end up being delayed and more expensive. Why then mediation as ADR in Japan?

Nevertheless, it should be noted that Japan's major arbitration organisations have never adopted a mediation system attractive enough for the parties to arbitration agreement. The mediation rules so far materialized are basically for the cases where no arbitration agreement exists between the parties. On the other hand, their arbitration rules can at most allow mediation during the arbitral proceedings. As we recall, Japanese people's preference for amicable settlement can be triggered during the negotiations as well as during arbitral proceedings. Therefore, more than a quarter of the cases filed with TOMAC are withdrawn after their applications,²⁸ and those are, in my view, most likely to be mediated in ad hoc ADR upon eliminating the problem of the time limit.²⁹ If we can introduce a combined mechanism which obliges disputing people, a good many of whom would otherwise settle their disputes in ad hoc ADR, first to mediate and, if it fails, then entitles them to go to arbitration, the percentage of successful resolution will be much higher as a system. This is exactly what the two-tier "Med/Arb" scheme is intended to do. It would also be cost- and time-effective and benefit the parties because a greater number of disputes could be settled much earlier in the pre-stage.

Moreover, the two-tier scheme would match the upward trend of mediation worldwide. It could also alleviate the anxiety expressed in the West over surprising interventions during the arbitral procedures in Japan.³⁰ The scheme is something which an administrator should think about. However, people in the West, particularly in common law countries, have already displayed their hatred against the scheme which would allow the mediator, in the event mediation fails, to act as an arbitrator in the subsequent arbitral proceedings unless the parties expressly agree otherwise. Therefore, to ensure "changing caps" should be given great weight in the consideration of the scheme.

Conclusion: Answer to the Question

Historically, mediation has always been an alternative to either litigation or arbitration. As we see, in the Edo Era, for example, the legislators introduced mediation upon realising

²⁸ *Supra*, note 13.

²⁹ This may be a good tactic because the limitation period ceases to run upon application of the dispute for arbitration under Japanese law. In cases such as this, mediation becomes pivotal, pushing arbitration into an ancillary position.

³⁰ *Supra*, note 22.

that to resolve the dispute in a strict and rigid legal framework was not necessarily good for the people. We can say that necessity called for mediation. Therefore, the answer to the question set out at the beginning of this article might be: drafter/legislators were eager at first to form a strict legal framework to resolve civil disputes and found out only later that there were certainly cases where mediation was more suitable as dispute resolution. In addition, in view of the preference for amicable settlement in negotiations, perhaps people could be mediated only when brought within a certain legal framework, be it litigation or arbitration, thereby rendering independent mediation lagging behind. At present, a hybrid dispute resolution mechanism such as the two-tier "Med/Arb" scheme looks like a better choice. Actually I view it as the way ahead of Japanese dispute resolution. ■

ENFORCEMENT OF INTERNATIONAL ARBITRATION AWARDS IN HONG KONG

Christopher KIDD*

Since the reunification, Hong Kong has continued to maintain its preexisting shipping and commercial law, including arbitration, entirely separate from the PRC. No attempt has been made to incorporate Chinese arbitration law in Hong Kong and the intention is that Hong Kong's arbitration system will remain separate and under the supervision of the Hong Kong Courts where the judiciary is the same. There are no mainland judges with jurisdiction in Hong Kong, the civil justice system continues to be independent and supportive of arbitration. Indeed, it is more cosmopolitan than many jurisdictions; the New Court of Final Appeal (which replaced the Privy Council in London) comprises well known and respected judges from the previous Court of Appeal in Hong Kong. In addition, the Court invites judges from other common law jurisdictions, including members of the House of Lords in London, to sit on Appeals. The aim to maintain the confidence in Hong Kong's dispute resolution services, including arbitration, has been maintained.

One of the perceived weaknesses of Hong Kong's arbitration which arose after the reunification; the enforcement of arbitration awards in Mainland China and vice versa, has also been remedied. Prior to the reunification, Hong Kong was a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards by virtue of its status as a colony of the UK. After the reunification the New York Convention did not apply to enforcement of Hong Kong awards in the PRC and vice versa, Hong Kong and China being the same country and the Convention only applies to the enforcement of awards between two different contracting countries. The difficulty has not, however, prevented the enforcement of Hong Kong arbitration awards in other states which are parties to the New York Convention, and vice versa.

To solve the post handover problem, the Hong Kong and PRC governments entered into an arrangement on 21st June 1999 which provided a framework for enforcing each other's awards. This Arrangement was given effect to by the Arbitration (Amendment) Ordinance

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which was enacted on 5th January 2000 and which took effect from 1st February 2000. In the PRC, the arrangement was given effect to by way of a Notice and Judicial Interpretation issued on 24th January 2000 by the Supreme People's Court. The new regime largely restores the pre-handover situation when awards could be summarily enforced under the New York Convention i.e. the parties seeking to enforce the award need only apply to the relevant Court for leave to enter judgment in terms of the award. Under the new Ordinance, the grounds for resisting enforcement in Hong Kong and Mainland China are consistent with those that apply to Convention awards.

There is therefore now a complete scheme available to parties wishing to enforce international arbitration awards in Hong Kong providing a variety of procedures depending upon the type of award which has been obtained.

1) Awards made under the UNCITRAL Model Law

The UNCITRAL Model Law on International Commercial Arbitration represents internationally agreed principles of best practice in international arbitration. One of the main objectives is to achieve finality in international arbitrations by maximizing the powers of the tribunal and curtailing the powers of the courts. The Model Law has been largely adopted in Hong Kong and the Hong Kong Courts interpret the Model Law with regard to its international origin and the need for uniformity in its application. Accordingly, an award made in Hong Kong under the Model Law may be enforced in Hong Kong. However, Hong Kong did not implement Chapter VIII of the Model Law concerning the Recognition and Enforcement of Awards. An award made in Hong Kong therefore has to be enforced in the same way as any other award made in Hong Kong, either by an action on the award or by summary enforcement.

a) An Action on the Award

The party seeking to enforce the award commences a separate action in the Hong Kong Courts enforcing the implied promise which exists in every arbitration agreement that the parties will perform the award. The applicant can therefore claim judgment for the amount of the award, a declaration that the award is binding, specific performance in appropriate cases, damages for failure to perform the award or an injunction restraining the unsuccessful party from failing to comply with the award. In such an action, the burden of proof rests with the party seeking to enforce the award.

He must prove the making of the contract which contains a submission to arbitration, that the dispute arose within the terms of the submission, the tribunal was duly appointed in accordance with the arbitration agreement, the making of the award and the amount awarded has not been paid or the award has not otherwise been performed. If any of these matters cannot be proved, the action will fail. The Defendant has a wide range of defences available to him including the arbitration agreement was never entered into, there has been no valid submission to arbitration, the arbitrator was in some way disqualified from acting, a valid award was never made, the award was never made, the award is void because the arbitrator exceeded his jurisdiction or acted without jurisdiction, the authority of the arbitrator was validly revoked before the award was made, the arbitrator failed to observe a substantive requirement as to the validity of the award, the award although valid when made, has for some reason ceased to be binding or that the award has been set aside by a Court. It is not, however, a defence that there has been misconduct by the arbitrator or that there has been an error of fact or law on the part of the arbitrator.

b) Summary Enforcement

A summary procedure also exists where, with the leave of the High Court, the award can be enforced in the same manner as a judgment, and judgment may be entered in terms of the award. The Court will usually give leave to enforce the award as a judgment unless there is either a real ground for doubting the validity of the award or the award is not in a form in which it can be enforced as a judgment. The main defences to an action for leave to enforce an award as a judgment are the same as those which apply to an action on the award (see above). Awards made in countries which are not parties to the New York Convention can be summarily enforceable in Hong Kong.

2) Enforcement of Awards made outside Hong Kong

The award of an overseas arbitrator may be enforced either by an action on the award (see above) or pursuant to a summary procedure under the Arbitration Ordinance which includes provisions for enforcing awards made in states which are parties to the New York Convention.

The Arbitration Ordinance gives effect to the New York Convention which is enforceable in Hong Kong either by action (see above) or in the same manner as the

award of an arbitrator which is enforced by way of the summary enforcement procedures in the Arbitration Ordinance. Accordingly, there are only very limited circumstances in which the Hong Kong Courts will refuse to enforce a New York Convention award but they may be generally summarized as follows:-

- i. One of the parties to the arbitration agreement was under some incapacity;
- ii. The arbitration agreement was invalid under the law which the parties agreed was to govern the arbitration agreement, or failing that, under the laws of the country where the award is made;
- iii. The party was not given proper notice of the appointment of the arbitrator, or the proceedings, or was unable to present his case;
- iv. The award deals with an issue which was not within the terms of the submission to arbitration;
- v. The composition of the arbitral authority, or the arbitration procedure, was not in accordance with the arbitration agreement or in the absence of any agreement with the law of the country where the arbitration took place;
- vi. The award has not yet become binding, or has been set aside or suspended by a competent authority of the country in which or under the law of which the award was made;
- vii. Enforcement will be contrary to public policy.

The Court will not, therefore, allow a party objecting to enforcement to effectively treat the enforcement proceedings as an appeal against the award. The Hong Kong Courts are therefore extremely reluctant to review the merits of the award, unless a public policy issue is raised. But this ground for resisting enforcement is narrowly construed and rarely succeeds.

It is to be noted that the Arrangement between the governments of Hong Kong and Mainland China concerning the enforcement of Hong Kong awards in Mainland China and vice versa, largely implements the same bases for refusing enforcement although concern has been expressed that the Judicial Interpretation which implements the arrangement in the PRC differs slightly from the wording used in the

Amendment Ordinance and New York Convention which apply in Hong Kong. The public policy ground in the Judicial Interpretation is drafted widely and suggests that enforcement will be refused if it would violate the public interest of the PRC. It may therefore be subject to abuse in the PRC although it is not thought likely to change the position in Hong Kong.

Concerns have also been expressed at the quality of awards from Mainland China which might be enforced in Hong Kong. The new Hong Kong regime only applies to the enforcement of Mainland awards which are defined in the Amendment Ordinance as awards which are made by a recognized Mainland arbitral authority as specified from time to time by the PRC government. It was initially hoped that the PRC government would confine the arbitral authorities to well respected arbitral authorities including, for example, China International Economic and Trade Arbitration Commission (“CIETAC”) and China Maritime Arbitration Commission (“CMAC”). However, the PRC government has listed 146 recognized mainland arbitral authorities.¹ Looking at the list, the question has been asked as to what experience

¹ The 146 Mainland Arbitral Authorities are:-

- A. Anqing, Anshan
- B. Baishan, Bangzhou, Baoji, Baotou, Beijing, Bengbu, Benxi
- C. Cangzhou, Changchun, Changde, Changsha, Changzhou, Chaoyang, Chengde, Chengdu, Chifeng, Chongqing, Chuzhou
- D. Dalian, Dandong, Daqing, Datong, Deyang, Dezhou, Dongying
- F. Foshan, Fushun, Fuxin, Fuyang, Fuzhou
- G. Guangyuan, Guangzhou, Guilin, Guiyang
- H. Haikou, Handan, Hangzhou, Hanzhong, Harbin, Hefei, Hegang, Heihe, Hangshui, Hengyang, Huhhot, Huaibei, Huainan, Huaiyin, Huangshan, Huizhou, Huludao, Huzhou
- J. Jiamusi, Jiangmen, Jiaxing, Jiayuguan, Jinan, Jinzhou, Jinhua, Jining, Jingzhou, Jixi
- K. Karamay, Kunming
- L. Laiwu, Lanzhou, Leshan, Lianyungang, Liaoyang, Linyi, Liupanshui, Liuzhou, Luoyang, Luzhou
- M. Ma'anshan, Mianyang, Mudanjiang
- N. Nanchang, Nanjing, Nanning, Nantong, Ningbo
- P. Panjin, Panzhihua, Pingdingshan, Pingxiang
- Q. Qingdao, Qinzhou, Qitaihe
- R. Rizhao
- S. Shanghai, Shantou, Shaoguan, Shaoxing, Shaoyang, Shenyang, Shenzhen, Shijiazhuang, Shizuishan, Suining, Suzhou
- T. Taian, Taizhou, Tianjin, Tianshui, Teling, Tongchuan, Tonghua, Tongling
- W. Wan Xian, Weifang, Weihai, Wenzhou, Wuhai, Wuhan, Wuhu, Wuxi, Wuzhou
- X. Xiamen, Xian, Xiangfan, Xiangtan, Xianyang, Xingtai, Xining, Xinyu, Xuzhou
- Y. Yangcheng, Yangquan, Yangzhou, Yantia, Yichang, Yinchuan, Yingkou, Yiyang, Yueyang
- Z. Zaozhuang, Zhangjiakou, Zhaoqing, Zhenjiang, Zhoushan, Zhuzhou, Zibo, Zigong.

some of these arbitral authorities actually have in handling complex arbitrations which is obvious cause for concern for multinational companies and shipowners with a presence in Hong Kong, or trading to Hong Kong. Even though it may be possible to argue that an award should not be enforced if improper procedures have been applied during the arbitration, the Hong Kong Courts have, in the past, enforced Mainland arbitration awards even though the procedures employed would have been considered unacceptable by Hong Kong standards. Generally, however, awards made by the Mainland's two international arbitration tribunals, CIETAC and CMAC, now consistently meet international standards. It remains to be seen whether all Mainland awards will meet those standards.

The procedure for enforcing a Convention award is simple, straightforward and does not involve substantial costs. An application can be made to the Court (without notice to the defendant) seeking leave to enforce the award in the same manner as a judgment. Although the Court can order that the other side be given notice and an opportunity to resist the application, the Hong Kong Courts very usually will give leave to enforce the award if the application is supported by an affidavit exhibiting the original award (or a duly certified copy), the original arbitration agreement (or a duly certified copy), a translation of the award into English, where appropriate. The Court usually gives leave to enforce the award unless the other party applies to the Court within 14 days to set aside the award. Where there is no successful challenge judgment can be entered in the terms of the award and enforced using the powers of the High Court which include seizure of assets, attachment of debts owed to the defendant, charging orders, cross examination of directors, and others.

It is also to be noted that there is a deterrent against parties seeking to challenge the enforcement in that the Court has power to order the defendant to give security for the sum awarded as a precondition to allowing the challenge to enforcement.

The Hong Kong Courts are therefore keen to enforce Convention awards and the Court usually exercises its discretion in favour of enforcement by discouraging opposition to enforcement based on unmeritorious technical points. Convention awards are upheld except where complaints of substance can be made good. Generally, to succeed in resisting enforcement the defendant will have to show a real risk of injustice e.g. denial of an opportunity to cross examine tribunal appointed experts or answer their evidence, where the tribunal exercise investigative powers which were available to it but the results of the investigations were not put to the party resisting enforcement such that they had an opportunity to respond, or where an

award was improperly obtained by unlawful and oppressive conduct. On the other hand, the Hong Kong Courts are unlikely to refuse enforcement for minor procedural complaints.

Furthermore, the Hong Kong Courts view with disfavor a party who keeps a procedural objection to himself until after the arbitration has finished and only seeks to raise the objection when attempts are made to enforce the award. Also, a party who deliberately takes no part in the arbitration will find it very difficult to resist enforcement unless he can show that he was not given proper notice of the appointment of the arbitrators, or of the arbitration proceedings, or was in some way unable to present his case.

3) Conclusion

The much awaited Arrangement between the Hong Kong and PRC governments largely restores the position prior to 1st July 1997 and will not only contribute to the more efficient enforcement of Hong Kong and Mainland awards, but will also help to give further confidence to Hong Kong's bid to be the prime dispute resolution centre in the Asia Pacific region and further add to its many strengths as a dispute resolution centre. ■

THE PRC'S NEW MARITIME PROCEDURE LAW

Claire MORGAN*

China's new Maritime Procedure Law¹ came into force on 1 July this year. It makes sweeping changes to the previous law on:

- The jurisdiction of the maritime courts in China;
- Arrest of ships and cargo in China;
- Injunctive relief;
- Trial procedures;
- Limitation funds;
- Maritime liens.

Its purpose is to assist in the implementation of the existing Maritime Code by providing detailed procedural rules tailored to maritime litigation. It will have a significant impact on maritime transportation and international trade in China. This article will highlight some of the most important changes.

Background

Until 1 July, the general Civil Procedure Law governed maritime litigation in China, supplemented by ad hoc explanatory documents issued by the Supreme Court dealing with, for example, the arrest of ships.² The Maritime Procedure Law now provides a comprehensive set of rules to meet the special needs of maritime litigation. It applies to any maritime lawsuit conducted in mainland China.

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¹ The Chinese Maritime Procedure Law was passed by the 13th section of the 9th Standing Committee of the National People's Congress on 25th December 1999 and came into effect on 1st July 2000.

² "The Regulations on the Arrest of Ships prior to Maritime Litigation", 1994.

Extension of the Jurisdiction of the Chinese Maritime Courts

In 1984, China set up a network of maritime courts.³ Initially, there were five, established in the main coastal cities, now increased to ten.⁴ The aim was to create centres of expertise in maritime law. However, one of the early problems which contributed to the unpredictable nature of maritime litigation in China was the tendency for other local courts, with judges inexperienced in maritime law, to accept maritime cases, particularly under pressure exerted by influential local companies. The new Law now affirms the status of the maritime courts and extends their jurisdiction, particularly with regard to injunctive relief in support of maritime claims.⁵

Reform of the Arrest Provisions

(1) Claims giving rise to a right to arrest

The 1994 Arrest Regulations provided a generic description of a maritime claim, followed by a non-exhaustive list of examples of such claims which would give rise to a right to arrest a ship. The description was wide enough to cover almost all common maritime disputes. Of even more concern was the practice of arresting ships under the Civil Procedure Code in order to obtain security for non-maritime claims. This caused great harm to the PRC's reputation as a place in which to conduct marine business.

To counter this, the Supreme Court has just published an explanatory document⁶ making it clear that no court shall accept an application for property preservation by way of the arrest of a ship otherwise than pursuant to the Maritime Procedure Law.

The Maritime Procedure Law, which replaces the Arrest Regulations, adopts the closed list of claims in the Arrest Convention 1999. This includes specific rights to arrest for claims relating to:-

³ "The Decision establishing Maritime Courts in Coastal Port Cities", NPC, 14th November 1984.

⁴ Dalian, Tianjin, Qingdao, Shanghai, Ningbo, Wuhan, Xiamen, Guangzhou, Beihai and Haikou.

⁵ However, it should be noted that the new Law does not go so far as to provide that maritime cases are under the *exclusive* jurisdiction of the maritime courts, a provision which was suggested in the draft law but not adopted by the Standing Committee of the NPC. One explanation for this may be to allow for the situation where a shipowner wishes to freeze the assets of a cargo owner or charterer to preserve them for a claim for unpaid freight/hire where that respondent is based in inland China where there are no maritime courts.

⁶ Notice No. 7 of 2000.

- Unpaid insurance premiums, including unpaid P&I Club calls;
- Wreck removal;
- Abandoned vessels;
- Agency fees, commissions and brokerage;
- An expanded range of environmental claims; and
- Contracts for the sale of a ship.

(2) Vessels liable to arrest

The Maritime Procedure Law provides that a maritime court may arrest in the following circumstances:-

- The 'guilty' ship which, at the time of the arrest, is owned by the defendant shipowner;
or
- The 'guilty' ship which, at the time of the arrest, is owned or demise chartered by the defendant bareboat charterer; or
- Any other ship which, at the time of the arrest, is owned by the defendant shipowner, demise charterer, time or voyage charterer;
- Any ship in respect of a claim against that ship which is protected by a maritime lien;
- Any ship in respect of a claim relating to the ownership, possession or mortgage of the ship.

This mirrors the Arrest Convention 1999 and removes the controversial provision in the earlier Arrest Regulations which allowed the arrest of any ship which, at the time when the claim arose and at the time of the arrest, was owned, operated or chartered by the respondent. The scope of the term "operated or chartered" had caused the courts great difficulty.

(3) Counter-security against wrongful arrest

Previously compulsory, this is now made discretionary. However, the new Law gives no guidelines as to the exercise of that discretion nor as to the amount or format of the counter-security which will be required. We anticipate that, in the case of a pre-litigation arrest, the courts will continue to order counter-security. The amount of security has ranged, in the past, from the amount of the claim to 30 days notional hire.

(4) “Appeal” against arrest

The court will make a ruling on the arrest application within 48 hours. Within five days thereafter, either party can apply to the same court for “reconsideration”. That court will give its decision confirming or setting aside the arrest within a further five days (a new time limit). There is no appeal to a higher court since the arrest is classified as an administrative as opposed to a judicial act. In reality, the chances of the court revising its original decision, in the absence of any new and compelling evidence, are slim.

(5) New recognition given to foreign jurisdiction and arbitration clauses?

The arresting party must commence substantive proceedings within 30 days of the arrest, failing which the vessel will be released.

In an interesting development, the new Law recognises that those substantive proceedings may be brought abroad/in arbitration if the parties are bound by an exclusive jurisdiction clause or by an arbitration agreement. In the past, while the Chinese courts have been compelled to recognise arbitration agreements pursuant to China’s obligation as a signatory to the New York Convention 1958, they have tended not to uphold foreign jurisdiction agreements. The reasons given by the courts varied from a technical objection that there was no provision under the Civil Procedure Law permitting the parties to agree to a foreign jurisdiction to a more fundamental objection that jurisdiction was a matter of procedural law to be decided by the courts alone. However, in one case last year,⁷ the Shanghai High Court did recognise a jurisdiction clause printed on the *face* of a bill of lading in favour of Hong Kong. The new Law seems to endorse recognition of foreign jurisdiction clauses. It will be interesting to see how the maritime courts interpret it in practice.

The Arrest of Bunkers and Cargo Carried on a Vessel

The new Law contains specific provisions on the arrest of cargo, bunkers and necessities in order to obtain security. These supplement the general provisions in the Civil Procedure Law allowing for pre-litigation conservatory measures. The important points to note are:-

⁷ Pelorus Ocean Line Ltd. v China Anhui International Economic and Technology Co-operation Corp., 1999.

1. the cargo must be *owned* by the intended respondent;
2. it may only be arrested up to the value of the claim;
3. counter-security against wrongful arrest may be required; and
4. substantive proceedings must be commenced within 15 days, failing which the cargo will be released.

If the respondent fails to put up security within 15 days (or earlier, if the cargo is perishable), the claimant can apply for judicial sale of the cargo.

Mandatory Injunctions

Maritime courts can now grant mandatory orders requiring a party to do or to refrain from doing an act (eg on application of the shipper to require an owner to issue a bill of lading after receipt of the cargo). An application for a mandatory injunction must satisfy the following requirements: the claimant must have a strong maritime claim; there must be good reason for the injunction; and there must be an element of urgency in that further loss or damage would be incurred without the injunction. Counter-security may be required.

The injunction is supported by the sanction of a fine or imprisonment. The new Law also provides powers for the court to order the preservation of maritime evidence. Since those powers lack teeth, we anticipate that such applications will be backed up with an application for a mandatory injunction.

New Trial Procedures

The new Law completely reforms the way in which collision cases will be tried in the PRC. The usual Chinese trial procedure of adducing evidence at multiple hearings has been swept aside. Now the parties must lodge a binding Maritime Accident Investigation Form (equivalent to the English Preliminary Act) recording the facts of the casualty. All evidence must be lodged prior to the first hearing (unless there is good reason why not) and will not be disclosed to the other side until then. The trial should be completed within a year.

Special provisions relating to the trial of general average cases have also been introduced.

Further, insurers should note that, subject to proof that they have paid their insured, new provisions allow them to commence proceedings in their own name. Conversely, in the

case of oil pollution claims, a third party victim can elect to sue the insurer of the polluting vessel directly.


The new Law explicitly recognises the right of maritime courts to apply the summary procedures set out in the Civil Procedure Law to clear-cut maritime claims. The claimant may lodge its complaint orally, following which the court will convene a hearing with both parties present at which the court will either dispatch of the case immediately or set a date for trial. Simplified methods are used to summon the parties and witnesses. The case will be heard by a single judge who will give judgment within three months.

Finally, in simple debt recovery cases a creditor can apply to the maritime court for “speedy debt recovery” where there is no other debt in dispute between the parties and the order for payment can be served on the debtor. The court must inform the creditor whether its application is accepted within five days and make an “order nisi” for payment within 15 days thereafter. The debtor can apply to set aside the order within 15 days, failing which execution will take place immediately. This could be a very useful tool for suppliers seeking to recover from Chinese shipowners.

The new Law also contains detailed provisions for the constitution of limitation funds, the judicial sale of vessels or cargo, the registration of creditors' claims and the distribution of the limitation fund/sale proceeds and a procedure for registration of maritime liens following a public notice. Consideration of these provisions is beyond the scope of this paper.⁸

Conclusion

The new Maritime Procedure Law establishes a detailed framework for the trial of maritime cases in China. It brings many vital areas of procedure closer to international practice, in particular the rules on arrest of ships and the trial of collision cases. It should result in increased consistency in Chinese maritime law practice. The real test of its effectiveness will be in its implementation by the courts over the next year. All those involved in the maritime industry in China will be watching this carefully.



⁸ More detailed comments on all the provisions of the Maritime Procedure Law can be found on the Sinclair Roche & Temperley website at www.srtlaw.com.

Editorial and Book Review

* Harvey Williams "*Chartering Documents*" 4th edition *

If we could preclude certain types, if not all, of claims which are otherwise brought in day-to-day shipping business, that would save time and cost considerably. So as to achieve this goal we should (1) get prepared in the drafting of the contracts to avoid future disputes in the first place and (2) take every available means to prevent the disputes once arisen from developing into claims. The former is apparently the better approach but so long as disputes could arise anyhow, we should also retain some techniques to cope with them.

Harvey Williams, "*Chartering Documents*" (4th ed.)(LLP) emphasizes the importance of taking necessary precautions at the stage of the drafting of contracts and provides a useful commentary on exemplary clauses of standard forms. It also analyses legal and practical backgrounds to those clauses so that readers can be equipped with knowledge to argue disputing parties out of their claims. In short, the book can serve as a practical reference when drafting chartering documents as well as being faced with disputes. It is one of the Lloyd's Practical Shipping Guides and will fit the needs of commercial people who are in the responsible positions to protect their interests in the chartering business, be it voyage, time or bareboat charter, or oil or bulk trade. For those Japanese who need quicker reference, a Japanese translation of the book is also coming out.

It is no wonder that the translation work has been taken up in consideration of the practical aspect of this book. Japanese people are in general said to have been somewhat indifferent to taking precautions in their contracts, and particularly to inserting such provisions as to be invoked in the event of breach of contract. This is perhaps because they have put emphasis on mutual trust of the parties and thought it contrary to that basic notion to anticipate breach of contract. However, people's minds are changing in today's global competition. Furthermore, where they have to face disputes, Japanese people are nowadays more practical than sentimental - they normally try to settle the disputes not out of their preference by nature for amicable settlement but rather carefully weighing the damages which might be awarded in arbitration/litigation against cost, time and business relationships which could be lost. Therefore, a practical guidebook such as this one may also help them reach a reasonable settlement.

While most thick textbooks tend to have relevant information scattered throughout, this

relatively compact book is a systematically organized commentary on standard forms together with references to important cases. The most recent case cited there is a decision of the House of Lords in 1998 (*The Giannis NK*), where a groundnut cargo was held to be dangerous in the sense that it forced a grain cargo to be dumped overboard after contact with it. The table of technical abbreviations is also useful. The book covers Shellvoy 5, Norgrain 89, Amwelsh 93, Shelltime 4, NYPE 46 and 93 and Conlinebill. To cite only a couple of the useful comments from the text: <Cancelling clause> “neither the exercise nor the non-exercise of a cancelling option precludes a damages claim.” “Shellvoy cancelling clause can be inserted into other c/p in order to minimize abuse of cancelling rights”; <Exceptions clause> “as with any exceptions clause, there is a constructional principle that any doubt about what is covered is resolved against the party relying on the provision.”

Features which should, among other things, be mentioned here are related to: deadfreight; exercising lien; speed and consumption claims; war insurance; problems surrounding bills of lading (clean bills issued for damaged cargoes/delivery of cargo without production of bills/claim by way of indemnity). A new chapter has been added to deal with the ISM Code, catastrophe, war and environmental clauses. Readers may well feel, however, that they cannot do away with a copy of the third edition as it contains a more detailed explanation on Gencon.

Takao TATEISHI - *Editor*

■ The Editor expresses his sincere thanks to those who kindly returned their reply to the questionnaire on the production of bound volumes of the JSE Bulletin. Regrettably, due to low levels of demand for such a product, we suspended the project. As many articles in the past issues as possible will be put onto our website at www.jseinc.org/ (see cover).