

# *WaveLength*

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## **The New Rule in Japan — Compulsory Entry to P&I Club**

*Yosuke Tanaka*<sup>1</sup>

### **1. Introduction**

On 14th April 2004, the new rule was established by the Japanese Parliament, which requires almost all ships bound for Japan must enter P&I Club. From 1st March 2005, all kinds of ships which have more than 100 gross tonnage have to conclude the P&I insurance contract before entering any Japanese ports and report to port authorities about such contract before entering the port areas.

Other countries, for example, the US, Canada and Australia, have the similar rule, however, it is the first time for Japan to have such compulsory rule and the Owners in many countries, especially China, Russia and South East Asia, will be influenced by such rule. Therefore, the new rule is to have considerable impact onto the Japanese maritime practice.

This report is intended to summarize the content of such new rule to assist the understanding by foreign parties concerned with the Japanese shipping industry.

### **2. Compulsory P&I Contract**

(1) According to the new rule, all foreign ships which have more than 100 gross tonnage have to conclude and maintain insurance contracts with P&I Clubs before entering and leaving any Japanese ports. All Japanese ships with more than 100 gross tonnage which are engaged in international voyage also have to conclude the contract with P&I Club.

With respect to tankers which carry oil in bulk as cargo, the “Law on Compensation for Oil Pollution Damage” in Japan (hereinafter referred to as the “Oil Pollution Law”), which implements the 69 and 92 CLC<sup>2</sup> and the 71 and 92 FC<sup>3</sup>, already has the provision for the obligation of the Owners to conclude the P&I contract. The new rule intends to expand the same obligation to the Owner of ships other than tankers. Therefore, the new rule was implemented as amendment of the Oil Pollution Law<sup>4</sup>.

The amended Oil Pollution Law refers to foreign ships and Japanese ships which fall

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<sup>2</sup> International Convention on Civil Liability for Oil Pollution Damage 1962 and 1992

<sup>3</sup> International Convention on the Establishment of the International Fund for Compensation for Oil Pollution Damage 1971 and 1992

<sup>4</sup> The amendment of the Law this time includes the implementation of the Protocol to 1992 FC concerned with the “3rd. Tier” to the Fund.

within the above-mentioned category as the “Specified Ship“ in its provisions<sup>5</sup>.

(2) The Specified Ship is required to conclude the P&I contract which covers the certain amount to compensate for the oil pollution damage caused by the spilt bunker and the cost for the wreck removal.

The amount to be covered by the contract should be at least the limitation amount as provided for in the “Law on Limitation of Liability for Shipowners”, which implements the London Convention 1976<sup>6</sup>.

(3) The Specified Ship is also required to keep on board the document which shows that the insurance contract is concluded with P&I Club with respect to that ship.

If the P&I contract is made with the Club which is one of the “International Group Clubs”, or the Japanese Insurance Company which is under the control of the Japanese Financial Service Authority, the ship can keep the copy of the contract on board.

However, if the contract is made with other Clubs or companies, the Owners has to apply for the Japanese Ministry of Land, Infrastructure and Transport (hereinafter referred to as “MLIT”) to issue the certificate for their ships, which shows that the satisfactory contract is concluded and maintained, before each ship enters Japanese ports. Once such certificate is issued, it continues to be effective for 1 year at longest.

The new rule, namely the amended Oil Pollution Law, shall come into effect from 1st March 2004, however, the MLIT will start the procedure to issue the certification from 1st December 2004.

### **3. Strict Liability**

(1) As the basis for the obligation to conclude the contract, the new rule provides for the “strict liability” of the Owners for the oil pollution damage caused by the bunker spilt.

The Oil Pollution Law in Japan already has the provision for such “strict liability” for the Owners of tankers. The new rule expands such kind of liability to the Owners of all kinds of ships.

(2) Under Japanese law, any legal liability should be, in principle, based on the fault or negligence. This principle was influenced by laws in Civil Law countries, especially France and Germany. Under this principle, “strict liability”, which does not need any fault or negligence to damage incurred, should be provided for clearly in the law or act. In this meaning, the new rule relies on the provision in the Oil Pollution Law in which such “strict liability” is already provided for.

(3) The new rule, namely the new provision in the amended Oil Pollution Law, provides that the “owner” and the “hirer” of the ship shall owe such strict liability jointly and

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<sup>5</sup> In details, the amended Oil Pollution Law defines the tankers and all other ships which owe the obligation for the P&I contract as the “Specified Ship”.

<sup>6</sup> Convention on Limitation of Liability for Maritime Claims 1976

severally for the oil pollution damage.

The “owner” of the ship shall mean the registered owner in the same way as under the CLC and the bareboat charterer or demise charterer are included in the “hirer” of the ship.

However, it is under controversy whether the time charterer shall be included in the “hirer” or not. The Japanese court once held that the time charter shall be construed as mixture of the demise charter and labor supplying agreement and the time charterer can be included in the “hirer” according to this judgment. However, the opinion to recognize the time charter as one of the carriage agreement has been prevailing these days.

It is believed that to avoid the confusion in practice, the MLIT will have the opinion that, whoever arranged the P&I contract, if the ship is covered by the contract for bunker spill damage and wreck removal cost, the ship shall be regarded to meet the requirement in the new rule.

#### **4. Procedure at Japanese Ports**

(1) The new rule requires the Specified Ship to report to the port authority about the P&I contract in addition to the name or the registered port before she entered the port area which is her destination.

If the ship has not maintained the P&I contract or has not kept the certification on board, the ship shall be prohibited from entering the Japanese port.

(2) The new rule also provides the MLIT with the power to investigate on board the ships. If the MLIT finds the violation of the new rule, they can order to comply the rule or detain the ship.

(3) The criminal penalty is also provided for the violation of the new rule.

For example, the imprisonment for 1 year or the fine of ¥500,000 at maximum shall be imposed on the violation of the obligation to conclude the P&I contract.

#### **5. Comments**

##### **(1) Standard to select the P&I Club**

It should be noted that the procedure for Owners under the new rule can be different depending on the P&I Club with whom the Owner makes the insurance contract as described in the above “2(3)”. If the Owner made the P&I contract with one of the International Groups Club”, their ships can enter Japanese ports only with the copy of the P&I contract. However, if the Owner concluded the contract with the Club which is not the member of the Groups or foreign insurance company, they have to apply to the MLIT for their certificate for each ship which is going to Japanese ports.

If considerable unfairness in such treatment of Clubs was appealed to the government, the standard to select the P&I Clubs by the MLIT might be changed.

## **(2) Scope of the entity to which the new rule applies**

The new rule applies to the “owner” and “hirer” of the ship as described in the above “3(3)”. However, the meaning of the “hirer” is not clear.

As already mentioned, the time charter was once held to be as mixture of the demise charter and the labor supplying agreement by a Japanese court. However, in practice, the time charter has different function from the demise charter. Therefore, the time charter should be clearly distinguished from the demise charter. Another judgment held the different view to the nature of the time charter, which was then regarded as one of the carriage contract.

In order to avoid the dispute in application of the new rule, it seems to be better to avoid such controversial word and to use the clear words to provide for the entity to which the rule applies.

## **(3) Basis for liability for wreck removal**

The new rule provides for the “strict liability” of the Owners for oil pollution damage caused by the bunker spilt, however, it does not clearly provide for the liability to remove the wreck.

Some Japanese laws provide the port authority or the MLIT with the power to issue the order to remove the wreck against the Owners, and once such order is issued, the liability to remove the wreck is clearly imposed on the Owners. However, such order has been seldom issued.

Under the general principle in Japanese Law, the Owners can be regarded to owe liability to remove the wreck as their property in case such property hinders safety navigation or other activities by others, and the Japanese government can claim to remove the wreck by virtue of the general power to administrate the territory of Japan.

However, in order to clarify the scope of application of the new rule, the liability of the Owners to remove the wreck should be provided for in clear words.

## **6. Conclusion**

Considering recent many cases in which the wreck was left by the Owners who had not concluded the P&I contract or the oil removal operation was paid for by the Japanese government, the new rule should be regarded as proper and desirable method against such cases. In addition, the new budget system was also established to help the local government which suffers from the left wreck or oil pollution damage. Under the system, the Japanese government will subsidize the local government. This package of policy should be appreciated.

However, as mentioned above in “5”, some problems can be found in the new rule and the new provisions in the Oil Pollution Law. Some further problem can be turned out after

the enforcement of the new rule. It should be noted that it is very important to check and reconsider the rule after its enforcement and rebuilt it if necessary, in order to achieve the proper method for the accidents on the sea<sup>7</sup>.

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<sup>7</sup> For making this report, I owe lots of kind and valuable advise to Mr. Nobuhiro Tsuyuki and Kensuke Kobayashi in the MLIT, however, all opinions or comments are solely from the author.

## **Piercing the Corporate Veil Concerning Arrest of Ship in Japan<sup>1</sup>**

*Mitsuhiro Toda<sup>2</sup>*

### **I. Introduction**

Japan is not a member state to the International Convention for the Unification of Certain Rules Relating to the Arrest of Sea-Going Ships, 1952. Japanese Maritime Law gives rise to a maritime lien to the wide range of maritime claims including claims for supply of the necessaries such as fuels, provisions, repair costs, pilotage, tuggage in addition to the typical claims for which maritime lien are given in the other jurisdictions such as collision damage, personal injury claims, salvage, crew wages and cargo claims. Any claims protected by maritime lien have priority over the mortgage claim in distributing the proceeds of the enforced sale of the vessel. This is probably the reason that Japan has not yet ratified 1952 Arrest Convention and 1952 Collision/Civil Jurisdiction Convention.

Japanese Commercial Code including maritime law was enacted in 1899. At that time, it was said that the model was German law. But nowadays, our commercial code has been changing introducing new legal systems coming from the United States, especially the company law. The legal situation concerning Piercing the Corporate Veil in Japan has also been influenced by the developments of laws of the United States and Germany. As you know, both states have admitted the conception of Piercing the Corporate Veil on certain conditions. Japan follows in accepting the theory of Piercing the Corporate Veil including arrest of the ships.

I would like to explain the general situation concerning Piercing the Corporate Veil, particularly concerning arrest of ships in Japan.

### **II. TWO SYSTEMS OF ARRESTING SHIP IN JAPAN**

In Japan, we have two legal systems concerning arrest of ship as follows:

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<sup>1</sup> An address to the ICMA XV, London on 29 April, 2004

<sup>2</sup> Attorney-at-Law, Law Offices of Toda & Co. Tokyo, Japan

## **1. Arrest by Virtue of Maritime Lien**

Maritime lien gives rise to the following claims:<sup>3</sup>

- (1) Expenses relating to the sale of the ship and her appurtenances by public auction, and the expenses of preservation after the commencement of the proceedings for the sale by public auction.
- (2) Expenses of preservation of the ship and her appurtenances at the last port.
- (3) All public dues levied on the ship in respect of the voyage.
- (4) Pilotage and towage.
- (5) Salvage award and the ship's contribution to general average.
- (6) Claims which have arisen from the necessity for the continuance of the voyage.
- (7) Claims of the master and other mariners which have arisen from their contracts of employment.
- (8) Claims which have arisen from the commercial sale, construction, or equipment of the ship, in cases where the ship has not yet made any voyage after her sale or construction; and claims in respect of the equipment and food and bunkers of the ship for her last voyage.
- (9) Cargo claim rights provided by Article 19 of Japan's International Carriage of Goods by Sea Act 1957.
- (10) Claim rights which may be limited by Japan's Limitation of Shipowners Liability Act 1975, as amended in 1982.

Supply of bunkers possibly gives rise to maritime lien either in item (6) or (8) above, as may be the case.

As mentioned above, any claims which shall be subject to the limitation of the

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<sup>3</sup> "Arrest of Ships", Lloyd's of London Press Limited, 1985 by Tameyuki Hosoi p.68

shipowners as per 1976 London Convention give rise to maritime lien such as collision, personal injury or damage claims, fishery claim from the grounding, cargo claim and etc.

If you have the above claims, then you can arrest the vessel in respect of which the claim arises. In this case, you have not to put up the counter security. You can further obtain the arresting order before the vessel comes to the Japanese territorial waters. Anyway, in this connection, we do not need to discuss about Piercing the Corporate Veil because the vessel which can be arrested by virtue of maritime lien is a vessel in respect of which the claims arise irrespective of her ownership (which may be similar to Action-in-Rem).

## **2. Provisional Attachment of Vessel**

Another type of arrest is Provisional Attachment of the vessel. This arrest is usually done to obtain the security from the insurer or P&I club of the arrested vessel. In case of the provisional attachment, you must establish that the vessel is owned by the debtor for your claims at the time when the arrest is carried out. Further, you have to put up the counter security with the court to be decided by a judge at its discretion. Usually, the amount of the counter security ranges from 30% to 70% of the alleged claims of the arresting party, considering the strength of the proof of the claim, the nature of the claim, the ship's value and etc. The provisional attachment is a procedure just to obtain the security. It is suspended at the stage that the vessel is arrested. You have to obtain the ordinary final judgment to put the vessel on the public auction to enforce the said judgment. The arresting order is given usually without hearing from the counter arguments from the shipowner. Then, the question may arise in respect of the ownership of the vessel.

For example, the claimant has supply claims against the parent company whose subsidiary company owns the vessels of X and Y, or the claimant has cargo claim in respect of the cargo which was lately on board the vessel X, but unfortunately, the vessel X sank. In such case, claimants may try to arrest the vessel Y. To succeed in arresting the vessel Y, you have to succeed in Piercing the Corporate Veil of the registered owner of the vessel Y.

As you know, nowadays a number of many vessels are flying so-called Convenience Flag such as Liberia, Panama, Cambodia, St. Vincent & the Grenadines, Malta, Cyprus and etc. Some of registries do not require registries of the names of the directors and, of course, shareholders of the company who is the registered owner of the vessel. In Japan,

arrest of the vessel Y can be done as Piercing the Corporate Veil of the registered owner of the vessel Y is admitted in certain cases as mentioned below.

### **III. The Supreme Court Judgment of Japan**

The leading case in Japan concerning the Piercing the Corporate Veil is the judgment of the Supreme Court rendered on February 27, 1969 (YAMAYOSHI SHOKAI V. HOSHIHARA, 551 Hanrei Jiho 80) This judgment rules as follows:

Generally speaking, a shareholder is a different legal entity from the corporation. This rule should apply to a so-called “one-man company” as well. However, the corporation is given the legal entity by the legislation that the corporation has such social value so as to be accepted as a different legal entity from the legal technique point of view. Therefore, if the legal entity is deemed to be as only “sham” or “alter ego” of the person behind the corporation or the corporation is just set up to avoid or evade the application of the law abusing the right to form the corporation, then such corporation could be denied in its legal entity and deprived of the Corporate Veil.

As you may understand, this judgment shows that there are two separate elements to Piercing the Corporate Veil. One is in case that the corporation can be deemed as the “sham” or “alter ego” of the person behind the corporation (e.g. the parent company). In this particular case, no elements of fraud is needed.

Another element is the abuse of the right to set up a corporation. This requires a fraudulent element. In general, Piercing the Corporate Veil in Japan are widely accepted in courts in interpreting this ruling of the Supreme Court. Let’s go on to the shipping law.

### **IV. “CAPE WIND” Case and Conclusion**

1. In December 1993, a marine paint supplier of Hong Kong corporation arrested the vessel of “CAPE WIND” of the Panamanian flag owned by a Liberian corporation as a security for the paint supplying claims against a Hong Kong corporation called Primera Ship Management who went bankrupt arguing that Primera was the real owner of the vessel and the registered owner’s corporate veil should be lifted. The vessel was later released from arrest by the mortgagee financier who purchased the vessel through the court proceedings paying out the tender money applying the mortgage claim as part of the purchase money. Then, the registered owner who was strongly supported (and controlled) by the mortgagee financier commenced litigation

against the arresting party of the paint supplier arguing that the arrest was wrongful because Piercing the Corporate Veil should be denied.

On April 13, 1998, the Tokyo District Court rendered the judgment (no appeals were made against this judgment, 1015 Hanrei Times 197) that the arrest of the “CAPE WIND” was not the wrongful arrest since Piercing the Corporate Veil of the registered owner could be accepted for the following reasons;

- a) All shares of the registered owner are owned by the parent company.
  - b) The representative director of the parent company and the registered owner was the same person.
  - c) The parent company requested the dockyard to change the name of the orderer to the subsidiary of the registered owner when the ship was newly built.
  - d) The registered owner gave full authorization to a director of the parent company to take delivery of the vessel from the dockyard.
  - e) The representative director of the parent company spoke in the creditors’ meeting for liquidation proceedings that the parent company owned the “CAPE WIND” together with the other two investors.
  - f) There are great discrepancies in the Articles of the Corporation and the Minutes of the Directors as to the name of the shareholders and the date of the establishment of the corporation.
  - g) The parent company concluded the agreement with the two investors that it will collect all the charter hires and freights from the ship’s operation and distribute the profits to the investors.
  - h) The registered owner has no offices at the registered address of Broad Street 80<sup>th</sup>, Monrovia, Liberia.
2. It was concluded by the Tokyo District Court that the subsidiary company was set up and used to register the vessel in its name as the “sham” or “alter ego” of the parent company of Primera.

I think that the above approach is probably similar to the approach taken by the U.S. Courts.<sup>4</sup>

3. I think, however, that the above rulings put more weight on whether profits from the ship's operation be fully taken by the parent company, whether the parent company played the key role in purchasing the vessel. Under Japanese Law, the registry is not a perfect proof of the ownership. You may insist that the registered owner is not the real owner against the registry of the ship, or even in case of the real estate. The issue of who the owner is should be decided from the viewpoint of how the legal title has been correctly transferred from one person to another person. Generally speaking, the fact who paid the purchase money in obtaining the ownership would be considered as the most important factor in deciding who the real owner is. Anyway, I can not simply specify clear conditions for the Corporate Veil to be lifted in Japan. Each case would have different factors. However, it seems evident that if a person behind the Corporate Veil takes all profits from the vessel's operation, then that person would be possibly named as the real owner who should assume responsibility for the vessel's operation in addition to the registered owner which is the "sham" or "alter ego" of himself.

I hope that this paper would be of some help for your understanding on this issue under Japanese law.

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<sup>4</sup> Berlingieri on Arrest of Ships, A Commentary on the 1952 and 1999 Arrest Conventions, third edition p 129, Paper entitled "Piercing the Corporate Veil the U.S. View presented by John M. Toriello of Haight Gardner Poor & Havens, New York, IBA, SBL, Conference, September, 1990

## The Outline of the Japanese Maritime Law<sup>1</sup>

*Souichirou Kozuka*<sup>2</sup>

*The following is a slightly amended version of the paper that the author presented at a seminar on Japanese maritime law held in Hanoi, Vietnam, in January 2003. Since the seminar formed a part of the research program of the Vietnamese government in preparation for the codification of a new maritime code of that state, the presentation gave a comprehensive picture of the Japanese maritime law, rather than focusing on issues unique to Japan. Due to time constraints of the seminar, only the very important cases are cited and no academic writings are referred to in the footnotes.*

### 1. Sources of Maritime Law

The Fourth Book of the Japanese Commercial Code<sup>3</sup> is titled as “Maritime Commerce.” It is, of course, the principal source of maritime law in Japan. However, it is not the only source. The reason is twofold.

First, after the codification of the Japanese Commercial Code in 1899, tremendous efforts have been made by lawyers in the world toward the unification of maritime laws of various jurisdictions. These efforts have been so successful that many uniform law instruments have been produced. This means that the original Japanese Code has become outdated in some respects. When Japan has acceded to some (not all) of these uniform laws, it was preferred to enact an independent statute to implement them rather than modify the Code greatly. Thus the International Carriage of Goods by Sea Act<sup>4</sup> (hereinafter “*ICOGSA*”), which implements the Brussels Convention on Bills of Lading (Hague-Visby Rules as amended by SDR Protocol)<sup>5</sup> and the Act on Limitation of

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<sup>1</sup> Reproduced from “The Report of the Japanese Maritime Law Association” No. 47, December, 2003.

<sup>2</sup> Associate professor of law, Sophia University, Tokyo.

<sup>3</sup> Law no.48 of 1899, as amended.

<sup>4</sup> Law no.172 of 1957, as amended.

<sup>5</sup> International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, 1924 (“*Hague Rules*”), as amended by the 1968 Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, 1924 (“*Visby Amendments*”) and the 1979 Protocol Amending the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, 1924 (“*SDR Protocol*”). Japan has acceded to the 1924 Convention and the 1979 Protocol, acceding to the latter having the effect of acceding to the 1968 Protocol as well. The Convention as amended by the two Protocols is hereinafter called as “*Brussels Convention*”.

Liability of Shipowners and Others<sup>6</sup> (hereinafter “ALLS”), implementing the 1976 Convention on Limitation of Liability for Maritime Claims<sup>7</sup>, form integral parts of maritime law in Japan.<sup>8</sup>

Secondly, the maritime law, though unique enough, is based on the general principles of civil and commercial law. The carrier’s liability is nothing but the liability arising from contracts or torts, which is governed by the Civil Code<sup>9</sup>. Maritime liens and mortgages on ships are special kinds of secured interests, which again are regulated by the Civil Code. And a bill of lading, as a kind of instrument that is negotiable, requires comparative analyses with other instruments like a bill of exchange or a bill issued by a warehouse operator. Thus, due regard would be needed to be paid to the coordination between maritime law and other rules of civil or commercial law.

It might be added that the Book Four of the Commercial Code itself refers to numerous provisions of other parts of the same Code: the law of transport in general (principally governing the transport on land), as codified in Book Three, Chapter 8 of the Commercial Code. See art.766 and art.776 of the Commercial Code.

## **2. Carriage of Goods**

An agreement of carriage of goods is a contract between a carrier, who undertakes the carriage, and his customer. Japanese law, as many others in the world, knows two types of such a contract. One is the carriage of general cargo, which means the carriage of one or some specified cargo(es). The other is a charter party, in which the carrier reserves the whole or partial space of the ship at the disposal of the other party (charterer) and undertakes to carry whatever cargo loaded onto the chartered space.

### **(1) Carriage of General Cargo**

#### Duty of the carrier

Under the contract of carriage of general cargo, the carrier owes obligation to exercise due diligence about the seaworthiness of the ship and about the goods. Pursuant to the Brussels Convention, the ICOGSA provides, as regards the duty of the carrier about the

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<sup>6</sup> Law no.94 of 1975, as amended.

<sup>7</sup> International Convention on Limitation of Liability for Maritime Claims, 1976.

<sup>8</sup> As regards the Brussels Convention, a separate statute has been enacted in order to ensure that the rules of the Brussels Convention applied only to international carriage of goods and to keep the provisions of the Commercial Code applied to domestic carriage. In the case of the Convention on Limitation of Liabilities, it was considered convenient to have the basic rules of procedure therefor codified together with the substantive rules but the former required so many provisions that they could not be included in the Commercial Code.

<sup>9</sup> Law no.89 of 1896, as amended.

seaworthiness, that the carrier shall be liable for loss, damage or delay of the goods resulting from failure of exercising due diligence to make the ship seaworthy, to properly man, equip and supply the ship as well as to make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation<sup>10</sup>. It is understood that the seaworthiness is required at the beginning of the navigation only and not throughout the journey. Secondly, it is provided that the carrier shall be liable for the loss, damage or delay of the goods resulting from not exercising due diligence about receiving, loading, stowing, carrying, keeping, discharging and delivering of the goods<sup>11</sup>.

Under the ICOGSA, the liability of the carrier with regard to these duties is based on the “presumed fault system”. It means that the carrier shall be liable unless he is successful in proving that neither he nor his servants and agents (see below 4.) failed to exercise due diligence as required<sup>12</sup>. This is consistent with the general rule of contracts, since in Japan a debtor cannot rebut his contractual liability unless he proves that there has been no fault on his side about non-performance of the obligation<sup>13</sup>. On the other hand, the principle of “presumed fault system” is not totally in concordance with the underlying idea of the Brussels Convention. The Brussels Convention derived from the rules of common law, which were historically based on the absolute liability and the exemption clauses in the bills of lading to escape from it. It is because of these backgrounds that the ICOGSA is drafted in a slightly different way from the Brussels Convention and treated the list of “excepted perils<sup>14</sup>” as the list of events to shift the burden of proof about the existence of the carrier’s fault<sup>15</sup>, rather than the list of exemptions from liability. Only a fault in navigation or in management of the ship<sup>16</sup> as well as a fire<sup>17</sup> are provided as exemptions in the strict sense<sup>18</sup>, since these two events normally constitute fault of the carrier and, therefore, render the carrier liable if there had not been a statutory provision of exemption.

There is also a special rule on the carriage of valuable goods. Unless the shipper declares the kind and the value of the goods at the time of consignment, the carrier shall be exempt from any liability<sup>19</sup>. This is because valuable goods require greater care in

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<sup>10</sup> ICOGSA, art.5.

<sup>11</sup> ICOGSA, art.3.

<sup>12</sup> ICOGSA, arts.4 (1), 5 (2).

<sup>13</sup> Civil Code, art.415.

<sup>14</sup> Brussels Convention, art.4 (2).

<sup>15</sup> ICOGSA, art.4 (2).

<sup>16</sup> Brussels Convention, art.4 (2)(a).

<sup>17</sup> *Id.*, art.4 (2)(b).

<sup>18</sup> ICOGSA, art.3 (2).

<sup>19</sup> Commercial Code, art.578 as applied through art. 766. It is understood that the provision is excluded if

handling, which may, in turn, require special rate of charge. Declaration of the kind and value of the goods gives the carrier an opportunity to be prepared for careful handling as well as to claim the special charge.

### Liability of the carrier

The carrier, if found being in breach of his duties, shall be liable for the loss of or damage to, or delay in delivery of, the goods. In other words, the carrier has to compensate for the harm that the party interested in the goods has incurred from such accidents. The accidents must have “resulted from” failure of due diligence of the carrier<sup>20</sup>. According to the general principle of contracts, the harm that needs to be compensated includes (a) such harm as will accompany the accident at issue in the ordinary course of things, and (b) such harm resulting from the accident due to special circumstances as long as contemplated by both parties<sup>21</sup>. The amount of compensation must be such that puts the harmed party to the equivalent situation that he should have been in but for the accident<sup>22</sup>.

The ICOGSA deviates from these general rules and provide that the compensation shall be determined by reference to the market price (or adequate price if there is no market) of the goods at the place where, and at the time when, the goods should have been delivered<sup>23</sup>, except when the damage resulted from an act or omission of the servant or agent done with intent to cause damage or recklessly or with knowledge that damage would probably result<sup>24</sup>. In the latter case, the provision of ICOGSA is excluded and the general principles described above govern.

Another important rule of the ICOGSA is the limitation of liability. It is provided, pursuant to the Brussels Convention, that the carrier is not liable for the total amount thus determined but shall be relieved of his liability exceeding (a) 666.67 SDRs per package or unit, or (b) 2 SDRs per kilogramme of gross weight of the goods, whichever is the higher<sup>25</sup>. Though the carrier is free to agree to higher (but not lower) amount of limitation of liability in the contract of carriage of goods<sup>26</sup>, in many cases it is stipulated in the

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the damage to the valuable goods has been caused intentionally by the carrier (as opposed to by servants and agents of the carrier).

<sup>20</sup> See ICOGSA, arts.3 (1), 5 (1).

<sup>21</sup> Civil Code, art.416.

<sup>22</sup> This is the commonly held understanding with regard to contractual liabilities in general, though no particular provision is found on this issue.

<sup>23</sup> ICOGSA, art.12-2 (1).

<sup>24</sup> ICOGSA, art.13-2.

<sup>25</sup> ICOGSA, art.13 (1). The text of this provision does not appear to be exactly in accord with art.4 (5)(a) of the Brussels Convention. However, it is understood that the ICOGSA should be interpreted as an implementation of the Convention and be, therefore, read as such.

<sup>26</sup> ICOGSA, art.15.

conditions of carriage that the liability of the carrier shall be limited to (a) or (b), whichever is the higher. Here again, the carrier is not entitled to this limitation of liability if the damage resulted from an act or omission of the servant or agent done with intent to cause damage or recklessly or with knowledge that damage would probably result<sup>27</sup>.

### Coexisting tort liability

In Japan, a carrier who failed to deliver the goods duly may also be accused of a tort. According to the Civil Code, one shall compensate the damages when he infringes upon the right of another with intent or by negligence<sup>28</sup>. If the carrier fails to exercise due diligence in making the ship seaworthy or in handling of the goods and causes damages to the goods, the owner of the goods may claim that his right to ownership (property right) has been infringed by negligence of the carrier. The Supreme Court of Japan has established a case law to the extent that this tortious liability coexists with the contractual liability, even in a case where both liabilities are owed to the same person (i.e. where owner of the goods is the other party of the contract at the same time)<sup>29</sup>. Therefore, art. 4bis (1) of the Brussels Convention,<sup>30</sup> as taken into ICOGSA as art.20-2 (1) is of great significance. Though the coexistence of contractual and tortious liabilities is the basic principle commonly relevant to all other cases, the issue is thus solved by a provision in the Convention only with regard to international carriage of goods by sea.

## **(2) Charter party**

The basic type of a charter party is a voyage charter party, in which the charterer is allowed to use the whole or part of the ship during the specified voyage. It may be noted that the provisions of the ICOGSA (or those of the Brussels Convention as well) can be modified or departed from by an agreement of parties to the charter<sup>31</sup>.

Under the voyage charter party, the carrier owes a duty to let the specified ship, which must be seaworthy, proceed to the port designated by the charterer. The charterer shall ensure that the designated port is a safe port. At the notice of readiness from the ship<sup>32</sup>, the charterer starts loading the cargo. The charterer has to finish loading by the end of the laytime. Failure of doing so causes the charterer to pay to the carrier demurrage as agreed

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<sup>27</sup> ICOGSA, art.13-2.

<sup>28</sup> Civil Code, art.709.

<sup>29</sup> See e.g., Nippon Tsuun KK v. Nihon Kasai Kaijo Hoken KK, Hanrei Jiho no.575, p.71 (Supreme Court, 17 Oct. 1969).

<sup>30</sup> Art. 4bis (1) of the Brussels Convention provides “The defences and limits of liability provided for in this Convention shall apply in any action against the carrier in respect of loss of or damage to goods covered by a contract of carriage whether the action be founded in contract or in tort.”

<sup>31</sup> ICOGSA, art.16.

<sup>32</sup> See Commercial Code, art.741 (1).

in advance<sup>33</sup>, which is nothing but liquidated damages to compensate the loss that the carrier incurs from his ship being kept longer than was originally planned<sup>34</sup>. It may be added that liquidated damages are to be enforced to the full extent under the Civil Code of Japan<sup>35</sup>. The carrier, not the charterer, is responsible about stowage and trimming of the goods unless a clause to the opposite, normally called “Free In Free Out (FIFO)” clause, is stipulated. The same rules as those on loading are applied to discharge at the port of destination.

Time charter is a special type of a charter party on which no specific statutory provision is found under the Japanese law. It is an agreement of chartering a ship during a specified time period. There are a few versions of general conditions to this type of charter party that are used worldwide, such as NYPE (New York Produce Form) or BALTIME. These general conditions contain such clauses on the sharing of risks and responsibilities as Let & Hire Clause<sup>36</sup>, Net-charter Clause<sup>37</sup>, Payment of Hire Clause<sup>38</sup>, Employment & Indemnity Clause<sup>39</sup>, and Responsibility & Exemption Clause<sup>40</sup>.

Under a time charter, the voyage that the ship is going to make is not determined in advance but is left to the directions from the charterer. It means that the charterer holds a larger power under a time charter as compared with a voyage charter. The Employment & Indemnity Clause, which authorises the charterer to direct the Master and the crew, supports it. Still, it is the carrier and not the charterer that employs the crew member. The Supreme Court of Japan, emphasising the latter point, distinguished a time charter from a bareboat charter, under which the charterer is deemed to be the carrier<sup>41</sup>.

### **3. Who is the Carrier?**

Historically, it was not conceivable to undertake carriage of goods without owning a ship of his own. The only exception was a bareboat charterer, who leases the ship from her owner and then mans and equips her to make her ready for voyage. The Commercial

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<sup>33</sup> Commercial Code, art.741 (2).

<sup>34</sup> However, art.741(2) of the Commercial Code calls it as “remuneration to the shipowner”.

<sup>35</sup> Civil Code, art.420.

<sup>36</sup> The shipowner lets the charterer to hire (use) the ship.

<sup>37</sup> The charterer shall pay all the costs incurred in the course of voyage.

<sup>38</sup> The charterer shall pay for the use and hire of the ship.

<sup>39</sup> Though the crew are employed by the shipowner, the charterer holds a right to give directions about the voyage to the crew members and retains an option to require change of the membership of the crew if there is a good reason.

<sup>40</sup> The shipowner and the charterer are exempt from the respective liability according to the list of exemptions provided in this clause.

<sup>41</sup> *Toyo Kasai Kaijo Hoken KK v. Kanki Gaiko KK* (“The Jasmine”), *Minshû* vol.52, no.2, p.527 (Supreme Court, 27 March 1998).

Code of Japan, being codified at the end of the 19th century, is based on this classical idea. It is why the Commercial Code employs the term “shipowner” instead of “carrier,” while providing that a bareboat charterer shall be deemed to be equivalent to the shipowner<sup>42</sup>.

Presently, however, it is quite common for a shipping company to hire a ship owned by another and use her for carriage of goods. The ship may be owned by a financial company and be leased to a shipping company. Her ownership may still be retained by the shipbuilder for the purpose of securing the payment of the purchase price. In such cases, the “true” owner may appear as a bareboat charterer and act as a carrier. In other cases, a charterer by voyage charter party or, more frequently, by a time charter party does not consign the goods of his own but instead use the chartered ship for carriage of goods consigned by others, thus serving as a carrier against the latter. There are even freight forwarders or non-vessel operating common carriers (NVOCCs) who do not own a ship but always charter ships of others in order to undertake carriage of goods.

Another strange practice commonly observed is that a ship is registered under the name of a dummy company in order to benefit from an advantageous taxation or a looser regulation and is chartered to the true “owner”. A ship in such a case is called a “flag of convenience” ship (FOC ship). Thus it is more than usual to see a ship registered in Panama being chartered to a Japanese company by a bareboat charter party, then chartered to a company established in Hong Kong that man and equip the ship with Filipino seamen, chartered back by a time charter party to the Japanese company, which, in turn, charter her to another company by a voyage charter party, the latter being in a better position to find customers and enter into agreements of carriage of goods as a carrier. It is in these cases that a question about who is to be identified as a carrier annoys lawyers.

Though complicated enough, it is a special case of identifying the parties to the contract and is to be left to general principles of contract law. Fundamentally, the consignor of the cargo should know whom he talked with. The counter party is usually the last charterer (voyage charterer) or his local agent. The major problem is that the charterer or his agent signs a bill of lading on which the phrase “For the Master” is always printed in advance. This phrase is considered as a declaration that the signature has been made on behalf of the shipowner. If this understanding is to be accepted as such, then the party to the contract shall be the represented, i.e. the shipowner, and not the charterer. In addition, a “demise clause,” a clause to the extent that the party that may be physically in transaction with the consignor shall be regarded as an agent of the shipowner or the bareboat charterer, which may be the case, is often inserted in the conditions of carriage. The Supreme Court of Japan, in a case where the holder of the bill

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<sup>42</sup> Commercial Code, art.704 (1).

of lading that was not the original consignor sued the time charterer, held that the carrier was found to be the shipowner “under the circumstances of the case.”<sup>43</sup> It must be admitted that the Supreme Court, having avoided articulating any clear rule on the identity of carrier, left the issue not totally resolved yet.

#### **4. Who Else is involved?**

The carrier cannot perform carriage of goods without employing various kinds of experts or servants and agents. It is usually these people that cause damages to the goods carried. Therefore, it is important to examine whether and to what extent the carrier shall be liable for acts and omissions of these people.

Some commentators distinguish two groups of people among these employed: those who are subject to the directions by the carrier and those who are not. The former includes the crew, who are a kind of laborers, and pilots. The examples of the latter are stevedores and classification societies. As under the English law, those included in the latter group is sometimes called as “independent contractors”, while those who belong to the former are normally referred to as “servants” and/or “agents”.

The ICOGSA provides that the carrier shall be liable when the carrier or those employed by him failed to exercise due diligence<sup>44</sup>. The common understanding is that “those employed” mentioned here include both servants and agents as well as independent contractors if the claim is based on the contract, since, according to the general principle of contract law, a debtor is liable for acts and omissions of his servants and agents as well as independent contractors<sup>45</sup>. As regards the liability from torts, the Commercial Code provides that the shipowner (to be understood as “carrier”, as mentioned above) is liable for damages caused intentionally or negligently by his crew<sup>46</sup>. It is a special rule to the employer’s liability of torts (*respondeat superior*)<sup>47</sup>. Commentators argue that this provision should be extended by analogy to damages caused by servants and agents of the carrier.

Since there are many unique rules on the exemption and limitation of liability with regard to the carriage of goods by sea (discussed above 2. (1)), the claimant may be tempted to sue the employed, rather than the carrier himself, to detour such unique rules. However, it would be rather strange if the servant or agent of the carrier should be held to

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<sup>43</sup> *Toyo Kasai Kaijo Hoken KK v. Kanki Gaiko KK* (“The Jasmine”), *Minshū* vol.52, no.2, p.527 (Supreme Court, 27 March 1998).

<sup>44</sup> ICOGSA, arts.3 (1), 5 (1).

<sup>45</sup> Though there is no explicit provision, the understanding is shared by all commentators.

<sup>46</sup> Commercial Code, art.690.

<sup>47</sup> Civil Code, art.715.

be liable in full, while the carrier (the employer) can enjoy the benefit of exemption or limitation of his liability. Besides, in some cases the carrier is engaged to indemnify the employed for the sum that the latter owed to the claimant. Thus the carrier would in fact be deprived of his privilege of exemption or limitation of the liability, if he would have to fully indemnify his employee. Therefore, when such indemnification is agreed between the carrier and his employed, a clause is normally inserted in the conditions of carriage stipulating that those employed shall be able to rely upon any defence that is available to the carrier (“Himalaya Clause”). This clause is considered to be valid as an agreement of third party beneficiary. Regarding servants and agents (excluding independent contractors), this rule is codified in art.20-2 (2) of the ICOGSA, since it is considered to be probable that the carrier is engaged in the indemnification.

## 5. Bills of Lading

### Transfer of the right to the goods

The carrier, when the goods have been loaded, must issue a bill of lading at the request of the consignor<sup>48</sup>. A bill of lading enables the right to the goods to be transferred to a third party. It is useful, for example, when the owner of the goods has been successful in selling the goods before the arrival of the ship or when the bank requires to take the goods on board as a security for the credit to the consignee, as in the case of the payment under a letter of credit.

For these purposes, two requirements must be fulfilled. First, one must be entitled to claim delivery of the goods, or to sue the carrier if the delivery is impossible, as long as he holds the bill of lading. Secondly, anyone other than the holder in due course of the bill must not be able to claim delivery of the goods. It is provided in Japan that, when the bill of lading has been issued, the delivery of the goods cannot be claimed without submitting the bill in exchange therefor<sup>49</sup>. Though not explicitly stated, it is obvious that the carrier should be held to have lacked due diligence if he were to have delivered the goods to someone other than the holder in due course of the bill of lading.

Who is the holder in due course depends on what type of a bill it is that has been issued. If it is a “negotiable” bill of lading, which is the most typical case, the holder in due course is the person to whom the bill has been duly endorsed<sup>50</sup>. The holder in due course shall be the named consignee if it is a “straight” bill, while in the case of a “bearer” bill the holder in due course is the person who has the bill in his hands. It may be

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<sup>48</sup> ICOGSA, art.6 (1).

<sup>49</sup> Commercial Code art.584 as applied through ICOGSA art.10.

<sup>50</sup> The Bills of Exchange Act, art.14 (1) (Law no.20 of 1932, as amended) as applied through the Commercial Code, art.519.

added that, under the Japanese law, a bill of lading is deemed to be an “order” bill except when indicated otherwise<sup>51</sup>. This policy is not the same as that of the English law, under which a bill is not negotiable unless indicated “to order (of the shipper)”.

In practice, more than one bill of lading is issued by the carrier at the same time. This is because at least three bills are required in a letter of credit transaction just in case for an accident in the postal delivery. The Commercial Code provides that, at the port of destination, the holder of only one bill is entitled to claim the goods<sup>52</sup>, since otherwise the consignee could not be delivered the goods if one of the bills had been lost by accident. Outside of the port of destination, however, the carrier shall not deliver the goods to anyone but the holder of all the bills<sup>53</sup>, since it is likely that a holder of only some of the bills is the acquirer in bad faith, such as a thief.

In addition to the above, the transfer of a bill of lading transfers the constructive possession of the goods<sup>54</sup>. In other words, the holder in due course of a bill of lading is deemed to have possession of the goods, though the goods are in fact on board the ship somewhere on the ocean. Under the Japanese law of property, one is entitled to claim his right to a mobile property definitely against a third party when and only when he possesses it<sup>55</sup>. Therefore, it is considered that the holder in due course of a bill of lading is assured of his right to the goods by the effect of this provision.

#### Statement in the bill of lading

Particulars on the goods to be carried as well as on the agreement of carriage are stated in the bill of lading. The most important items among them are: marks on the goods, the quantity or weight, as the case may be, as well as the apparent condition, of the goods. Under the Brussels Convention, statements about these items constitute *prima facie* evidence of the receipt by the carrier of goods in the stated conditions<sup>56</sup>. This so called evidentiary effect, which, though a statutory provision is lacking, has been approved by the Supreme Court of Japan<sup>57</sup>.

When the bill of lading is transferred to the third party acting in good faith, the carrier is barred from relying on a proof to rebut the statement in the bill<sup>58</sup>. This means that the carrier cannot rebut the *prima facie* presumption drawn from the statement in the bill,

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<sup>51</sup> Commercial Code, art. 574, as applied through ICOGSA, art.10.

<sup>52</sup> Commercial Code, art.771.

<sup>53</sup> Commercial Code, art.773.

<sup>54</sup> Commercial Code, art.575 as applied through ICOGSA, art.10.

<sup>55</sup> Civil Code, art.178.

<sup>56</sup> Brussels Convention, art.3 (4).

<sup>57</sup> Mitsui OSK v. The Federal Insurance Co., Ltd., Minshu vol.27, no.3, p.527 (Supreme Court, 19 April 1973).

<sup>58</sup> ICOGSA, art.9.

even if the statement has not been true. As a matter of course, this is not the case if the third party knew the truth before acquiring the bill.

However, a bill of lading, differently from a bill of exchange, is not a perfect “negotiable instrument”. In the case of a bill of exchange, a claim is founded on the act of issuing a bill itself. However, a holder of a bill of lading can merely exercise the claim that has arisen from the contract of carriage and nothing more. Therefore, if the goods do not exist and the bill is merely a fake, then the holder of the bill can claim nothing even though he had been acting in good faith. A liability for issuing a fake bill should be discussed independently.

## 6. Maritime Claims

In the course of maritime activities, shipowner and other relevant parties cause various claims. These claims, whether based on contracts or in torts, can be called maritime claims, as distinguished from claims having nothing to do with maritime activities. The list of claims that are normally considered as “maritime” is found, for example, in the definition clause of a convention on arrest of ships<sup>59</sup>.

### (1) Maritime Liens

First, it may be noted that in many jurisdictions some of these maritime claims are given preference over other claims, being secured by maritime liens on the ship. Under the Japanese law, the claims secured by maritime liens are: law costs incurred for the forced sale of the ship with entailed costs; costs incurred for the preservation of the ship in the last port; dues and taxes imposed on the ship; pilotage dues and the charge for tugs; remuneration for assistance and contribution of the ship in the general average; claims resulting from contracts or acts that were necessary for the continuation of the voyage; claims arising out of employment of the Master and the crew; claims arising from the sale, building or equipment of the ship that has not commenced voyage as well as claims arising from equipment of, or supply of foods and fuels to, the ship for the sake of the last voyage<sup>60</sup>; claims for damages to the goods if the damages were caused by the carrier that is a charterer of the ship<sup>61</sup>; claims subject to limitation (*see* below 6. (4))<sup>62</sup> and claims arising from the oil pollution that are subject to limitation proceedings under the Act on Civil Liability and Compensation for Oil Pollution<sup>63</sup>. The list of secured claims is rather

<sup>59</sup> *See* International Convention Relating to the Arrest of Sea-going Ships, 1952, art.1 (1); International Convention on Arrest of Ships, 1999, art.1 (1).

<sup>60</sup> Commercial Code, art.842.

<sup>61</sup> ICOGSA, art.19.

<sup>62</sup> ALLS, art.95.

<sup>63</sup> The Act on Civil Liability and Compensation for Oil Pollution, Law no.95 of 1975, as amended, art.40.

long, as compared with recent international conventions on maritime liens<sup>64</sup>, and a question has been raised by one commentator whether, above all, it is necessary to secure such claims as are subject to limitation only because they are not paid in full. The commentator argues that claims of the consignor of the goods may not deserve being secured by maritime liens, since damages to them can be covered by cargo insurance, while there is a good reason to secure pure tort claims such as those arising from collision or oil pollution.

In order for a maritime lien to arise, the debtor of the claimant does not have to be the shipowner: a claim caused by the bareboat charterer can also be secured by a maritime lien<sup>65</sup>. One court held that the supplier of the fuel oil to the time charterer can be endowed with a maritime lien on the ship<sup>66</sup>. Though not explicitly stated in the judgement, it may have been noted that, under the Net-charter clause of standard charter parties for a time charter, the time charterer is responsible for procurement of fuel oil.

## **(2) Mortgages on Ships**

Though a ship is mobile equipment, she can be hypothecated by a mortgage as long as she is registered<sup>67</sup>. It is useful, in particular, for a shipbuilder or a financier to secure the credit given to the shipowner. However, maritime liens are given preferences over a mortgage on the same ship<sup>68</sup>.

## **(3) Enforcement of a Maritime Claim**

When a maritime claim, secured or not, is not satisfied voluntarily by the debtor, the claimant has to enforce his claim by arresting or attaching the asset of the debtor. The internationally accepted policy is that a ship, which may be the principal asset of the debtor, can be arrested only in respect of a maritime claim but no other claim<sup>69</sup>. The Japanese law, however, has not followed this approach. Therefore, a ship registered in Japan is subject to attachment by any claim of her owner, in addition to the maritime claims.

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<sup>64</sup> See International Convention for the Unification of Certain Rules Relating to Maritime Liens and Mortgages (1967), art.4 (1); International Convention on Maritime Liens and Mortgages (1993), art.4 (1). The Japanese law is closer to the predecessor of these Conventions. See art.2 of the International Convention for the Unification of Certain Rules Relating to Maritime Liens and Mortgages, 1926.

<sup>65</sup> Commercial Code, art.704 (2).

<sup>66</sup> *Pine Trio Corp. v. Marubeni International Petroleum Co., Ltd.*, Hanrei Times no. 561, p.150 (Appeals Court of Takamatsu, 2 May 1985).

<sup>67</sup> Commercial Code, art.848.

<sup>68</sup> Commercial Code, art.849.

<sup>69</sup> International Convention Relating to the Arrest of Sea-going Ships, 1952, art.2; International Convention on Arrest of Ships, 1999, art.2 (2).

A maritime claim secured by a lien or a mortgage on a specified ship can, of course, be enforced on her. Whether a claimant is entitled to attach any other asset of the debtor differs from jurisdiction to jurisdiction. A compromised rule accepted internationally is that a claimant of a maritime claim can arrest “sister ships” of the debtor, which mean ships owned by the debtor<sup>70</sup>, but nothing else. Again the Japanese law does not share this view so that a claimant can arrest or attach any of the assets owned by the debtor (including the sister ships).

#### **(4) Limitation of Liabilities of the Carrier**

There is an international regime that subjects some kinds of maritime claims to the procedure of limitation of liabilities<sup>71</sup>. This regime, contrary to the regime of international conventions on arrest of ships, has been accepted by Japan and is codified in ALLS. The maritime claims subject to the procedure of limitation are: claims in respect of loss of life or personal injury or loss of or damage to property, occurring on board or in direct connection with the operation of the ship; claims in respect of loss resulting from delay in the carriage by sea of cargo, passengers or their luggage; claims in respect of other loss resulting from infringement of other rights, such as the right to fisheries; claims in respect of further loss caused by measures taken in order to avert or minimise loss; and claims of a person other than the person liable in respect of such measures<sup>72</sup>.

The procedure of limitation of liabilities is a sort of “small scale bankruptcy”. The amount decided according to the tonnage of the ship<sup>73</sup> sets the ceiling upon the total sum that the shipowner or other type of a carrier is held responsible<sup>74</sup>. The shipowner or others that has constituted a fund up to the said amount can be exempt from the enforcement of maritime claims subjected to this procedure when the court declares the commencement of the procedure<sup>75</sup>. The fund is shared among these claimants basically *pro rata*, i.e. in proportion to the amount of each claim<sup>76</sup>, and the debtor shall be relieved from the maritime claims involved effective the day when the distribution from the fund becomes available<sup>77</sup>.

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<sup>70</sup> International Convention Relating to the Arrest of Sea-going Ships, 1952, art.3 (2); International Convention on Arrest of Ships, 1999, art.3 (2).

<sup>71</sup> The International Convention on Limitation of Liability for Maritime Claims, 1976, and its predecessors (the International Convention for the Unification of Certain Rules Relating to the Limitation of the Liability of Owners of Sea-Going Ships, 1924, and the International Convention Relating to the Limitation of the Liability of Owners of Sea-Going Ships, 1957).

<sup>72</sup> ALLS, art.3 (1).

<sup>73</sup> ALLS, art.7.

<sup>74</sup> ALLS, art.3 (1). Salvors are also entitled to limit their liability in the same way (see ALLS art.3 (2)).

<sup>75</sup> ALLS, art.33.

<sup>76</sup> ALLS, art.7 (6).

<sup>77</sup> ALLS, art.76.

## **7. Other Rules Unique to the Maritime Law**

### **(1) Torts Liability of the Carrier**

#### Collision

The liability of the carrier with regard to collision is nothing but a usual tort liability governed by the Civil Code<sup>78</sup>. However, as regards the case of collision between two or more ships, the general rule in the Civil Code is excluded unless all the persons interested belong to the same state as the court trying the case, as a result of Japan's being a State Party to the 1910 Collision Convention<sup>79</sup>. Contrary to the general rule that the shipowners shall be liable jointly and severally if all of them are found negligent<sup>80</sup>, under the said Convention, the shipowner of each ship shall be liable in proportion to the degree of fault respectively committed, except as regards damages caused by death or personal injury<sup>81</sup>.

#### Oil Pollution

The liability for oil pollution resulting from the escape or discharge of the oil carried on board a ship as cargo is also a special case of tort liability. However, a very unique regime has been established and accepted by many states regarding this type of damage. The regime is devised in order to have the burden shared between the shipping industry and the oil industry, as well as to ensure larger compensation to the damaged party than is normally available to maritime claims under the limitation of liability procedure. Japan is a State Party to both of the two Conventions that make up this regime, namely the International Convention on Civil Liability for Oil Pollution Damage, 1969, as amended (CLC), and the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971, as amended (FC), and has enacted the Act on Civil Liability and Compensation for Oil Pollution to implement them.

The basic feature of CLC is the strict liability for oil pollution damages upon the registered owner of the ship, the compulsory maintenance of liability insurance to cover such liability, and the channeling of the liability to the registered owner<sup>82</sup>. It is unique to this regime that the registered owner, contrary to the traditional shipowner or carrier, is held to be the subject of liability, even though the registered owner may be the financier or a lessor of the ship having no engagement with the maritime activities. These features

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<sup>78</sup> Civil Code, art.709.

<sup>79</sup> The International Convention for the Unification of Certain Rules of Law Relating to Collision Between Vessels, 1910, art.12, proviso 2. The Convention is directly applied in Japan as a self-executing convention.

<sup>80</sup> Civil Code, art.719.

<sup>81</sup> The International Convention for the Unification of Certain Rules of Law Relating to Collision Between Vessels, 1910, art.4.

<sup>82</sup> Channeling of the liability means that the damaged party can sue only the registered owner and no one else. The registered owner, having compensated the damaged, can raise suit of recourse against others.

are, of course, codified in the Act on Civil Liability and Compensation for Oil Pollution<sup>83</sup>.

The FC has established the International Fund to provide additional compensation to the damaged besides sharing partly the burden that the registered owner owes under the CLC. Contribution to the fund is required of each state in proportion to the amount of the crude oil imported via carriage by sea<sup>84</sup>. The Act on Civil Liability and Compensation for Oil Pollution provides that those who were delivered crude oil in the preceding year shall contribute to the International Fund in accordance with the amount delivered<sup>85</sup>.

## **(2) Regimes *sui generis***

### General average

The Commercial Code of Japan, as in all other maritime laws in the world, provides for a unique system of loss sharing called general average<sup>86</sup>. It is a body of rules to share costs and losses incurred in the course of having the ship get out of emergency that would otherwise have endangered the ship and the whole cargo. However, it is to be noted that presently the provisions in the Commercial Code play a very limited role, since the York-Antwerp Rules promulgated by Comité Maritime International (CMI), updated most recently in 1994, are incorporated in the bills of lading without exception and govern all the cases of general average.

### Salvage

It is also provided in the Commercial Code that those who were successful in salvaging of a ship or cargo involved in an accident shall be entitled to remuneration<sup>87</sup>. This and related provisions, originally intended to encourage salvage by giving incentives for it, is again of a rather limited importance, since salvage is conducted by specialised enterprises these days. Such a salvage company enters into an agreement for salvage with the shipowner when an accident occurs. As conditions for such an agreement, the Lloyds Open Form (LOF) is widely used.

## **8. Scope of Application**

The scope of application of the maritime law does not differ from that of any other law. As long as the subject matter belong to the private law, which means the legal relationship between private parties, then the governing law shall be decided according to

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<sup>83</sup> See arts.3, 13 of the Act.

<sup>84</sup> FC, art.10.

<sup>85</sup> The Act on Civil Liability and Compensation for Oil Pollution, art.30.

<sup>86</sup> Commercial Code, arts.788-796.

<sup>87</sup> Commercial Code, art.800.

the rules on the choice of law of the state of the court trying the case. Since the conflict-of-law rules in Japan provides that the governing law on a contract can be decided by the agreement of the parties to it<sup>88</sup>, the ICOGSA was applied in a case where Malaysian lumber was carried from a port in Malaysia to a port of Taiwan by a Taiwanese carrier, just because every party agreed before the Japanese court that the Japanese law should govern<sup>89</sup>.

If, after this process, it is found that the Japanese law is to govern the case, the scope of application of relevant provisions must be examined. The basic rule is that the maritime law of Japan, being a part of the Commercial Code or special statutes to supplement the Code, is applied only to activities surrounding a ship used for commercial navigation<sup>90</sup>. Navigation means a journey on the sea, as opposed to inland waters, the latter being rivers, lakes and ports. However, considering that activities of a ship used for non-commercial navigation, such as ships used for fishery, may have much in common with the case of commercial navigation, the rules of maritime law is to be applied *mutatis mutandis* to activities of such ships<sup>91</sup>.

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<sup>88</sup> Act concerning the Application of Laws (Hôrei), art.7.

<sup>89</sup> Taiwan Fire & Marine Insurance Co., Ltd., v. Unison Navigation Corp., Hanrei Jihô no.1737, p.135 (Appeals Court of Tokyo, 14 Sept. 2000).

<sup>90</sup> Commercial Code, art.684.

<sup>91</sup> The Shipping Act, art.35 (Law no.121 of 1959), as amended.