# *WaveLength*

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# Japanese Maritime Law for Oil Pollution

*Yosuke Tanaka**

## 1. Introduction

This is to summarize the Japanese law to be applied to the cases in which oil pollution is to occur by the accidents of vessels on the sea, and to introduce relating other matters, including the practices and some disputes among lawyers, academics and judgments in Japan relating to such areas of law.

## 2. Summary of laws

(1) CLC and FC

(a) Firstly, Japan ratified the 92 CLC (International Convention on Civil Liability for Oil Pollution Damage, 1992) and the 92 FC (International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992), including the Protocol 2003 to the 92 FC to create the so-called "third tier".

(b) We had ratified the 69 CLC and the 71 FC and then enacted domestic legislation in 1975 to incorporate CLC and FC scheme into Japanese law, which are named as "Act on Liability for Ship Oil Pollution".

After ratification of the 92 CLC and FC, we amended the Act to incorporate the new scheme.

(c) Under the current Act, the Owners of the tankers must bear the absolute liability for the damage caused by the spilt oil carried by their tankers and other parties relating to the vessel does not owe the liability ("sole liability").

However, the Owners can limit their liability unless the damage is proved to have been caused by the "act or omission, committed with the intent to cause the loss, or recklessly and with knowledge that such loss would be probably result".

The victims can claim for the compensation against the PI Club with which the Owners of tankers is obliged to make insurance contract, and also against the International Compensation Fund for the damage amount over the limitation permitted to the Owners.

(d) The limits of liability of the Owners under the current Japanese Act are as follows;

Minimum liability for ships of 5,000 tons or less; 4.512 mil. SDR
Liability per ton in addition to minimum liability; 631 SDR
Maximum Liability; 89.7 mil. SDR

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The Owners have to set up the limitation fund to the court and it is distributed among the victims ("creditors") by the trustee who is appointed by the court.
(e) The victims can claim directly the International Oil Pollution Compensation Fund ("IOPC Fund") for the amount which is exceeding from the limited amount of the Owners' liability up to 750 mil SDR as the "third tier".

(2) Oil Pollution from Non-Tanker
(a) As to the oil pollution caused by the bunker oil spilt from Non-tanker vessels, the Bunker Convention (International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001) has come to effect in November, 2008, which Japan has not ratified it yet.
(b) However, we established the almost same rules as the Bunker Convention by amending the Act on Liability for Ship Oil Pollution, which amendment came into effect in March, 2005.

The difference between the Bunker Convention and the Japanese Act is the latter requires the vessel with more than 100 tons to execute the insurance contract to ensure the cost for oil pollution, though the former requires it to the vessel with more than 1,000 tons.
(c) Under the current Japanese Act, the Owners of the non-tanker vessel can limit their liability according to the general Limitation of Liability Procedure.

As to the Limitation Procedure, Japan ratified the 76 LLMC (Convention on Limitation of Liability for Maritime Claims, 1976) and the Protocol, 1996.

We enacted the domestic law named as "Act for Shipowners Limitation of Liability" in May, 1984 to incorporate the 76 LLMC scheme into Japanese law. After the 96 Protocol came into effect in May, 2004, the amended Act came into effect in August, 2006.
(d) The limits of liability of the Owners under the current Japanese Act for general Limitation Procedure are as follows,

In case of the property damage only;
Minimum liability for ships of 2,000 tons or less; 1 mil. SDR
Liability per ton in addition to minimum liability
for ships of more than 2,000 up to 30,000 tons; 400 SDR
for ships of more than 30,000 up to 70,000 tons; 300 SDR
for ships of more than 70,000 tons; 200 SDR

In case of personal injury/property damage;
Minimum liability for ships of 2,000 tons or less; 3 mil. SDR
Liability per ton in addition to minimum liability

for ships of more than 2,000 up to 30,000 tons; 1,200 SDR
for ships of more than 30,000 up to 70,000 tons; 900 SDR
for ships of more than 70,000 tons; 600 SDR

(e) The Owners who caused pollution by their non-tanker vessels can limit their liability according to the above general Limitation Procedure unless the damage is proved to have been caused by the "act or omission, committed with the intent to cause the loss, or recklessly and with knowledge that such loss would be probably result".

However, the Owners of non-tanker vessels may owe the liability together with other parties as the "joint and several liability".

We do not have the similar system of IOPC Fund for such bunker damage, so the victims of such damage cannot claim more than the limited amount.

(3) MARPOL Convention

(a) With respect to the measures to prevent the oil pollution or oil spills from the vessel, MARPOL Convention (International Convention for the Prevention of Pollution from Ships, 1973) and the Protocol, 1978 came into effect in October, 1983.

Japan ratified it in June, 1983 and enacted relevant domestic law as "Act for Marine Pollution Prevention".

(b) Under the current Japanese Act, local government can issue the order to remove the wreck and take the preservation measures to prevent the marine pollution.

(4) Other Conventions

(a) With respect to the pollution by hazardous substances, the HNS Convention (International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea) was enacted.

As to the rights of the coastal states to remove the left wreck, the Nairobi International Convention on the Removal of Wrecks 2007 was also enacted.

(b) However, Japan does not have the intention to ratify those conventions.

## 3. Relating Matters

(1) Practices in Japan

(a) Japanese court does not have any special courts for maritime cases, so the Limitation Procedures for the 92 CLC and 96 LLMC are handled by the Bankruptcy Department in the District Court, which court is mainly assigned the first instance procedure in civil procedures.

The reason why such departments are assigned such role is that the procedure to divide the limitation fund is similar to the procedures in bankruptcy procedure.

In the same way as the bankruptcy procedure, a lawyer is appointed as the trustee to check the credits and distribute the fund among creditors. However, lawyers who do not have a lot of experiences in Maritime law can be appointed and some delay may be caused in the procedure.

(b) As to the setting-up the limitation fund, we usually put up the cash to the court.

We can generally use the bank remittance system to pay some money to the court, however, the LLMC scheme requires us to fix the amount of SDR on the day one day before the application for Limitation Procedure, so it should be noted that the amount must reach the bank account of the court on the next day when we fix the amount of SDR.

(2) Compulsory Entry to PI Club

(a) As the result of the amendment of Act on Liability for Ship Oil Pollution in March, 2005 as described above, we established the new rule that all of vessels with more than 100 tons have to execute the PI insurance contract to ensure the cost for oil pollution and wreck removal before they enter Japanese territory. All of the vessels must have on board the certification for such contract, and some vessels can be checked at the Japanese port such certification by port authority.

(b) This rule was affected from the facts that many wrecks were left without being salvaged and become dangerous subjects for pollution and navigation of other vessel. In order to reduce such danger, the government enacted the new rule for compulsory requirement for all of the vessels to enter any Japanese ports.

(3) Disputed Problem

(a) In the procedure for the Limitation Procedure, it is disputed whether the claim from the Japanese government to remove the wreck or take preventive measures to avoid expansion of spilt oils can be limited by the Limitation Procedure or not.

(b) Some lawyers are in the opinion that such claims can be included into the “Limited Claims” as far as the words of the law permit it and it should not be considered whether it is claimed from the government or not.

However, majority lawyers think that if the government claim, which is finally reimbursed by tax, can be limited by the procedure, the Owners who do not try to take measures, in which case the government managed to take measures in place of them, can obtain benefit more than the Owners who voluntarily take such measures, therefore, the claim from the government can not be limited and can be enforced against the owner outside of the Limitation Procedure.

(4) Disastrous Experience

(a) As to the claim from the government, it reminds us of our unforgettable experience of

the accident of the tanker, “Nakhodka”. In the accident, the Russian tanker sank and broke into two parts in Japan Sea, and crude oil of more than 6,200 tons were spilt and more than 400 km in the Japanese coast were polluted.

About 35,800 mil Yen were claimed from Japanese government, local governments, hotels groups in the coast, fishery groups and so on. The amount from the government was 17,000 mil Yen.

(b) The plaintiffs filed the procedure in Tokyo District Court, and before setting up the Limitation Fund based on the 92 CLC, all of the parties agreed with the compromise settlement.

After this disastrous events, Japan amended the requirement for the structure of tankers (e.g., double bottom plates) and practices of checking the tankers entering Japanese territory were amended severely.

# Salvage and Salvage Agreement in Japan

*Yasuma Ogawa**

## Salvage Scene

In Japan, the commercial salvage was started privately by Mr. Reizo Yamashina in Tokyo around 1883, while Mitsubishi Nagasaki Dockyard set up a salvage division in 1893. Mitsubishi Nagasaki Dockyard constructed themselves the "Oura Maru" of 672 tons gross with 1,000 horse power, which was the first dedicated steel-hull salvage vessel in Japan, for use in their salvage operations. These salvage companies were merged several times following the change of the times and situation, resulting in the set up of Teikoku Salvage Co., Ltd. in 1924. On the other hand, a leading marine insurer in Japan, The Tokio Marine & Fire Insurance Co., Ltd. set up within their marine claims department a salvage division, which eventually was separated and developed to form their own salvage organization, The Tokio Salvage Co., Ltd. in 1917. These two then leading salvage companies were liquidated to form a new company, The Nippon Salvage Co., Ltd. taking over most of the salvage vessels, equipment, salvage personnel and expertise which had been nourished for the last 40 years over.

The prominent salvage operations performed by the salvage companies before establishment of Nippon Salvage included the "Dakota" (20,718 grt) grounded in Chiba, Japan in 1907, the "Empress of China" (5,947grt) also grounded in Chiba, Japan in 1911, the "Minesota" (20,718 grt) grounded in Yamaguchi, Japan in 1915, the passenger vessel "Chiyo Maru" (13,426 grt) grounded in Hong Kong in 1916, the Chinese vessel "Tong Lee" grounded in Vietnam in 1917, the "Taisoku Maru" grounded in Philippines in 1919, the "Heffron" (7,906 grt) with some 900 Czechoslovakian soldiers on board grounded in Kanmon Straits in Japan in 1920, the "Glenamoy" (7,269 grt) grounded in Yangtze River, China in 1924, etc. Salvage operations were undertaken mostly on Lloyd's Standard Form of Salvage Agreement (LOF) for foreign vessels, while just a verbal agreement was made for salvage of the domestic vessels except for special cases.

## Salvage Agreement

The outbreak of World War II necessarily brought about an increase of damage to the insured vessels and cargoes, which were eventually required to re-insure with the government. In this connection, as requested by the relevant government authority,

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Nippon Salvage prepared two forms of salvage agreement; “Nissal Form One” which was an open form, and “Nissal Form Two” which was a lump sum form. In those days, there were many salvage works entrusted by Japanese Navy, to whom however a “no cure no pay” salvage agreement was not acceptable. These special agreement forms included the clauses which allowed the salvor to extend the agreed period of salvage operations whenever necessary and to be compensated with the costs and expenses incurred during the salvage operations within the values of the ship’s wreck and cargo remaining aground albeit unsuccessful. It was a salvage agreement close to a contract agreement but without any promise of accomplishment of successful salvage.

The Japan Shipping Exchange, Inc. (JSE) published a Salvage Agreement form in 1947 which was prepared taking into consideration the useful clauses contained in the Nissal Forms and the LOF then available. The form was based on “no cure no pay” and cost plus bonus, without any clause for compensation of costs and expenses within the remaining value of the wreck. However, the “Nissal Form” continued to be used not only by Nippon Salvage but also by other salvage companies in Japan as if it were a standard salvage agreement form in Japan. In reality however, the form was not actually signed but the verbal agreement was enough for execution of salvage operations under the mutual understanding that the services would be performed under the “Nissal Form”. On the other hand, LOF was usually used for salvage of foreign vessel.

In 1979, JSE form of salvage agreement was revised following the revision of LOF 1972. The new form, JSE 1979 was based on “no cure no pay” and there was no significant difference in the terms and conditions in principle to those of LOF. After publication of JSE 1979, Nippon Salvage as well as other Japanese salvage companies began to use this standard form for salvage of Japanese vessel. However, it was difficult in reality to change the old practice of assessing the amount of salvage remuneration on the cost plus bonus basis as the relevant clause in the form stipulated that the remuneration was to be decided taking into account the costs and expenses reasonably incurred by the salvor as a main factor, and the practice eventually remained to have been followed for a long time thereafter, which unfortunately obliged the salvor to be remunerated insufficiently in particular cases.

In 1985, JES form was revised to incorporate a safety net clause for salvage of a laden tanker, as so did LOF 1980. JSE form was further revised in 1991 to incorporate the special compensation clause, following the revision of International Salvage Convention 1989.

JSE form was again revised in 2005 incorporating Special Remuneration Clause which operates like SCOPIC Clause of LOF to complement the special compensation clause. Latest version available is JSE 2007 which was drawn up with a minor revision to JSE 2005 and is now widely used for most salvage cases in Japan and for some cases in other

countries.

Claims for salvage under JSE form is usually settled amicably through direct negotiation between the salvor and insurers on behalf of the shipowners or cargo owners. However, the complicated matter may be referred to an Arbitration at The Japan Shipping Exchange, Inc. There is also a Mediation system for salvage claims at JSE.

It is a practice for salvage claims under JSE form that the salvor prepares among other documentations a calculation of costs and expenses incurred during/for the salvage operations. The costs include the costs for salvor's own salvage crafts, personnel and equipment calculated with tariff rates, while a salvor prepares the out-of-pocket expenses for the claims under LOF. The amount of salvage remuneration is decided taking into account the costs and expenses as a main factor, salved values, dangers and other criteria comprehensively. It should be noted here that an Arbitrator at JSE arbitration found in his recent arbitral award to the effect that the salvage reward should not be of such a nature as can be decided by adding a certain percent increment as a bonus to the costs and expenses incurred but the total costs and expenses should be meant to be necessarily secured within the salvage reward, when the amount of reward should be determined taking all criteria into account comprehensively.

## Change of surroundings in salvage

Following the recent rapid development of maritime traffic rules, navigational aids, weather information services, communication systems, etc., the number of maritime casualty has been decreasing. On the other hand, the modern vessels have been becoming much larger and more complicated due to high-tech designed hull and machineries, which necessarily have been leading to soaring of the values of vessel and cargo to be salved. There has also been a rapid and tremendous increase in the kinds of chemicals, dangerous goods, pollutants, etc. Given such cargos stowed in some of the containers on board a large container vessel in serious disaster, the salvage would become very complicated/difficult and extremely expensive.

A large vessel also has a large quantity of fuel oils on board. Due to increasing demand for environmental protection today, the shipowner might possibly suffer more critical affects from his liability for the environmental damage caused by casualty rather than a loss or damage to his vessel. In such circumstances, the salvor's liability has overly increased when he undertakes salvage of a vessel, cargoes and bunkers in such an excessively risky situation. In relation to this problem, SCOPIC Clause of LOF or Special Remuneration Clause of JSE is working quite effectively for alleviation of the excessive liability of the salvor, who has now regained an incentive to undertake salvage voluntarily.

Many countries in Europe, South Africa, Australia, etc. adopted and are maintaining ETV (Emergency Towing Vessel) system in order to complement the limited private salvage resources in their own country, while United Kingdom has recently decided to cease the system due to financial reason.

There has been no ETV system in Japan, and the shipowner cannot expect the ETV for emergency. It is not economical for the shipowner to maintain his own in-house salvage personnel and facility and he has to seek for assistances from the professional salvor. Salvage business however is always unstable as nobody knows when a casualty occurs, while the professional salvor must continue to maintain and stand by his salvage personnel and facility ready to mobilize immediately to respond to any casualty once occurred, which necessitates the salvor to incur a lot of running costs particularly during the long idle time. These costs are difficult to find in the salvor's documentations to be disclosed for settlement of salvage claims. However, the salvor should be remunerated well enough taking into account such costs as well for encouragement of salvage, so that the salvor will survive to be of assistance to the shipowner in alleviating his liabilities once casualty occurred.

In Japan, Nippon Salvage is still a leading salvage company, having their own dedicated salvage vessels, equipment and salvage personnel always stationed at their salvage bases. They have been very active not only in Japan but also overseas and are expecting to be listed in the shipowner's contingency plan to serve them whenever necessary for any alleviation of shipowner's liability.

# Summary of TOMAC Arbitration

## International Arbitration Claiming for Insurance Calls and Premiums

The Claimants : Insurer
The Respondents : Assured

In relation to the disputes between the parties indicated in the attached paper A(omitted)., the undersigned arbitrators, appointed in accordance with Article 16 of the Rules of Arbitration of TOMAC of The Japan Shipping Exchange, Inc. make the award as follows:

### AWARD

1. (1) The Respondent, "Y1" shall pay to the Claimant the sum of US$30,658.39.
   (2) The Respondent, "Y2" shall pay to the Claimant the sum of US$20,804.06.
   (3) The Respondent, "Y3" shall pay to the Claimant the sum of US$30,058.61.
   (4) The Respondent, "Y4" shall pay to the Claimant the sum of US$14,088.57.
   (5) The Respondent, "Y5" shall pay to the Claimant the sum of US$3,125.40.
   Each Respondent shall pay the interest on the sum described above at five percent per annum from 21 May, 2009 until the completion of the payment.
2. Other Claims by the Claimant shall be dismissed.
3. The costs of arbitration shall be Yen1,071,000, 58% thereof shall be borne by the Claimant, 13% thereof shall be borne by "Y1", 9% thereof shall be borne by "Y2", 13% thereof shall be borne by "Y3", 6% thereof shall be borne by "Y4" and 1% thereof shall be borne by "Y5". Provided the Claimant shall pay to the Attorneys of both "Y1" and "Y2" the sum of Yen289,380. The Claimant shall bear the costs of arbitration which other Respondents should pay to The Japan Shipping Exchange, Inc. on their behalf and shall collect them from these Respondents in addition to the amount described above 1.
4. The claim for attorney's fees for "Y1" and "Y2" in order to respond to this arbitral proceedings shall be dismissed.

### Claim and Defense

**I. Claim Applied for by the Parties**

The Claimant

1. The Respondents shall pay to the Claimant, jointly and severally, US$231,218.48 and

the interest thereon at five percent per annum which started accruing from the date of filing of this application up to the completion of the payment.

2. The costs of arbitration shall be borne by the Respondents.

The Respondents ("Y1" and "Y2")

1. The Claimant's claim shall be dismissed.
2. The costs of arbitration shall be borne by the Claimant.
3. The attorney's fees for "Y1" and "Y2" in order to respond to this arbitral proceedings shall be borne by the Claimant.

**II. Gist of Statements by both Parties**

1. Grounds of the Claimant's Claim

(1) The Claimant, of which members are shipowners and others, is a mutual insurance association (hereinafter referred to as "the Association").

The Respondents are corporations doing shipping business as described in the attached Table A.

(2) In the period from the policy years commencing on 20 February 2005 to the policy year ending on 20 February 2008, each Respondent was a shipowning company of each ship respectively as indicated in the attached Table B (omitted) and was assured under the P&I insurance contract with the Claimant.

(3) The Supplementary Calls and Release Calls during each policy year stated above (2) were decided by the Board of Directors of the Claimant and Supplementary Calls and Release Calls for the Ship are indicated in the attached Table C (omitted).

(4) According to the Rule 15 of the Rules of Association (hereinafter referred to as "the Rules of Association"), "The Association may conclude a contract with more than one person in respect of one ship" and "The Joint Members shall be jointly and severally liable to pay all debts due to the Association" and "be liable for all of disclosing material information and others." And according to the Rule 14 thereof, the Association is entitled to treat the entry of two or more ships entered by one or more Members as an entry conducted with one Member" (hereinafter referred to as "Fleet Entry").

As the Respondents were the owners of the ships indicated in the Table B, they are jointly and severally liable to pay all Supplementary Calls and Release Calls concerned as indicated in the Table C in accordance with these provisions.

(5) Accordingly, the Respondents are jointly and severally liable to pay US$231.218.48 and the interest thereon at the rate of 5% per annum which started accruing from the date of filing of the application for arbitration up to the completion of the payment.

(6) As the Rule 46 of the Rules of Association provides that any dispute arising in respect of the insurance contract between the Association and Members shall be referred to the arbitration by The Japan shipping Exchange, Inc., Claimant applied for arbitration.

2. Defense and Statement by the Respondents

"Y1" and "Y2" were represented by Japanese attorneys (hereinafter referred to as "the Attorneys") and they stated as follows:

(1) "Y1" and "Y2" admitted the Claimant's statement (1).

(2) "Y1" admitted that it was the owner of the "ship 1" and "Y2" admitted that it was the owner of the "ship 2", during the specified term indicated in the Table B respectively, but they did not admit other Claimant's statements. "Y1" and "Y2" had not entered into any insurance contract with the Claimant by themselves as the Claimant stated. "Y1" and "Y2" had not given power of attorney to the bareboat charterers "C1" and "C2" to conclude insurance contracts. The Clause 13 of Barecon 2001, a standard form of bareboat charter, does not provide that the shipowner gives the charterer the power of attorney to conclude an insurance contract and "Y1" and "Y2" did not give an approval in writing as provided therein.

"Y1" and "Y2" were the owners of "ship 1" and "ship 2" respectively and were Co-Assureds during a specified term, but this was because the bareboat charterers contracted with the Claimant insurance contracts for "Y1" and "Y2" as third parties. Accordingly "Y1" and "Y2" are not liable to pay any Call to the Claimant.

(3) The Claimant's statement (3) is unknown to "Y1" and "Y2".

(4) The Claimant's statement (4) is unknown to "Y1" and "Y2".

(5) The Supplementary Call and the Release Call are unknown to "Y1" and "Y2", but they dispute on the other points of the Claimant's statement (5) and are not liable for the payment of any Call.

(6) "Y1" and "Y2" had concluded bareboat charters with"C1" or "C2" respectively, however never given the bareboat charterers power of attorney to conclude a insurance contract, become Members nor parties to any insurance contract.

Consequently, the Rules of Association do not apply to "Y1" and "Y2" and there is no arbitral agreement under the Rule 46 of the Rules of Association between them and the Claimant. As the application for arbitration by the Claimant is unlawful, such application should be dismissed.

3. "Y3", "Y4"and "Y5" did not only attend before the Arbitral Tribunal, but never filed their defense, statement or evidence.

## III. Evidence

The Claimant submitted Claimant's evidence 1 to 34 and the Attorneys submitted Respondents' evidence 1 to 14. Both parties did not dispute the original and existence of such evidence.

## Reasons

**1. Summary of the case**

The Application for Arbitration by the Claimant is a claim for joint and several payment by five Respondents of the Supplementary Calls and the Release Calls during the policy years from 20 February 2005 to 20 February 2008 which amounted to US$231,218.48 under the Rules 14 (Fleet Entry) and 15 (Joint Entry) of the Rules of Association.

"Y1" admitted that "Y1" had entered into bareboat charters with "C1" and "C2" respectively in respect of the ships indicated as "Contract Number 5, 6 and 7" in the Table B, and also "Y2" admitted that "Y2" had entered into bareboat charter with "C1" in respect of a ship indicated as "Contract Number 18" in the Table B. However, these Respondents stated that they had never authorized "C1" to become a member of the Claimant and enter into insurance contracts with the Claimant on their behalf and that there were no arbitration agreements and insurance contracts.

Thus, the issues to be determined in this arbitration are whether these Respondents were the members of the Claimant and entered into the insurance contracts with the Claimant, and if so, how much these Respondents should pay to the Claimant as Supplementary Calls and Release Calls.

**2. Entry and Contract**

(1) Where bareboat charters were entered into, the charterers have generally dealt with the business of hull insurance (including war insurance) and P&I insurance on their own account. In general, bareboat charterers enter into hull insurance (including war insurance) on their own names for shipowners as the assured (insurance for third parties). On the other hand, P&I insurance is a mutual insurance, and so bareboat charterers not only become members of a P&I club but also do their business of entering into P&I insurance contracts on behalf of the shipowners concerned. In many cases bareboat charterers are authorized to select the appropriate P&I club (a member of International Club in most cases) and enter into P&I insurance at their discretion, although the intention of owners may be given to the bareboat charterers in some cases. Such practice has been made for a long period and well known to the shipping circles. Accordingly on entering the P&I club, the owners, types, gross tons, class and other necessary items of the ship should be informed to the P&I club concerned without showing the power of attorney or approval of the owners in writing, which the club does not require. This could be the international commercial practice.

Bareboat charter is generally concluded by using such standard contract forms as BARECON 2001 or BAREBOAT CHARTER of The Japan shipping Exchange, Inc. These forms include a clause which requires bareboat charterers to bear the costs and

expenses for Hull and Machinery, War and Protection and Indemnity risks and to enter into insurance contracts in order to protect the interests of shipowners, bareboat charterers, ship-mortgagees and shipmanagers. Such clause, for instance, Clause 13 of BARECON 2001 and Clause 10 of JSE form, is an expression of the said commercial practice.

Each bareboat charter was entered into on BARECON 2001 between "Y1"and "C1", between "Y1" and "C2" and between "Y2" and "C1"(Respondent's Evidence 1). These Respondents stated that Clause 13 merely imposed the charterer to do the business of entering into the insurance contracts and pay the calls and premiums, and did not entitle the charterer to become a member of P&I club and to enter into the insurance contracts for and on behalf of the owners. However, as the P&I insurance is a mutual insurance and many P&I clubs do not approve non-members to conclude insurance contracts with them, such interpretation of Clause 13 by the Respondents is difficult to be said reasonable against the established commercial practice. Accordingly, this Clause should be construed that the charterers are obliged to insure the ship concerned and that they are entitled to do so under the name of her owners, if necessary.

(2) In accordance with the Japanese law concerned a member of the Association cannot conclude any insurance contract for third party as assured, but it can do so for members of the Association.

However, under the Rules of the Claimant, it may conclude a contract with more than one person (Joint Members) in respect of one ship (Rule 15(1)) and the Joint Members shall be jointly and severally liable not only to pay all debts due to the Association concerning the entered ship, but be under the other obligations and liabilities as members (Rule 15 (2)-(7)). It must be construed that the Claimant does not approve an insurance contract to be concluded for third parties under these provisions. Because it is not appropriate for a person to be favoured by insurance without any obligation to the insurer in consideration of the nature of the mutual insurance. In other words, when the Claimant entered into an insurance contract with a bareboat charterer dealing with a shipowner as a joint member, advance call should be paid by the bareboat charterer at the time of the contract and there would be no problem concerning the conclusion of the contract. Afterwards when supplementary calls or release calls are necessary to be levied on the members by the Claimant, if those who are favoured with P&I insurance are not liable for payment of such Calls, the mutual insurance association would face the difficulties of its management and lose impartiality between members. This provision is said to be a provision for obligation of payment of supplementary calls or release calls for fear of any breach of obligation or non-payment of such calls by a member. (If the bareboat charter provides that the charterer shall bear such calls, shipowner will reclaim from the charterer the money paid as such calls.) Accordingly, even if there is a possibility of construing the

Japanese law concerned that a member of the Association can conclude an insurance contract with the Association for third party as assured, the Rules of Association do not approve such dealing.

(3) While the Articles of the Association provides that a shipowner is entitled to become a member of the Claimant, according to the Rule 1 of the Rules of Association any person desiring to insure his ship shall submit to the Association an application form (including an "Application for Membership") stating the ship which is a subject matter of insurance ("Entered Ship") and other items specified therein and then the contract of insurance shall be deemed to come into effect and at the same time he becomes a member of the Association when the said application has been approved by the Association and a part or whole of calls or premiums have been paid. Thus as the Respondents were the members of the Claimant, any dispute between them and the Association in respect of the insurance contract can be referred to the arbitration by The Japan Shipping Exchange, Inc., and the application for arbitration by the Claimant is not against the Rules of Arbitration thereof, this application is lawful.

**3. Debts and Sum to be Borne by the Respondents**

(1) As for a ship under the bareboat charter, a shipowner, bareboat charterer, ship-mortgagee, shipmanager, and so on have interests respectively in her, and then it is necessary for P&I insurance to make these persons enjoy the insurance as members. According to the Rule 15 of the Rules of Association persons other than bareboat charterer can become Co-Assured Members (Joint Members) in respect of the Entered Ship and be assured within the insured sum of the ship. On the other hand, in case of a failure of payment of any Call by the bareboat charterer Joint Members have to be jointly and severally liable to pay it to the Association. This provision is, as stated before, a reasonable one aiming at impartial interests between the members and the Association.

(2) By the way, the Rule 14 stipulates that if a debt to the Association remains outstanding in respect of any Member who forms part of a Fleet Entry, all the Members of the Fleet Entry shall be jointly and severally liable to pay the debt. However, if the shipowner is liable to pay the debts arising in respect of a ship owned by other shipowners which forms part of a Fleet Entry by the bareboat charterer, such Fleet Entry will compel the shipowner to pay all Calls and other debts which are no concern with him against his will. If such construction is correct, the shipowner who has been made a Joint Member by the bareboat charterer, will be obliged to bear all debts with no restriction. The rule for Fleet Entry is provided for underwriting purposes where a bareboat charterer wants to insure the all ships together under his control and it should be construed that a shipowner are jointly and severally liable for debts exclusively arising from the policy which describes his name as a Joint Member of the specified ship.

(3) The Arbitral Tribunal considered the Insurance Contracts (Contract Number 1~31) indicated in Table B with the Certificates of Entry(Claimant's Evidence 2-1 to 31), Guidance of the Advance Call (Claimant's Evidence 4-1 to 3), emails concerning "Y1" (Claimant's Evidence 6-1 to 13 and 7-1 to 6), emails concerning "Y2" (Claimant's Evidence 8-1 to 4), emails concerning "Y2" (Claimant's Evidence 9-1 to 12), emails and other documents concerning "ship 3" and "ship 4" (Claimant's Evidence 10-1 to 16) and the oral statements before the Tribunal and other documents filed by both parties, and approved that Contract Number 1~31 in the Table B had been concluded.
(4) Each amount of Supplementary Calls and Release Calls during policy years 2006, 2007 and 2008 is described in Table C in accordance with the Special Circular 06-006 dated 21 November, 2006 (Claimant's Evidence 25), the Special Circular 07-007 dated 19 November, 2007 (Claimant's Evidence 26) and the Debit Note following such Special Circulars (Claimant's Evidence 3-1~24). The Tribunal admitted that such description was reasonable. Among the Respondents, "Y1" shall be liable to pay debts due to the Claimant as the shipowner under the Insurance Contract indicated as "Contract Number 5, 6 and 7" in the Table B, and in the same way other Respondents shall be liable to pay debts due to the Claimant, i.e. "Y2": "Contract Number 18", "Y3": "Contract Number 2, 3 and 4, "Y4": "Contract Number 11" and "Y5": "Contract Number 12, 13 and 14". Consequently each amount to be paid to the Claimant by each Respondent shall be as indicated in the Table D (omitted).

Since the owners of ships under bareboat charter contract described in the other contract numbers are not the Respondent, it can not be said that the Respondents are held liable for any Supplementary Call or Release Call arising out of such contract numbers, even though the bareboat charterer of "C1" or "C2" are concerned with as joint members.

**4. Conclusion**

According to the Rules of Association the contract of insurance shall come into effect and concurrently bareboat charterers and owners of the ship concerned become Joint Members of the Association when a part or whole of calls or premiums have been paid. Thus, any dispute between them and the Association in respect of the insurance contract can be referred to the arbitration by The Japan Shipping Exchange, Inc., and the application for arbitration by the Claimant is lawful.

The Claimant can reasonably require of the Respondents the payment of the Supplementary Calls and Release Calls, if each Respondent was a Joint Member of the Claimant in respect of the concerned ship, but the claims for such Calls concerning other Fleet Entry ships are unreasonable and the amount to be paid to the Claimant by each Respondent is as described in the Award 1 above. Consequently other claims by the Claimant should be dismissed.

The costs of arbitration shall be Yen1,071,000 and ratio of each party shall be decided as described in the Award 3 in consideration of fairness between the parties.

As for the Claim for the attorney's fees submitted by the Respondents, the Tribunal did not find a reasonable ground to be paid, in spite of the provision of Article 44 (2) of the Rules of Arbitration and decided as described in the Award 4.

Under the circumstances, the Tribunal held as stated the above Award.

Place of Arbitration: Tokyo
Date of Arbitration: 24 December, 2010
The Japan Shipping Exchange, Inc.
Tokyo Maritime Arbitration Commission (TOMAC)

Arbitrator: Akira Takakuwa

Arbitrator: Masakazu Nakanishi

Arbitrator: Motohiro Sugiura

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