Wave Length

JSE Bulletin No. 59
March 2014

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Published by The Japan Shipping Exchange, Inc.
Wajun Building
Koishikawa 2-22-2
Bunkyo-ku
Tokyo 112-0002
Japan

ISSN 0448-8741

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Total Loss of Ship Arising From Collision at Sea

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1. Introduction

Ship collision incidents may occur in foreign territories or high seas and these ships may be of foreign registry. Due to such nature, collision actions can be complex, lead to many different issues and involve different jurisdictions and systems of law.

This Article only deals with Apportionment of liability and damages for a total loss arising from a collision under Japanese law[1]. It is beyond the scope of this Article to deal with every possible item of damages, but principal items of damages for a total loss are dealt with therein.

2. Apportionment of liability between colliding ships

Liability for collision damage is based upon fault. The Japan Coast Guard (JCG) conducts an investigation for criminal proceedings where the collision occurred. The Master and crewmembers are normally examined by the JCG. Once the criminal proceeding is closed i.e. sentence was finalized, the resulting statement is disclosed subject to prosecutors' approval. The Japan Transport Safety Board (JTSB) routinely investigates collisions for purposes of establishing what happened in order to improve safety in the future. JTSB issues and discloses the investigation report to public. Also, the Japan Marine Accident Tribunal gives crewmembers with a Japanese license administrative punishment. The report and ruling are very convincing evidence.

In case it is impossible to determine the extent of the proportion of the respective faults, the liability of the colliding ships is apportioned equally. On the contrary, in case it can be determined, each ship will bear liability in proportion to their respective faults (Article 797 of the Commercial Code), i.e. one such ship can recover against another ship only to such a proportion of his damage as corresponds to the degree of fault of that ship.

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[1] Japan is a party to the 1910 Convention for the Unification of Certain Rules of Law with respect to Collisions between Vessels and 1972 Convention on the International Regulations for Preventing Conllisions at Sea, however, has not ratified the 1952 International Convention for the Unification of Certain Rules Relating to Penal Jurisdiction in Matters of Collision and other Incidents of Navigation or the 1952 International Convention on Certain Rules Concerning Jurisdiction in Matters of Collision.

Where a collision was occasioned by the fault of both ships and both were damaged in the collision, there is an issue whether their respective claims should be set off against each other and the balance remains (so-called single liability doctrine) or their respective claims should remain separately (so-called crossing-over liability doctrine).

There is no judicial precedent of the Supreme Court about this matter, but a judgment of the Tokyo District Court admitted the so-called crossing-over liability doctrine[2]. The doctrine is consistent with the opinion shared by majority of maritime law scholars[3].

In practice, once the claim has been assessed and the percentage representing collision liability is applied to the claims, the claims are then set off to discover the amount payable by one ship to the other. It is this set-off figure to which the limitation provisions apply so that one can never be certain that limitation is of relevance in any matter until final claims are agreed. However, in many cases, it is possible to estimate when limitation will apply. In any event, under the Limitation of Shipowner's Liability Act, if a limitation fund is established and it is ultimately discovered that limitation does not apply i.e. the set-off figure is lower than the limitation fund established, then the party seeking to limit can obtain a refund of the balance from the court and the party seeking to recover will receive only the set-off figure and no more.

3. Damages

(a) General principle

The law of tort is generally applicable to collisions at sea in the same way as it is applicable to torts on land[4]. In general, owners of colliding ships have to place owners of innocent ships as closely as possible to the same position they were at before the collision ("Restitutio in integrum"). Unless other intention is manifested, the amount of the damages shall be determined with reference to monetary value (Article 417 and Article 722 Section 1 of the Civil Code). With respect to this matter the judgments are piling up and the

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[2] 16 Kaminshu No.7, 1257 (Tokyo D. Ct., 20 July, 1965).

[3] Takashi Hakoi, Masahiro Amemiya, Satoshi Nakaide, Tadahiro Matsuda, Jumpei Osada, *The Law of Marine Collision*, 93 (2012).
In practice, normally the extent of the proportion of the respective faults can be determined. Therefore, collecting evidence for especially apportionment of liability is very important. The best opportunity for collecting evidence is immediately after the collision when all the witness are still on board and the events are still fresh in their minds. In some cases, local ship's agent is also very helpful in assisting claim handling and information collection. The collection of evidence such as charts, rough logs, notes, course records, VDR data and Als data etc. is vital.

[4] The Lisbon Rules were drafted by the Comite Maritime International (CMI), at Lisbon, in 1985. They have no legal force and they are not designed to deal with the question of liability. Their sole purpose is to provide a uniform method of assessment of damages arising from collision and to save both parties time and expense otherwise incurred in proving their respective claims. However, in Japan it is but seldom that the parties agree that their respective claims arising out of the collision shall be assessed in accordance with the Rules.

following precedent theory[5] is established in Japan;

Article 416 of the Civil Code[6] as to assessment of loss and damage in case of breach of contract shall apply to tort cases likewise[7].

It is stipulated in Article 416 of the Civil Code that;-

(i) A demand for damages shall be for compensation from the obligor for such damages as would ordinarily arise from the non-performance of the obligation-duty.
(ii) The obligee may also recover for damages which have arisen through special circumstances, if the parties have foreseen or could have foreseen such circumstances.

The claimant is entitled to compensate for loss and/or damage which would have been able to be anticipated to occur before the tort from the view-point of reasonable people[8].

(b) Value of ship

Where a ship has sunk as a result of a collision and cannot be salved and restored to useful service in an economical manner, she has become a total loss. A ship is a

[5] Minshu No. 5, 386 (Sup. Ct., 22 May, 1926).

[6] This concept is considered to have been introduced from England i.e. the famous case, Hadley v Baxendale.

[7] If a victim sustains loss and/or damage and the claim stands within the category of foreseeablity, then the victim is entitled to damages even if he/she does not sustain any damage to the property. We have many precedents in which tenants of offices and shops were permitted to claim economic loss when the rented offices and shops were damaged by negligence of the third parties. In this sense, under Japanese law, theoretically speaking, a time charterer of a ship can claim his own loss when his chartered ship is involved in marine accidents. However, in most of cases, time charterers do not sustain economic loss because in such cases ships become off-hire, and charterers do not need to pay for that period. However, if time charterers sustain additional loss which cannot recovered by off-hire and such economic loss would have been able to be anticipated by the tortfeasor before the accident, then such economic loss would be recoverable to the extent of the requirement of special circumstances provided for Article 416 of the Civil Code.

[8] Under Article 95 of the Limitation of Shipowner's Liability Act (1996 Limitation Convention) ships causing damage to other ships can be arrested because such claims create a maritime lien. The lien becomes time-barred after the lapse of one year from the date of the accident (Article 847 of the Commercial Code). Japan is not a signatory of 1926 Convention, of 1967 or of 1993 Convention relating to Maritime Liens and Mortgages. The district court which has territorial jurisdiction over the place where the subject ship is currently located has jurisdiction for the enforcement of maritime lien on her by way of public auction. We have two kinds of major view regarding governing law with respect to creation and validity of maritime lien. One is that both the law of the subject ship's flag and the law governing the claim to be secured by the maritime lien should apply and provided that both affirm creation of maritime lien, a Japanese court recognize the maritime lien. Another is that only Japanese law applies i.e. the lex fori principle.

constructive total loss when the cost of salvage and repairs would exceed the ship's market value at the date of the collision.

When a ship has become a total loss, the owner's damage will be measured by the market value at the date of the collision[9], i.e. even though a repair would be physically feasible, damages are limited to the value of the ship.

The value is calculated by reference to the type, age, condition, nature of operation of the ship, hire or freight market, costs for construction of a new similar ship and any other relevant factors. Salvage value of a wreck, if any, should be deducted from the market value. In practice, the value of a ship is proved by calling evidence from marine experts such as the Japan Shipping Exchange, Inc, surveyors or shipbrokers.

(i) How much owners of a lost ship can recover from owners of a colliding ship when the market value of the ship has changed between the time of the collision and the time when a hearing is concluded.

In The FUKIMARU[10], she sank as a result of a collision. World War I broke out after several months of the collision and then the demand for ships had gone up sharply. Accordingly the market had exploded, but some time later the market turned and deteriorated. The value of FUKIMARU at the time of the conclusion of the court hearing returned to the same level as that at the time of the collision. The plaintiff insisted on compensation at the highest value. However, it was held that the recoverable amount should be the just market value when the collision occurred unless the defendant foresaw or should have foreseen that the plaintiff could have earned more than that value by disposal of the ship or other means if the collision had not occurred.

(ii) Which market's value is taken to be ascertained.

The opinion shared by majority of maritime law scholars is that the market value of the port of registry should be taken[11]. However, in view of the fact that most of ocean-going ships are flag-of-convenience ships, the market value of the port of registry does not seem to be necessarily reasonable.

(iii) Ships without market value

A ship may have a value peculiar to itself, having regard to its special construction or use, or the position or occupations of the owner such as warships, fishing boats, dredgers.

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[9] 11 Minshu No.1 170 (Sup. Ct., 31 January, 1957), Hanrei-Times No.141, 148 (Kobe D. Ct., 15 December, 1962), Hanrei- Jiho No748, 77 (Tokyo D. Ct., 17 June, 1974) and others.

[10] Supra note 5.

[11] Takashi Hakoi, *The Maritime Law*, 361 (2nd ed. 2013). There is no precedent regarding this issue.

If the lost ship cannot fairly be valued at a market price, then the basis of assessment may be the special value of the ship to her owners. In these cases the reproduction cost less depreciation by age or scrap value may be evidence of value at the date of collision[12].

In *The Toyomaru*[13], a fishing boat became a total loss due to collision. There was no market for such fishing boats. However, the owner of the sunken fishing boat could purchase a similar fishing boat. Gross tonnage of both the sunken boat and the substitute boat was almost same and their engines were the same type and age, however, hull of the substitute boat was seven years newer than the sunken boat. The Supreme Court upheld the decision of the appeal court that as far as the owners does not have intention to make excessive profits with the collision, even though the substitute boat was not totally same as the sunken boat, the owner shall be entitled to damages equal to the cost of purchasing a similar boat.

(iv) Insured value

With respect to hull insurance, insured value is agreed between owners and hull underwriters. Generally speaking, insured value is agreed based on the amount needed for which the owner will procure a replacement for the insured ship. Therefore, it may be considerably higher or occasionally lower than the market value.

In case of fishing boat insurance, insured value is calculated from the residual value rate based on the fishing boat insurance evaluation standard and the age. Therefore, insured value often accords with market value. In *The Yukiyoshimaru*[14], the insured value of the sunken fishing boat was recognized as the market value at the date of the collision.

(c) Loss of earnings

The loss of profits or of the use of a ship pending repairs arising from a collision is a proper element of damage. Although collect freight lost because the cargo cannot be delivered is included in the measure of damages for total loss, whether there is a right of recovery for loss of profitable use in total loss cases is disputable[15].

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[12] In judgment of Kobe District Court of 30 October 1963 (9 Shomu-geppou No.12, 1329), it was held that the value of sunken ship was 20% of reproduction cost of a substitute ship bearing in mind that age of the sunken ship was 25 years.

[13] Kaijiho-kenkyukaishi No.46, 23 (Sup. Ct., 17 July, 1981). Hanrei-Jiho No.868,89 (Nagoya H. Ct., 15 February, 1977).

[14] Hanrei-Jiho No.2080, 111 (Miyazaki D. Ct., 12 March, 2010)

[15] Rule Ⅰ 2(d) of the Lisbon Rules provides that damages recoverable in the event of a total loss shall be include, subject to reimbursement for any claim for loss of freight under paragraph(c) above, compensation for the loss of use of the vessel for the period reasonably to find a replacement whether the vessel is actually replaced or not.

There are judicial precedents rendered by the Supreme Court that expected earnings in case of a total loss of a cargo ship is not recoverable because the value of the lost ship should cover all losses sustained by the owner[16].

However, in *The Toyomaru*[17], the Supreme Court gave a different judgment ruling that expected loss of earnings during the period reasonably required to obtain a replacement ship is recoverable. The case was concerning loss of earnings of a fishing boat owner. The Tokyo Appeal Court also accepted the expected loss of earnings during the period reasonably required if he had built a new ship[18]. In that case the plaintiff did not build a new ship. Also, a judgment rendered by the local court recently admitted the expected loss of earnings during the period reasonably required to build a new fishing ship as a recoverable damage[19].

(d) Others recoverable damages

In total loss cases, the expenses of repatriating the crew, damages for loss of the personal effects of the crew[20] should be recoverable.

The wreck removal costs should be recoverable. If the ship sunk due to a collision with another vessel in the port or navigational channels or fairway, then the port authorities or the JCG may order to the owner of the sunken ship to remove the ship or make the cargo on board harmless. In such case, the owner of the sunken ship cannot insist limitation of liability to those authorities. If the owner of the sunken ship refuses to comply with orders given by JCG, that would be a criminal offence. JCG or local government can perform the wreck removal operation in case that the owner of the sunken ship does not do it and later, claim reimbursement of the full costs from the sunken ship or its P&I Club. Then, the owner of sunken ship or its P&I Club would seek to be indemnified those costs from another ship whose navigational faults contributed to the occurrence of the collision. In such case, it is an issue whether the other ship can insist on limitation of the owner's liability. The Sapporo Appeal Court rendered a ruling that the other ship can limit its liability for the wreck removal costs paid by the owner of the sunken ship as per the JCG order[21]. The ruling was upheld by the Supreme Court[22].

Also, it is usual to allow the claimants around 10% of the total claim to cover his legal fees[23].

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[16] Supra note 5 and others.
[17] Supra note 13.
[18] Judgment of Tokyo Appeal Court of 27 March, 2002.
[19] Supra note 14.
[20] In general, it is not straightforward to collect evidence justifying an amount of damage.
[21] Hanrei-Times No.478, 132 (Sapporo H. Ct., 29 June, 1982).
[22] 39 Minshu No. 3, 899 (Sup. Ct., 26 April, 1985).
[23] 23 Minshu No.2, 441 (Sup. Ct., 27 February, 1969) and others.

Interest on damages is recoverable in addition to the principal sum. Normally, interest runs from the date of the collision to the date of payment. However, where the loss was sustained or the expense was incurred after the collision, interest runs from that date to the date of payment. The rate of interest is 5 percent per year (Article 404 of the Civil Code).

4. Statute of limitation

Claims arising from a collision at sea are extinguished by prescription upon the lapse of one year (Article 798 of the Commercial Code).

There is a judgment to the effect that by virtue of Article 724 of the Civil Code the claim is time barred if it is not exercised by the claimant within one year from the time when the claimant comes to know of the damages and the identity of perpetrators[24]. There is a crucial difference between the judgment and the Convention. The judgment, therefore, is criticized by some scholars[25].

There is an old judgment to the effect that Article 798 of the Commercial Code did not apply to personal injury claims arising from a collision and by virtue of Article 724 of the Civil Code the claim is time barred if it is not exercised by the claimant within three years from the time when the claimant comes to know of the damages and the identity of the perpetrator[26].

If negotiations are underway, it is possible for parties to waive benefits of prescription. Even though the parties cannot conclude such an agreement, the claimant's demand nullifies the prescription, whether the demand was made in writing or orally. However, the demand shall not have the effect of interruption of the prescription unless a judicial claim, filing for demand of payment, filing for settlement, participation in bankruptcy procedures, participation in a rehabilitation procedure, participation in a reorganization procedures, attachment, provisional seizure, or provisional disposition is commenced within 6 months (Article 153 of the Civil Code).

[24] 59 Minshu No.9, 2558 (Sup. Ct., 21 November, 2005).
[25] Takashi Hakoi, Masahiro Amemiya, Satoshi Nakaide, Tadahiro Matsuda, Jumpei Osada, supra note 3, 137.
[26] Minroku No.21, 530 (Sup. Ct., 20 April, 1915).

US Choice of Law Clause in Bunker Supply Contract and Maritime Lien

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1. Preface

Now that flag of convenience is quite common and an action against the registered owner of the ship (usually, a mere paper company) is ineffective, a maritime lien plays very important role in security for various claims arising from navigation of ships (for example, construction and repair costs, provision of bunkers and other necessaries, pilotage, salvage fee, etc.). On the other hand, there is a tendency in many country that coverage of a maritime lien is restricted as narrow as possible because a maritime lien has priority over mortgage without any registration and accordingly hampers the role of mortgage in shipping finance. However, the legal system of maritime lien is still not identical according to countries. Particularly, while many countries including the UK do not accept a maritime lien for provision of "necessaries" such as bunkers, some countries such as the USA and Japan recognize a maritime lien for that, and a lot of dispute about jurisdiction and governing law has been occurred between the suppliers of necessaries and ship owners over the world.

In the US, Federal Maritime Lien Act (FMLA) §31342 provides that "a person providing necessaries to a vessel on the order of the owner or a person authorized by the owner … has a maritime lien on the vessel." and §31341 further provides that "a person providing necessaries to a vessel on the order of the owner or a person authorized by the owner … has a maritime lien on the vessel" and accordingly the US law is said to be the most favorable governing law for bunker suppliers. Thus, nowadays many bunker suppliers insert US Choice of Law Clause into their standard terms and conditions of the contract but in some case they do so in order to create a maritime lien despite lack of connection between the transaction and the US. It is hotly debated whether the bunker suppliers can enjoy a maritime lien in such case under the US law, especially after Trans-Tec Asia case in 2008.

The writers are now acting for a ship owner in the case that the ship was arrested by a bunker supplier claiming a maritime lien based upon the US Choice of Law Clause in the bunker supply contract, and one decision was handed down by Mito District Court in November 2013. This decision, as mentioned after, only orders suspension of the enforced sale procedure and conclusive judgment on governing law of maritime lien and interpretation about the US law have to be left to the decision in the main proceedings

(action for declaratory judgment of non-existence of maritime lien). However, as this decision is full of suggestion about the above issues and further shows up problems in enforcement procedure of a ship arrest in Japan, we would like to start with the outline of the decision.

2. Outline of the case

(1) Background facts

The vessel X (hereinafter, "X"), owned by company "A" in British Virgin Islands and carrying Panama flag, was time-chartered out to a Chinese company "B" and further time-chartered to a Korean company "C". During the time charter period C concluded a bunker supply contract with a Korean company "D" and the bunkers were supplied to "X" through Singaporean company "E" when she called at Singapore.

The "Standard Terms and Conditions" of "D" allegedly handed to "C" before the contract stipulated that "The Agreement is subject to the USA Law." (US Choice of Law Clause). After supply of the bunkers, "D" claimed approximately USD 240,000 to "C" but "C" did not pay for it and afterwards applied bankruptcy in Korea. On December 7, 2012, Seoul Central District Court in Korea accepted the application of bankruptcy.

(2) Arrest by the bunker supplier

On December 9, 2012, immediately after the commencement of bankruptcy procedure for "C", "D" arrested "X" when she called at Kashima Port, arguing that "D" has a maritime lien on "X" for above bunker supply claims. The Mito District Court accepted "D"'s argument and decided to commence the enforced sale procedure for "X" on December 14, 2013.

(3) Objection against the arrest

"A" immediately raised an objection against the decision to commence the enforced sale and simultaneously applied for release of "X" based upon Article 117(1) of Civil Execution Act. On December 18, 2012, the enforced sale procedure was partly cancelled in exchange for security put up by "A" to cover "D"'s claims. The "X" was released from the arrest.

In the objection proceedings, "A" made the following arguments:

a) A maritime lien has to be governed by dual application of the law of contract, and the law of the place where the vessel was actually existed when the claim accrued or the law of the forum (*lex fori*), not the law of flag.
b) Even under the US Law, there is no maritime lien under FMLA for a foreign supplier of necessaries to a foreign flag vessel in a foreign port.

The Mito District Court dismissed the above application on July 31, 2013 stating as follows:

a) A maritime lien is governed by dual application of the law of contract and the law of flag.
b) It is still not proved that the interpretation such as "there is no maritime lien for a foreign supplier to a foreign flag vessel in a foreign port" is established in the US.

(4) Application for suspension of enforced sale and declaratory judgment of non-existence of lien

Under Japanese Civil Execution Act, no appeal is available to "A" when the objection is dismissed. If a distribution hearing is held, "A" is able to raise an objection again in that hearing and dispute the existence of a maritime lien in the subsequent proceedings. However, in case that there is only one claimant like this case, the procedure is simplified and the distribution is made without any hearing, which makes it impossible for "A" to dispute the existence of a maritime lien. Thus, "A" necessarily took an action for declaratory judgment of non-existence of maritime lien and simultaneously applied for suspension of the enforced sale of "X".

In this suspension proceedings, the Mito District Court took totally different views from the above decision. The Court denied a maritime lien for D on the "X" and ordered suspension of the enforced sale.

(5) Summary of the Mito District Court's Decision

The Decision ruled that Maritime lien should be governed by the law of the contract and the law of the place where the vessel was actually existed when the claim accrued, stating the following reasons:

a) Maritime lien is given by laws to secure the claims accrued for necessity of continuation of voyage at the place where the vessel actually navigates, independently of registration of the vessel.
b) In case that the country in which the claims actually accrued does not give a maritime lien, the creditors usually do not expect that their claims are secured by a maritime lien, and accordingly it is overprotective to give unexpected maritime lien to the creditors.
c) The article 13.2 of the Act on General Rules for Application of the Laws provides that "acquisition or loss of a real right shall be governed by the law of the place where the subject property of the right is situated at the time when the facts constituting the cause of the acquisition or loss were completed."

As the bunkers were supplied in Singapore the law of which does not give maritime

lien for necessaries, the decision ruled that no maritime lien is given to the bunker supplier "D".

The Decision further examined the issue of law of the contract and mentioned that it is difficult to say that a maritime lien is given by FMLA even when there is no connection to the US in respect of any factor including supplier, registry of the vessel and place of the transaction, on the contrary it is fair to interpret that there must be more than the parties choice of US law to grant a maritime lien under FMLA.

3. The governing law of maritime liens under Japanese choice of Law rules

In discussion of exercising maritime liens, a controversial issue is which country's law is to govern maritime liens. Under Japanese law, maritime liens, prescribed in Article 842 of Commercial Code, are recognized as real rights (*right-in-rem*) which secure particular maritime claims. Furthermore, Japanese law relating to the choice of rules is contained in the Act on General Rules for Application of Laws, its Article 13 paragraph 1 provides that "A real right to movables or immovables and any other right requiring registration shall be governed by the law of the place where the subject property of the right is situated", and its Article 13 paragraph 2 provides that "Notwithstanding the preceding paragraph, acquisition or loss of a right prescribed in said paragraph shall be governed by the law of the place where the subject property of the right is situated at the time when the facts constituting the cause of the acquisition or loss were completed". In spite of that, since there is no specific provision for maritime liens under Japanese Law, there have been several different theories concerning the governing law of maritime liens.

The dominant theories are the following three. First, "The law of the Ship's flag or registry". Second, "the law of the forum" (*lex fori*). Third, "The law of the place where the subject property of the right was situated at the time when the facts constituting the cause of the acquisition or loss were completed (In other words, the law of the place where the necessaries were supplied)".

It should be noted that the majority of scholars argue that maritime liens shall be governed by not only one of the above-mentioned three laws but also the governing law of the contract (Under Japanese choice of Law, the contract is governed by the law of the place chosen by the parties or in the absence of a choice of law, the law of the place with which the act is most closely connected). More specifically, the most prevailing view in japan has been that maritime liens are governed by the law of the Ship's flag or registry and the governing law of the contract.

Despite this, the Tokyo District Court held in 1992 that law of the forum is applied as the governing law of maritime liens. This decision had strong influences on practices of enforcing maritime liens in Japan. Nevertheless, this decision did not seem to have enjoyed

the approval of scholars.

As mentioned above, the Mito District Court made a decision that the law of the place where the necessaries were supplied and the governing law of the necessaries contract should govern the maritime liens. The essence of the decision's reasoning is as follows: Considering the issue of "flags of convenience", there are hardly any genuine links between the flag or registry and the vessels. In other words, the idea "The law of the ship's flag or registry" is no longer appropriate as the governing law of maritime liens in the contemporary world. On the other hand, the idea "The law of forum" provokes "forum shopping" and also defeats the expectations of claimants. Therefore, in accordance with Article 13 paragraph 2 of the Act on General Rules for Application of Laws, maritime liens shall be governed by the law of the place where the subject property of the right was situated at the time when the facts constituting the cause of the acquisition or loss were completed.

The reasons of above decision seem to be highly suggestive. Anyway, in brief, as the Mito District Court's holding suggested, the trend of Japanese case-law concerning governing law of maritime liens is shifting from the law of the Ship's flag or registry to the law of the forum or the law of the place where the subject property of the right was situated at the time when the facts constituting the cause of the acquisition or loss were completed. The Mito District Court's case is still ongoing and the decision in the main proceedings (action for declaratory judgment of non-existence of maritime lien) is expected shortly. We would keep an eye on the progress of the case and like to share the decision in the near future.

4. Choice of US Law Clause and application of FMLA

(1) Conventional interpretation of the FMLA

Another main issue is whether FMLA gives a maritime lien despite there is no ties between the US and the transaction when there was US Choice of Law Clause in the bunker supply contract. The language of the relevant articles of FMLA is as follows:

§31342. Establishing maritime liens

(a) Except as provided in subsection (b) of this section, a person providing necessaries to a vessel on the order of the owner or a person authorized by the owner –

(1) has a maritime lien on the vessel;

(2) may bring a civil action in rem to enforce the lien; and

(3) is not required to allege or prove in the action that credit was given to the vessel.

(b) This section does not apply to a public vessel.

FMLA does not restrict the supplier to be protected to US citizens, nor require that the necessaries are provided within the US, nor require that the vessel to which the necessaries are provided fly the US flag. The only exception clearly written is §31342 (b) which provides that "This section does not apply to a public vessel".

Notwithstanding the above, it had been thought that there is no maritime lien under the FMLA for a foreign supplier of goods and services to a foreign flag vessel in a foreign port. **(*Benedict on Admiralty*)**

(2) *Trans-Tec v. M/V Harmony Container*

However, on March 11, 2008, US Court of Appeals for the 9th Circuit rendered a conflicting decision with those conventional interpretations on FMLA.

(Background of the case)

M/V "Harmony Container", a Malaysian-flagged vessel was time-chartered out to a Taiwanese corporation, and engaged in trades from ports in North and South America to ports in Far East. The vessel particularly made regular stops at Long Beach California. The Taiwanese charterer entered into a bunker supply contract with the Trans-Tec Asia, a Singapore corporation, and the bunkers were supplied to the vessel in Busan, Korea. Prior to the supply of the bunker, the Trans-Tec Asia e-mailed a confirmation (Bunker Confirmation) which provided that it incorporates Trans-Tec's standard terms and conditions but the charterer did not request a copy of the standard terms and conditions.

As the Taiwanese charterer thereafter went bankrupt, Trans-Tec Asia threatened to arrest the vessel once she arrived at Long Beach, California and the vessel's insurers posted security to avoid the arrest. Trans-Tec filed a suit in federal court in Los Angeles, asserting a maritime lien, the federal court, however, dismissed the Trans-Tec Asia's action on the grounds that US law denies a maritime lien to foreign necessaries providers servicing foreign-flagged vessels in foreign ports.

(Summary of the decision)

The Court of Appeals granted a maritime lien and reversed the district court's decision for the following reasons:

1) Where foreign parties have specified that they want US law to determine the existence of a maritime lien in a transaction involving multiple foreign points of contact, and the ship has sailed into the United States, it is reasonable to uphold the choice of American law.
2) The FMLA, by its plain language, is not restricted in application to United States

and though Congress may have had American suppliers in mind, the statute, on its face, recognizes a maritime lien in favor of any person providing necessaries.

3) Given the nature of admiralty law and the high seas, the parties' agreement to apply US maritime lien law, and the fact that the vessel routinely sailed into a US port and was subject to *in rem* jurisdiction in California, applying the FMLA does not result in the "exterritorial" application of US maritime lien law.

(3) *Triton Marine Fuels v. M/V PACIFIC CHUKOTKA*

The above decision of the Court of Appeals for the 9th Circuit was followed by the 4th Circuit's decision in Triton Marine Fuels v. M/V PACIFIC CHUKOTKA on July 29, 2009.

(Background of the case)

Triton Marine Fuels Ltd. (Triton), a Panamanian corporation, entered into a bunker supply contract with Emerald Reefer Lines (ERL), the sub time-charterer of the M/V PACIFIC CHUKOTKA, and supplied bunkers to the vessel in Ukraine. The Bunker Confirmation of Triton contained a choice-of-law provision, which states "This agreement shall be governed and construed in all particulars by the laws of the United States of America, and the parties hereby agree to the jurisdiction of the United States District Courts". Since ERL failed to pay the bunker prices, an in rem action was commenced in the US. The District Court dismissed the in rem action because the FMLA is not to be applied extraterritorially to confer a maritime lien upon the plaintiff (ERL).

(Summary of the decision)

The Court of Appeals for 9th Circuit, referring to the Trans-Tec Asia case, found the choice of law clause in the Bunker Confirmation enforceable in consideration of the facts that the parties agreed to have their transaction governed by the laws of the US, and the vessel sailed into a US port, and concluded that a maritime lien arose in favor of Triton under FMLA for the following reasons: 1) the FMLA does not limit the availability of maritime liens to American suppliers, nor does it limit liens to American vessels, nor does it require that the provision of necessaries occur within an American port. 2) the case presents no problems of extraterritoriality because there are a significant number of ties between the US and the transaction at issue (ERL has its principal place of business in the US and concluded its negotiations for the bunkers transaction there, the fuel supplied by Triton enabled the vessel to travel to the US and deliver the cargo to a US port, the parties chose US law to govern their transaction.)

(4) Analysis

As a decision in a Court of Appeals does not bind the other Court of Appeals for the

different Circuit, it cannot be said that the interpretation of FMLA on this issue was fully established by the above two decisions. It is, however, now difficult to simply assert that there is no maritime lien under the FMLA for a foreign supplier of goods and services to a foreign flag vessel in a foreign port. Likewise, it is not correct to say that the above two decisions require no ties between the transaction and the US to grant a maritime lien under FMLA. Either decisions showed consideration to problems of extraterritoriality, referring to the facts such as the vessel sailed into the US port, or buyer's principal place of business and place of negotiations was in the US and so on. Where there is no connection with the US in respect of any of the above three factors (flag, nationality of supplier, place of supply), the US law does not primarily govern the transaction, and it should be nothing but the parties' choice to make the contract be governed by the US law. It is fair to say that the above two decision showed an interpretation that the parties' choice to apply US law to the transaction involving multiple foreign points of contact is enforceable as far as there are some ties between the US and the transaction in addition to the parties' choice of US law. The Mito District Courts' decision took the same view.

The Canadian court also showed the same understanding: The Canadian Federal Court, on the *World Fuel Services Corporation v. M/V "Nordems"* case, found that the owners were not bound by the US Choice of Law Clause in the bunker supply contract to which they are not privy, and further, even if the US law is applied, there must be more than US Choice of Law Clause in a bunker supply contract for US courts to give effect to a maritime lien.

As analyzed above, the two decisions of US Federal Court of Appeals rendered in 2008 and 2009 showed the framework of interpretation of FMLA on this issue. It is now very common that the standard terms and conditions of bunker supplier contains US Choice of Law Clause and a lot of similar disputes is anticipated to arise again under various jurisdictions. Continuous attentions have to be paid to the future decisions by US Courts.

5. The procedure for exercising maritime liens

Maritime liens enable claimants to arrest and sell the vessel by Auction without the litigation judgment which affirmed their claims. The arresting court issues a commencement order for exercise of a maritime lien without hearing anything from the ship owner when the claimant submits *prima facie* evidence to prove a maritime lien to the court. "The evidence to prove a maritime lien" are usually the contracts to support the claims allegedly secured by the maritime lien.

If the ship owners want to dispute the existence of the maritime lien, they have to raise an objection after the court issued the commencement order and require the stay of the procedure of exercise of maritime lien. The ship owners may assert absence or extinguishment of the security interest as the basis for filing an objection to a disposition

of execution against a commencement order for exercise of maritime lien (Article 182 and 189 of the Civil Execution Act). An appeal against a disposition of execution may be filed against an order to rescind a civil execution procedure (Article 12 of the Civil Execution Act). On the other hand, no appeal is allowed against an order to dismiss the ship owners' objection.

The ship owners have another option: They can bring a law suit demanding a declaratory judgment to confirm non-existence of a maritime lien. At the same time, they should take an action for temporary suspension of the auction. The latter procedure is called "provisional dispositions to determine a provisional status (kari no chii o sadameru karishobun)", prescribed in Article 23 paragraph 2 of the Civil Provisional Remedies Act. However, this procedure takes much time and costs the ship owners, especially in respect of the counter security (usually, 30% ~ 80% of the claim amount or ship's value) to suspend the enforced sale procedure. Though easy access to ship's arrest is very important to make maritime liens practically effective, the present Japanese ship's arrest procedure seem to lack the due process for the ship owners.

The Shipper's Liability towards Third Parties Imposed on Shipment of Dangerous Goods

- Analysis on the "NYK Argus" [2013] (Tokyo High Court _Hanrei-Jihou Vol. 2181, p. 3) -

*Jumpei Osada**

FACT

This dispute arose from a chain of carriage contract with regard to a container ship, the "NYK Argus" (hereafter "the vessel"), which was employed by NYK Line for liner services on the Grand Alliance between Asia and Europe.

The chemical products (PSR-80, and NA-125, hereafter "the cargo") had been loaded on board the vessel pursuant to the contract of carriage between the defendants and the carrier.[1] The cargo was stowed by the carrier as general cargo in the No.3 hold adjacent to a fuel tank because the defendants allegedly failed to give notification of the cargo's dangerous nature to the carrier in contravention of the IMDG Code,[2] "The Regulations for the Carriage and Storage of Dangerous Goods in Ship" (hereinafter, "the Regulations") and the Notification for Establishing Standards for the Carriage of Dangerous Goods in Ships (hereafter, "the Notification").

The vessel sailed on 28 September 2004 from Kobe to Southampton via Singapore. On 19 October, in the middle of the Mediterranean Sea, the fire alarm sounded when smoke and extremely high temperatures were detected in the No.3 hold in which the cargo's container was stowed ("the incident"). As a result of the incident, despite the crew's firefighting efforts, the hull and the other cargo on board suffered severe damages.

The disponent owner of the vessel and the consignees and insurers of the other cargo (hereafter "claimants") claimed damages against the shipper of the chemical products (hereafter "defendants") on the basis of law on tort.[3] The claimants argued that the defendants had been in breach of a duty to properly classify the cargo in complied with the

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1 It is not clear from the description of the judgment whether the contract was in the form of a charterparty or was evidenced by bills of lading.

2 International Maritime Dangerous Goods Code established by International Maritime Organisation (IMO)

3 The claim included the enforcement of the rights that stemmed from the subrogation and assignment by insurer.

Regulations and to inform the carrier of their dangerous nature at the time of the shipment. The defendants denied their liability in every respect, and contended that the incident did not result from the defendants' negligence.

In the first instance, the judges in the Tokyo District Court dismissed the claim.[4] The judges held that the defendants, who were in an "ordinary negligence", were entitled to be exempted from their liability on tort by relying upon "the Act on Liability for Fire Caused by Negligence" (hereafter "ALFCN"). The only one provision in ALFCN provides that a person shall not be liable for a fire unless he is in "gross negligence". The defendants, therefore, were not held liable on the grounds that they were merely in an ordinary negligence, not gross-negligence, at the time of shipment.

The claimants appealed.

(i) The issue concerning the applicable law was added by the defendants at the appeal stage in the Tokyo High Court. The major points at issue that had been discussed before the Tokyo District Court were taken over to the Tokyo High Court, including; (ii) whether the cargo should have been categorised as dangerous goods, (iii) what the major cause of the incident was, (iv) whether the defendants were negligent with regards to the incident, and (v) whether ALFCN applies to a case even where the fire occurred on the high seas.

Held,

that (i) only Japanese law, not Panamanian law, is applicable to the present case, (ii) the cargo should have been classified as dangerous goods pursuant to the IMDG Code, Regulations and Notifications, (iii) the dangerous nature of the cargo triggered off the incident, (iv) the defendants were negligent in terms of a breach of the shipper's obligation to classify the cargo properly and inform the carrier of its dangerous nature, and (v) given that the incident occurred in the high seas and the shipper is imposed a special obligation by the Regulations, ALFCN should not be applied to this case.

Applicable law

At the stage of appeal, the defendants alleged that Panamanian law should be applied to this case in addition to Japanese law, with the intention to invoke the short period time-bar under Panamanian law.

However, the judges held that only Japanese law was applicable to the case, in

[4] Judgment of Tokyo District Court on 27 July 2010

accordance with "Ho-rei"[5] which was enforceable at the time of the incident but was replaced by a new act at the time of the judgment.[6] This article does not intend to discuss in detail the logic upon which the judges relied because the argument is no longer applicable to the new act. That being said, it seems to me that a brief review of the case under Ho-rei is still instructive to understand the principle of the new act. Because the new act is based upon the same principles as Ho-rei, the same conclusion would be drawn even if the judges based their decision in this case upon the new act. This article sets out to examine what the outcomes would be if the new act was applied to this case.

The new act provides the general principle that a case is subject to the law of the place where the result of the wrongful act occurred; provided, however, that if the occurrence of the result was ordinarily unforeseeable, the law of the place where the wrongful act was committed shall govern.[7] In addition, the formation and effect of a claim arising from a tort shall be governed by the law of the place with which the tort is obviously more closely connected than the place indicated in Art 17.[8]

The new act does not have any provision specifically applying to cases concerning ships' incidents on the high seas. Although a special provision for the case of a collision was discussed in the reform process, its introduction has not taken place for the time being. It is argued that a flexible interpretation of the aforementioned Art 17 and 20 would allow for the dispensation of such a special provision.

Based upon the new act, the law of the place where the result of a wrongful act occurred cannot be identified in the present case because the incident occurred on the high seas. Where it can be held that the occurrence of the result was ordinarily unforeseeable, Japanese law shall be applied as the law of the place where the wrongful act was committed (in this case, the place where the loading operation had been performed was located in Japan.).[9] Where the occurrence is held to be foreseeable, Japanese law shall be applied in accordance with Art 20. Given that both the damaging and damaged cargo had been loaded in Japan, that the disponent owner is the subsidiary of Japan-based NYK Line and that the time charter had been concluded in Japan, Japanese law shall be considered as

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[5] The Act on General Rules for Application of Laws (Act No. 10 of 1898)

[6] The Act on General Rules for Application of Laws (Act No. 78 of June 21, 2006). The full version of the new act can be found in the website of Ministry of Justice. http://www.japaneselawtranslation.go.jp/law/detail/?ft=1&re=01&dn=1&co=01&x=0&y=0&ky=%E6%B3%95%E4%BE%8B&page=2

[7] Art 17 of the new act

[8] Art 20 of the new act

[9] Art 17 of the new act

the law of the place "most closely connected" in line with the contract of carriage.[10] In any case, it can be presumed that Japanese law shall be applied to the present case even under the new act.

Although this is the case to which the old act Ho-rei was applied, such case law under Ho-rei will continue to be good law even after the introduction of the new act.[11]

In practice, it is rather rare that Japanese law is applied to cargo claims on deep-sea trades, even where the transaction has been carried out between Japanese companies. This is because most bills of lading and charterparties designate English law as the governing law. When it comes to this case, the claimants were not privy to the contract of carriage with the defendants, so the governing law clause in the contract could not be invoked. This is the practical reason why Japanese law was applied to this case.

The nature of the cargo

Before mentioning the cause of the incident, the judges confirmed that the cargo should have been classified as dangerous cargo in accordance with IMDG Code, the Regulations and the Notifications, because both NA-125 and PSR-80 fall within the definition of dangerous cargo as self-heating solid, organic, n.o.s (No.3088).

The major cause of the Incident

The claimants asserted that the incident had been caused by a thermal decomposition reaction which resulted from the fact that the container holding thermally unstable cargo was loaded adjacent to the fuel tank. On the other hand, the defendants contended that the incident occurred due to the self-accelerating decomposition reaction of the cargo which was the result of an extreme over-heating of the fuel tank due to human error on the part of the crew, or a mechanical failure of the equipment. Thus, the issue arose as to whether the fuel tank was heated to the extent that its temperature had become abnormally high, as the defendants argued.

The judges held in favour of the claimants with regards to the cause of the incident. The judges found that the cargo (especially PSR-80) had gradually increased in temperature, the heat had then been conducted through the fuel tank for 55 successive hours, and then the cargo of PSR-80 and NA-125 experienced thermal runaway,[12] resulting in the cargo,

[10] Art 20 of the new act

[11] Akiyoshi Ikeyama, 'Legal issues on jurisdiction and governing law in maritime cases in Japan', East Asia Maritime Forum 2011 held on 10 and 11 of Sep. 2011 at Waseda University.

[12] It refers to a situation where an increase in temperature changes conditions in a way that causes a further increase in temperature, often leading to a destructive result. It is a kind of uncontrolled blowback.

together with the fiber drums, cardboards and containers themselves, emitting smoke.

Negligence on tort --- The liability toward third-parties

The claimants argued that the defendants were liable for all the damages to the hull and the other cargo on the grounds that they failed to fulfill the duty to classify the cargo pursuant to the Regulations and to notify the dangerous nature of the cargo to the carrier.

The Japanese law on the Carriage of Goods by Sea Act ("JP COGSA") provides an article related to the shipper's liability when they ship a dangerous cargo, following the Art IV rule 6 of the Hague-Visby Rules.[13] The shipper of such goods shall be liable for all damages and expenses arising out of or resulting from such shipment.

Nevertheless, the claimants could not sue the shipper for contractual liability because there is no direct contractual relationship between the claimants and the defendants.

The nature of shipper's liability towards third parties imposed on shipment of dangerous goods had been uncertain under the Japanese law, even though some cases had appeared before the courts.[14] The "*NYK Argus*" can be considered to be remarkable in the sense that the judges clearly set out the basic principle on the issue of the shipper's liability towards third parties such as the shipper of the other cargo on board the same vessel.

First, the judges confirmed that when the shipper intends to ship inflammable substances which can be categorised as a dangerous goods, he is obliged to ascertain precisely whether it falls within the category in accordance with the IMDG Code and the Regulations, to classify properly the substances pursuant to the United Nations Recommendations on the Transport of Dangerous Goods, and to notify properly the dangerous nature to the carrier. This is considered to be a requirement for achieving the purpose of ensuring the safety of the vessel, the crew and the other cargo on board.

Second, the judges held that such a burden does not stem only from the administrative regulations under the Ship Safety Law and the Regulations, but also from the duty to care for the life and property of others, including third parties who do not enter into any contract with the shipper. This kind of requirement is also acknowledged worldwide as an effective measure necessary for their safety.

Third, they affirmed that such duty constitutes a part of "the duty of care" as the basis

[13] Art 11 of JP COGSA
[14] *Inter alia*, the Judgment of Supreme Court on 25 March 1993, *Minshu 47-4-3079*

in order to ascertain whether they are negligent in the context of tort.

They further amplified such general obligation to cases where inflammable substances are shipped. In such cases, there is an obligation to ascertain properly whether the substances fall within the category of inflammable substances and, if so, to judge which classification is appropriate within the category. Remarkably, in cases where the shipper cannot ascertain from the annex of the Regulations whether the cargo should be classified as inflammable substances or not, the judges also required the shipper to refer to the outcome of the evaluation test for dangerous goods as a part of the duty to care. In other words, it is not enough for the shipper to merely refer to the description of the annexed list of the Notification.

Based upon the premises that the cargo should have been categorised as dangerous goods and the major cause of the incident was the nature of the cargo as stated above, the issue is focused on the question as to whether the defendants have foreseeability with regard to the possibility that the cargo should fall within the category of dangerous goods. They established the principle that the shipper shall be liable for damages to the vessel and third parties, including members of the crew and the other cargo-interests, where he had foreseeability of the fact that the cargo would fall within the category of inflammable substances under the IMDG Code, Regulations and Notifications.

The value-judgment behind the established principle seems to be that the shipper, in most cases, is the only person who will be able to acquire the information necessary to form a judgement on the correct categorisation of the goods. It is fair to allocate shippers the task of providing their carriers with sufficient information to ensure the safety of the ship herself and third parties. Accurate information is of the utmost importance for carriers in order that they can perform their safe voyage. This is particularly relevant to the voyage of container ships, as it is impractical to inspect the contents of all the containers by themselves before loading, so they are reliant upon the information provided by the shippers.

Based upon these principles, the judges found that the defendants failed to comply with such duty of care, and that they had foreseeability regarding the damages to the vessel herself and the other cargo at the time of shipment. The shipper was accordingly held to be in negligence in the context of tort law.

The judges also affirmed the causation between the defendants' negligence and the damages. The logic is as follows; if the cargo had been properly classified with the nature

and type of the cargo indicated in accordance with the Regulations, then the cargo would not have been shipped on deck,[15] it would have been loaded more than 3 meters away from any sources of ignition and heat,[16] and each cargo of NA-125 and PSR-80 would have been segregated,[17] as required by the Regulations respectively.

The judges also dismissed the defendants' argument that their negligence should be justified because there had been no mention of any dangerous goods in the MSDS[18] given by the manufacturer. They held that shipper shall not be justified merely because they are a trading company and not a manufacturer who ought to have known the nature of the chemical products. If a trading company or retailer were entitled to discharge the shipper's liability, it would lead to a circumvention of the purpose of the law and regulations which impose a strict obligation upon the shipper. In that sense, it can be argued to be reasonable.

The Act on Liability for Fire Caused by negligence

The most criticised point of the judgment in the first instance was that they held that ALFCN shall apply to this case merely because Japanese law is applicable, despite the fact that the fire had occurred in a vessel preceding her voyage on the high seas.

This unique law was enacted more than 100 years ago, based upon the fact that most housing in Japan at that time was wood-framed and could burn very easily. The purpose of the act was to ensure that people were protected from paying huge compensation for damages resulting from their slight negligent acts, such as an accidental fire in the kitchen. However, it is now argued that this act should be thoroughly repealed in the process of reforming the Civil Code because the rationale for the act has already been lost with the increase in metal-framed and fireproofed buildings.

Nevertheless, the District Court surprisingly admitted the defendants' argument which, relying upon ALFCN, stated that the defendants were not liable for the damages to the vessel and the other cargo because they were not in gross negligence.

In contrast, the judges in the High Court overruled the decision. After considering the purpose of the law that imposes upon shippers the strict obligation to classify properly and indicate the nature of the goods, the judges rejected the defendants' argument and held that ALFCN shall not be applied to the present case. As a further supplement, the judges held

[15] Art 20 of the Regulation
[16] Art 63 of the Regulation
[17] Art 21-1 of the Regulation
[18] Material Safety Data Sheet

that the incident did not correspond to "fire", even if ALFCN applies. It should be said that a fire risk is assumed, as a matter of course, among the legal framework with regard to the shipper's obligation on shipment of dangerous goods regulated by the international convention and local act. Thus, ALFCN is not intended to apply to the case within the scope of such legal framework, that is, the fire occurred in the high seas.

Now that ALFCN does not apply to the case, it would be a natural consequence that the negligent defendants were held to be liable for the damages to the hull and other cargo, irrespective of whether their negligence is gross or not.

Conclusion

Therefore, the judges admitted the claimants' claim for damages, including cargo's damages caused by the action of sprinkling the storage seawater on the cargoes.

Although danger is inherent in seaborne trade, more or less, the danger may increase depending upon the nature and condition of the goods shipped. Today, many cargoes being globally-traded have a dangerous nature to some degree. The information related to the contents of cargo, therefore, is of essence for the carrier to carry out his contracting voyage safely and timely. It is not only the case of chemical or oil tanker specifically designed for shipment of dangerous cargo but also container vessel for general cargo.

The carrier is not the only person who can incur loss or damages from the dangerous nature of the goods shipped. The shipper of the other cargo on board the same vessel is also often the person who may suffer damages from an explosion, fire, contamination or leakage arising from the presence of dangerous goods.

This case, as discussed above, established the principle for the shipper's liability towards third parties, such as the shippers of the damaged cargo. Generally, tort claim is more cumbersome than contractual claim, due to the heavier burden of proving that the defendants were negligent. However, it should be noted that Japanese law differs from that of most other jurisdictions including England in that, whilst English law considers dangerous goods to fall under strict liability,[19] the majority of the Japanese academic field tends to approach cases of dangerous goods on a fault-basis with regard to the nature of the contractual liability on dangerous goods.

The judgment should be highly esteemed in that they showed the principle that the

[19] *Brass v Maitland* (1856) 6 E&B 470, The *"Giannis NK"* 1 Lloyd's Rep [1998] 337

shipper shall be liable for damages not only to contractual carrier but also to third parties including the shipper of the cargo on board the same vessel on the basis of tort law. It also should be welcomed in terms of rejecting the exemption from tortious liability on the basis of ALFCN.

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