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Rapid and Cost-Effective Arbitration Procedure for Small Claims Launched by TOMAC

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The Code of Civil Procedure of Japan which was substantially amended on 26 June 1996, came into force as from 1 January, 1998. However, Chapter 7 (Public Notice Procedure) and Chapter 8 (Arbitration Procedure) thereof were left untouched. These Chapters are now under the name of 'The Law Concerning Public Notice Procedure and Arbitration Procedure'. I am not sure when a new Arbitration Law will be enacted in Japan. On the other hand Tokyo Maritime Arbitration Commission (TOMAC) of The Japan Shipping Exchange, Inc. (JSE) makes an attempt to reflect the wishes of the industries concerned. It can be said that such wishes mean expedition, simplicity and low cost.

TOMAC Arbitration Rules

TOMAC had had two arbitration rules, i.e. the Ordinary Arbitration Rules and the Simplified Arbitration Rules until the beginning of last February. Under the latter Rules introduced in 1985, it has taken five months on average for the arbitrators to give their award. Recently there is a demand for more simplified, quick and inexpensive procedure for the resolution of small claims. Thus TOMAC made the Rules of the Small Claims Arbitration Procedure (SCAP) which came into force as from 10 February, 1999. The following is an introduction of the new Rules in comparison with the Ordinary Arbitration Rules and the Simplified Arbitration Rules.

The Small Claims Arbitration Procedure(SCAP)

The SCAP Rules should be used in principle where neither the claim nor any counterclaim exceeds the sum of Five Million Yen (¥5,000,000) by agreement between both parties. If the parties do not agree to follow these Rules, the dispute should be decided in accordance with the Ordinary Arbitration Rules.

(1) Application and Defence

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An applicant for Small Claims Arbitration shall file with the Secretariat of the JSE the Statement of Claim in Small Claims Arbitration. When TOMAC acknowledges that the application complies with such requirements of the Rules, it shall accept the application.

The Respondent shall be instructed to file with the Secretariat within fifteen(15) days from the day after its despatch a Defence in Small Claims Arbitration, while under the Ordinary Arbitration Rules twenty-one(21) days are given to the Respondent and under the Simplified Rules fifteen(15) days are given.

The Ordinary Arbitration Rules stipulate that in the event of any further supplementary statement and documentary evidence being filed, the procedure of filing shall be repeated. Under the new Rules any supplementary statement should, in principle, be submitted orally to the Arbitrator at the hearing. As for the documents, the new Rules give the Arbitrator the power of requiring the parties to submit any document signed by the parties in connection with the dispute and other documents which the Arbitrator deems necessary or appropriate. Accordingly, most of the documentary evidence will be submitted at the beginning.

(2) Appointment of an Arbitrator

A sole Arbitrator, who has no connection with either of the parties or the matter in dispute, shall be appointed by TOMAC from among persons listed on “the Panel of Arbitrators” within ten(10) days from the day when the Respondent’s Defence was filed or should have been filed, whichever is earlier. Under the Simplified Arbitration Rules uneven number of arbitrators or a sole arbitrator shall be appointed within ten(10) days. And in the case of Ordinary Arbitration TOMAC Arbitrator Selection Subcommittee selects from “the Panel of Arbitrators” arbitrator candidates appropriate to conduct the proceedings. The arbitrator candidates are selected based upon the Subcommittee’s understanding of the nature of the arbitration in question.

Further I have to mention the appointment of arbitrators system under the Ordinary Arbitration Rules. Because in principle three arbitrators are to be selected, three candidate groups are formed, for instance, three shipping people, three consignees and three insurers. The parties may each eliminate one name from each of the three groups and may indicate an order of desirability next to the remaining names. When completed this form is returned to the TOMAC Secretariat. And then the Subcommittee selects three arbitrators with due respect for the views of the parties.

(3) Hearing

The Arbitrator shall convene a hearing, in principle, within fifteen (15) days from the day of appointment. There must be only one (1) hearing in the absence of exceptional circumstances. And where the parties agree, the Arbitrator may omit the hearing and decide the dispute. Under the Simplified Rules the Arbitrators shall, in principle, organize hearings separately for each party and then conclude the hearings with both parties sitting together at the final hearing. In the case of Ordinary Arbitration Arbitrators may hold the hearings whenever they think appropriate. Usually three to five hearings are held.

(4) Award

In the Arbitration Award, the summary of the facts and points at issue and the reason for the decision may be described as briefly as practicable.

The SCAP Rules have another unique stipulations concerning grace period and notarial deed as follows:-

Where the Arbitrator awards the claim in whole or in part to the Claimant, the Arbitrator may, having considered the Respondent's payment ability, the trade relationship between the parties and/or other pertinent circumstances, grant the Respondent (a) a period of grace for payment; (b) payment by instalments within the period not exceeding three (3) years without incurring default interest; and/or (c) issuance of promissory notes on such instalments. If the Arbitrator grants such payment method, the Arbitrator must state in the award that in the event of nonfulfilment of the obligations by the Respondent in respect of such payment the Respondent shall forfeit the benefit of the period of payment and pay the balance immediately together with interest which the Claimant would have earned had the Arbitrator not granted such payment method. (Section 13)

Further, the Arbitrator may, in awarding all or part of the monetary claim to the Claimant, recommend that the parties obtain a notarial deed for compulsory execution of the arbitral award in order to avoid any delay. (see Section 14) In general, the Claimant must gain a judgment for compulsory execution in order to execute the arbitral award under Japanese law. As is often criticized, court proceedings inclusive of a judgment for compulsory execution take a long time. If the parties agreed on the notarial deed, the Notary Public will give it immediately to the Claimant. Then compulsory execution may be done without any delay.

(5) Costs

The Claimant shall, when applying for Small Claims Arbitration, pay to the Secretariat a Filing Fee in the amount of Thirty Thousand Yen (¥30,000), while under the Ordinary Arbitration Rules and the Simplified Arbitration Rules a Filing Fee is One Hundred Thousand Yen (¥100,000). The costs of Arbitration shall be paid from the Arbitration Fee paid to the Secretariat and the remuneration for the arbitrator shall be paid out of the Arbitration Fee as is same under the other two Rules. So you need not worry about unnecessary expenses or any financial sacrifice.

The rate of the Small Claims Arbitration Fees shall be five percent (5%) of the amount of the claim and the counter-claim, if any, but not less than Seventy Thousand Yen (¥70,000), while under the Ordinary Arbitration Rules the minimum amount thereof is Nine Hundred Thousand Yen (¥900,000), and under the Simplified Arbitration Rules Six Hundred Thousand Yen (¥600,000).

I would like to mention that in any case, TOMAC Arbitrators deal with disputes as public services to the industries concerned, not as business. Our new Rules will afford you a quick and inexpensive resolution of small claims and we expect a number of small claims of demurrage or dispatch money, off-hire and so on will be filed with the TOMAC in the near future. ■

THE RULES OF THE SMALL CLAIMS ARBITRATION PROCEDURE (SCAP) BY TOKYO MARITIME ARBITRATION COMMISSION (TOMAC) OF THE JAPAN SHIPPING EXCHANGE, INC.

[Official Translation]

Made 3rd February, 1999

In force 10th February, 1999

Section 1. [Definition] The Small Claims Arbitration Procedure in these Rules means arbitration procedure which is performed with expedition and simplicity, regarding a dispute over a claim not exceeding, in principle, Five Million Yen (¥5,000,000), under these Rules in place of the Rules of Maritime Arbitration of The Japan Shipping Exchange, Inc. (hereinafter referred to as “the Rules of Maritime Arbitration”), by agreement between both parties.

Section 2. [Relation between these Rules and the Rules of Maritime Arbitration] All matters which are not covered by these Rules shall be governed by the Rules of Maritime Arbitration.

Section 3. [Application for the Small Claims Arbitration Procedure] An applicant for the Small Claims Arbitration Procedure under these Rules (hereinafter referred to as “the Claimant”), shall file with the Secretariat of The Japan Shipping Exchange, inc. (hereinafter referred to as “the Secretariat”) the following documents in three (3) copies (in respect of items 4 and 5, one (1) copy each is sufficient):

1. Statement of Claim in the Small Claims Arbitration Procedure;
2. A document evidencing the agreement that any dispute shall be referred to arbitration by the Tokyo Maritime Arbitration Commission of The Japan Shipping Exchange, inc. (hereinafter referred to as “TOMAC”) or arbitration in accordance with these Rules;
3. Documents in support of the claim, if any;
4. Where a party is a body corporate, a document evidencing the capacity of its representative;
5. Where an attorney is nominated by the Claimant, a Power of Attorney empowering the attorney to act on behalf of the Claimant.

Section 4. [Acceptance of Application for the Small Claims Arbitration Pro-

cedure] When TOMAC acknowledges that the application complies with the requirements of Section 3, it shall accept the application.

Section 5. [Filing of Defence in the Small Claims Arbitration Procedure] (1)

When TOMAC has accepted the application for the Small Claims Arbitration Procedure, the Secretariat shall forward to the other party (hereinafter referred to as “the Respondent”) the duplicate of the Statement of Claim in the Small Claims Arbitration Procedure together with copies of the documentary evidence. In addition, the Secretariat shall instruct the Respondent to file with the Secretariat within fifteen (15) days from the day after its dispatch a Defence in the Small Claims Arbitration Procedure and any supporting evidence in three (3) copies respectively, and also those documents as specified in items 4 and 5 of Section 3.

- (2) Where there is no document evidencing the agreement to refer a dispute to arbitration under these Rules, the Secretariat shall forward to the Respondent, together with those documents specified in the preceding sub-section, a notice in writing to the effect that TOMAC shall proceed with the Small Claims Arbitration Procedure unless the Respondent submits an objection in writing thereto within the period stipulated in the preceding sub-section. Where the Respondent has not submitted an objection in writing within the said period, the Respondent shall be deemed to have confirmed that the dispute should be submitted to the Small Claims Arbitration Procedure under these Rules.

Section 6. [Counterclaim by Respondent] (1) If the Respondent wishes to apply for the Small Claims Arbitration Procedure of a counterclaim arising out of the same cause or matter, the Respondent must do so within the period stipulated in Section 5(1).

- (2) When such an application has been made within the period stipulated in Section 5(1), the Small Claims Arbitration Procedure of such counterclaim shall, in principle, be performed concurrently with the Small Claims Arbitration Procedure applied for by the Claimant.

Section 7. [Supplementary Statement] (1) When the Respondent files with TOMAC a Defence in the Small Claims Arbitration Procedure in accordance with the provisions of Section 5, the Secretariat shall forward to the Claimant the duplicate of the Defence together with copies of the documentary evidence, if any.

- (2) Further arguments by the parties shall, in principle, be submitted orally to the Arbitrator at the hearing.

Section 8. [Filing Fee and Costs of Arbitration] (1) The Claimant shall, when

applying for the Small Claims Arbitration Procedure, pay to the Secretariat a Filing Fee in the amount of Thirty Thousand Yen (¥30,000) together with the amount defined in the Tariff of Fees for the Small Claims Arbitration Procedure Costs (hereinafter referred to as “the Arbitration Fee”).

- (2) The provision in the preceding sub-section shall also apply to an application for the Small Claims Arbitration Procedure of a counterclaim.
- (3) Each party shall pay the consumption tax imposed on the amount of the each fee as provided in the foregoing (1) and (2).
- (4) The Filing Fee shall not be refunded after the application for arbitration has been accepted.

Section 9. [Appointment of Arbitrator] TOMAC shall, within ten (10) days from the day when the Respondent’s Defence was filed or should have been filed, whichever is earlier, appoint a sole arbitrator from among persons listed on “the Panel of Arbitrators” who have no connection with either of the parties or the matter in dispute.

Section 10. [Hearings] (1) The Arbitrator shall convene a hearing, in principle, within fifteen (15) days from the day of appointment. There must be only one (1) hearing in the absence of exceptional circumstances.

- (2) Both parties shall be allowed to have witnesses attend the hearing and give evidence. However, if a witness is unable to attend the hearing for any reason, a signed statement is acceptable.

Section 11. [Disclosure of Documents] The Arbitrator may require from the parties production of the following documents which are certain to exist but have not been produced by the parties as evidence:

1. A document which was signed by the parties and under or in connection with which the dispute arose;
2. Any document which is usually created in the course of dealings between the parties;
3. Any document the production of which one party who bears the burden of proof, is legally entitled to request from the party holding such document, and any other documents which the Arbitrator deems necessary or appropriate.

Section 12. [The Award] (1) The Arbitrator shall issue an award on the case immediately after conclusion of the hearing pursuant to Section 10.

- (2) In the Award of the Small Claims Arbitration Procedure, items 3 and 4 of Section 32(1) of the Rules of Maritime Arbitration may be described as briefly as practicable.

- Section 13. [Period of Grace]** (1) Where the Arbitrator awards the claim in whole or in part to the Claimant, the Arbitrator may, having considered the Respondent's solvency, the trade relationship between the parties and/or other pertinent circumstances, grant the Respondent (a) a period of grace for payment; (b) payment by instalments within the period not exceeding three (3) years without incurring default interest; and/or (c) issuance of promissory notes on such instalments.
- (2) If the Arbitrator grants such payment method, the Arbitrator must state in the award that in the event of nonfulfilment of the obligations by the Respondent in respect of such payment the Respondent shall forfeit the benefit of the period of payment and pay the balance immediately together with interest which the Claimant would have earned had the Arbitrator not granted such payment method.
- (3) Where the Arbitrator awards the counterclaim in whole or in part to the Respondent, the preceding sub-sections shall also apply thereto.

- Section 14. [Notarial Deed]** (1) The Arbitrator may, in awarding all or part of the monetary claim to the Claimant, recommend that the parties obtain a notarial deed for compulsory execution of the arbitral award.
- (2) When the parties agree on such notarial deed, the Secretariat shall perform the necessary work on behalf of the parties. In this case, the Secretariat shall require from the Claimant reimbursement of the fee paid to the Notary Public plus a charge of Ten Thousand Yen (¥10,000) to cover the administrative expenses.
- (3) Where the Arbitrator awards all or part of the counterclaim to the Respondent, the preceding sub-sections shall also apply thereto.

Section 15. [Costs of Arbitration] The costs of the Small Claims Arbitration Procedure shall be paid from the Arbitration Fee paid to the Secretariat under Section 8 and the ratio in which each party shall bear shall be decided by the Arbitrator.

Section 16. [Omission of Procedure by Agreement] Where the parties agree that a certain part of the arbitral procedure under these Rules is to be omitted, the Arbitrator may, in its discretion, omit such part.

The Tariff of Fees for the Small Claims Arbitration Procedure Costs

The rate of the Small Claims Arbitration Procedure Fees to be paid shall be as follows:

Five percent (5%) of the amount of the claim and of the counterclaim, if any, but not less than Seventy Thousand Yen (¥70,000). ■

Sanko Steamship's Successful Emergence from Reorganization

Kazuo SATORI*

The Sanko Steamship Co., Ltd. became insolvent in early August of 1985. During 1985 this was the biggest news to the worldwide shipping industry. In addition, the amount of debt involved in the Sanko case was the largest ever in post-WWII Japan. The amount of debt exceeded 700 billion yen.

On August 13, 1985 Sanko Steamship applied for corporate reorganization and on January 31, 1986 the corporate reorganization procedures were started. Finally, on November 1, 1989 Sanko's reorganization plan was accepted by the creditors and the Court. Originally the reorganization was designed to operate for 18 years from, 1989 to 2007. However, Sanko emerged from the reorganization 9 years earlier than had been originally envisioned under the reorganization plan. By January 30, 1998 the reorganized Sanko had paid all of its debts. The reorganization plan ceased and Sanko emerged from corporate reorganization on February 27, 1998.

History of Sanko Steamship Company Ltd.

Sanko Steamship was founded in 1934 and Mr. Toshio Komoto became president of the company in 1937. At this time Sanko Steamship was a small company but with Mr. Komoto as president the company quickly grew in size. Before its insolvency, Sanko had one of the largest shipping fleets in the world.

In 1985, the worldwide tanker volume was 286 million dead weight tonnage ("DWT"). Of this amount, 12 million DWT, or about a 4% share of the world market, belonged to Sanko's operation. At this time Sanko owned 2% of the world market's tankers. In the Japanese tanker market, Sanko owned 28% of all Japanese tankers' DWT. If Sanko had immediately ceased operations, this would have had a large effect on both the world and Japanese markets.

Sanko's Financial Problems

When the world tanker market entered into a slump in 1977, Sanko failed to estimate the

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severity of the oversupply of tanker DWT. When Sanko finally realized that the over capacity problem was not a short term problem, Sanko tried to cancel its chartering agreements with overseas ship owners.

In 1984 Sanko planned to reduce its tanker volume while at the same time it was increasing its volume with profitable small bulk carriers. This strategy resulted in cash flow problems for Sanko because of the approximately 30 to 40 billion yen in compensation required to terminate Sanko's long term time chartering contracts. At first Sanko tried to correct the cash flow problem by working directly with its bankers. However, they were unsuccessful in these private negotiations. At one point around August 10, 1985 Sanko had about 30 vessels which were refused service by bunker suppliers and stevedore companies. Since the vessels were refused service, the vessels stood dead in harbors awaiting some type of breakthrough in Sanko's workout negotiations.

In the end, the cash flow problem forced Sanko to enter into the corporate reorganization. On August 13, 1985 Sanko Steamship Company Ltd. filed for corporate reorganization in the Amagasaki Branch of the Kobe District Court.

Unique Provisions in Japanese Reorganization Law

The Japanese reorganization law was adopted after WWII and is modeled after United States bankruptcy reorganization law. Both the Japanese and United States reorganization laws are unique and strong since under the corporate reorganization procedure, secured creditor's rights are limited.

Comments on the Effectiveness of Sanko's Reorganization Plan

Sanko will pay a total of 61 billion yen in installment payments to all creditors for 18 years pursuant to the reorganization plan. In January of 1990 Sanko's total assets were about 42.5 billion yen and total liabilities were about 693.5 billion yen. If Sanko had not reorganized the unsecured creditors would have received no payments, since the liquidation value of the assets was less than Sanko's 52 billion yen in priority debt. However, the "ongoing concern" value of the assets was enough to provide a reorganized Sanko a cash flow stream to pay for about 2.5% of the unsecured debts.

Unsecured creditors received about 2.5% of their debts by receiving 1/3 in cash and 2/3's in stock. There was 627.2 billion yen in unsecured debt and unsecured creditors received payments of 15.2 billion yen in the first year. This 15.2 billion yen consists of 9,528 million yen in new stocks issued to the creditors and 5,749 million yen in cash paid to the creditors. The secured creditor's assets must be appraised based on the going concern

value. The amount of reallocated debt for the secured creditors was 24.9 billion yen. After reallocation, the secured creditors will receive 100% of their debt by installment payments over a period of 18 years.

At the time of filing for reorganization in 1985, Sanko had 2,560 employees. If Sanko had merely shut down, all of these employees would have immediately lost their jobs. Instead, the number of employees was gradually reduced and in 1998 Sanko employed a total of 504 employees. In addition, since Sanko controlled a large portion of Japan's DWT, shutting down Sanko would have had a negative effect on the Japanese shipping market. Thus, the reorganization allowed Sanko to pay a percentage of unsecured debts, provided employment for its employees and avoided a negative economic impact.

Recognition of Japanese Bankruptcy Proceedings Outside Japan

One of the problems facing corporate reorganizations for international companies including the Sanko reorganization, is the territorial rule as written in the Corporate Reorganization Act. Japanese bankruptcy law has exactly the same territorial rule. In plain words, if a reorganization is underway in Japan, such a reorganization proceeding does not have to be recognized by creditors outside of Japan.¹ At the time these laws were enacted, such a provision seemed natural since Japan's isolation from the rest of the world effectively prevented administration over assets outside of Japan. However, today such an outdated law fails to recognize Japan's immediate and important connection to the world-wide economy.²

Thus in *Orient Leasing Co., Ltd. v. The Ship "Kosei Maru"* 1F. C. 670 (1978), a Canadian Court allowed a Japanese creditor, holding a mortgage on a vessel, to seize the vessel which was owned by Japanese company that was reorganizing in Japan.³ Since the Sanko

¹ The territorial rule is set out in the Corporate Reorganization Law, Article 4 which provides:

"1. Reorganization proceedings commenced in Japan shall be effective with respect to only the company's properties existing in Japan.

2. Reorganization proceedings commenced in a foreign country shall not be effective with respect to properties situated in Japan."

² The territorial rule began to be negated with respect to Japan's recognition of foreign bankruptcies proceedings, in the *Swiss Administrator* case, *Judgement of January 30, 1981, Tokyo Kosai* 994 Hanji 53. (Limited recognition of foreign bankruptcy proceeding where the bankruptcy administrator is merely "substituting" or stepping into the shoes of the foreign bankrupt). However the written law still exists in Japanese law, therefore a Japanese Court's future application of this rule against foreign debtors is not clear.

³ Citing Japan's territorial rule provision, the Canadian court held that the reorganization company's asset in Canada (a ship entering Canadian waters) was not subject to the ongoing reorganization in Japan. Because of the ongoing reorganization in Japan, the Japanese creditor could not have foreclosed this mortgage in Japan by seizure. However, the Japanese mortgagor was allowed to do in Canada what the Japanese mortgagor could not do in Japan because of Japan's territorial rule.

matter involved facts similar to the *Orient Leasing* case, a Japanese reorganization that involved assets located outside of Japan, it appeared at the outset that Sanko's reorganization could be interrupted. During the reorganization, a great deal of Sanko's assets would be operating outside of Japan during the reorganization proceeding. If Japanese creditors could use the territorial rule to seize property, outside of Japan, as they had in *Orient Leasing*, Sanko's reorganization would be ineffective.

However the Japanese Court seems to have substantially negated the territorial rule by allowing the Japanese reorganization trustee to file a petition in the United States District Court seeking ancillary case status pursuant to Section 304 of the U.S. Bankruptcy Code of 1978. Sanko filed its petition for Section 304 protection on July 30, 1986. The U.S. District Court granted the Japanese trustee's request for a permanent injunction regarding Sanko's U.S. property on July 30, 1986.

Thus, the Japanese trustee obtained exclusive control over Sanko's properties in the U.S. as against creditors in the U.S. No creditors challenged the Japanese trustee's power to file such a petition in the United States. Creditors throughout the world could easily access all documents that Sanko filed in the U.S. District Court. The Section 304 procedure⁴ provided creditors with satisfactory discovery concerning Sanko's plans and the creditors did not need to rush to arrest Sanko's vessels.

Increasing Profits through the Handy Size Bulk Carrier Market

Sanko succeeded in shortening the reorganization time period by building a large quantity of business in the handy size bulk carriers market. Sanko was successful because during

⁴ If a Japanese debtor is reorganizing in Japan and has assets in the United States, this Section 304 of the U.S. Bankruptcy Code can be used by the Japanese debtor to prevent creditors in the United States from interrupting the reorganization. In other words this Section 304 can be used to protect the debtors assets from foreclosure of liens, the seizure of property, or any other process normally used to recover funds from an insolvent debtor. In short, a Japanese debtor's assets located in the U.S. will be given the same protection that the assets would have had if they were located in Japan.

In order to fall within the ambit of this statute's protection, a Japanese debtor or Japanese trustee must file a petition in the United States in a U.S. District Court. Deciding where to file the petition is a matter of reviewing the particular facts of the case and applying the rules for selecting venue as set out in 28 U.S.C. 1410. All the necessary court documents are straightforward and can be readily prepared by U.S. bankruptcy attorneys with assistance from Japanese attorneys.

After the petition is filed and the matter is heard by the U.S. District Court, the Japanese debtor's assets in the United States will be protected from creditors and others who may seek to interrupt the Japanese debtor's reorganization. Of course, creditors located in the U.S. will be given an opportunity to object in a U.S. District Court proceeding, but absent strange extenuating circumstances, it is likely that the U.S. District Court will issue an order which protects all of the Japanese debtors assets in the United States.

the time period of 1987-1990, there was a tremendous increase in market for handy size bulk carriers. Sanko was able to supply some of this new demand. Also, Sanko built new ships to provide new and competitive ships for the shipping market.

Employee Ownership in Sanko Steamship Company, Ltd.

At the time Sanko entered into reorganization there were a total of 80,763 shareholders of Sanko. During the reorganization all the shares of Sanko were written off and new shares were issued and given as payment to Sanko's unsecured creditors. After reorganization there was a total of about 169 shareholders. At the present time the capital funds of Sanko equal about 11.9 billion yen. Of these capital funds, about 8% is owned by the employees stock retirement plan. Other large shareholders own less than 5% of Sanko. Thus Sanko's employees now own a large portion of Sanko.

Sanko's Remarkable Success

Sanko's effective use of the reorganization law is the only time in Japanese history when an international Japanese shipping company successfully reorganized. In the past reorganizations were typically used by Japanese industrial companies to make a profit mainly in the domestic market. All former-shipping companies that applied for reorganization and attempted reorganization failed.⁵ At the outset of Sanko's reorganization some journalists forecasted that the reorganization of a shipping company would be either impossible or very difficult. In the end, Sanko proved them wrong and emerged from reorganization sooner than expected. Sanko accomplished this on its own efforts without a financial sponsor.

Sanko's reorganization was remarkable since it demonstrated that a Japanese company engaged in global operations could successfully reorganize. Even with international competition, Sanko was able to obtain the fair treatment of unsecured creditors and Sanko's employees. In addition the reorganization minimized the economic impact on the Japanese economy. All of these reasons make Sanko's reorganization a model for any future corporate reorganization by Japanese international companies.⁶ ■

⁵ For example the Terukuni Kaiun case. In September 1975 Terukuni Kaiun applied for corporate reorganization and in November 1975 the reorganization began. Two and one half years later, in March of 1978, the company's reorganization plan was admitted and started well. But later the reorganization eventually failed.

⁶ Much of the information in this article was provided by Mr. Nobuyasu Harada, a member of the First Tokyo Bar Association who was involved in Sanko's reorganization procedure.

ARBITRAL AWARD IN DISPUTES ARISING FROM SHIPBUILDING CONTRACTS

Claimant-1: Buyer of Vessel-1 and -2

Claimant-2: Buyer of Vessel-3

Respondent: Builder of the Vessels

With respect to the disputes between Claimant-1 and Respondent regarding two shipbuilding contracts both dated 1st October, 1993, and the disputes between Claimant-2 and Respondent regarding a shipbuilding contract dated 29th January, 1994, the undersigned Arbitrators appointed in accordance with Section 14 of the TOMAC Rules hereby render the following award. The three arbitration proceedings were consolidated into one, since Claimant-1 and Claimant-2 (jointly "Claimant") are deemed subsidiaries of the same company and these companies are under the presidency of Mr. W.

AWARD

1. Arbitration applications by both parties shall be dismissed.
2. The costs of arbitration shall be Yen4,758,600 which shall be shared between the parties equally. Claimant shall pay the costs in full and then Respondent shall pay to Claimant Yen2,379,300.
3. The court of competent jurisdiction shall be the Tokyo District Court.

Claims and Summary of Facts

Claims made by Claimant

1. Respondent shall pay to Claimant US\$3,315,270.76.
2. The costs of arbitration shall be borne by Respondent.

Claims made by Respondent

1. The instant arbitration proceedings shall be dismissed.
2. If the above item 1 is not acknowledged, the Claimant's claim shall be dismissed and Claimant shall pay to Respondent US\$1,931,011.61.
3. The costs of arbitration shall be borne by Claimant.

Pleadings made by Claimant

1. Vessel-1

- (1) Claimant-1 and Respondent entered into a Shipbuilding Contract dated 1st October, 1993, (Evidence 015A-1, hereinafter referred to as the "Contract-1") for an 8,000DWT general cargo vessel ("Vessel-1"). Although the delivery date stipulated in the Contract-1 was on or before 30th October, 1994, it was revised to 30th October, 1995, because of the Respondent's poor performance of construction work. In consequence of such delay Claimant-1 suffered damage of US\$676,395.20 as lost hire.
- (2) Respondent shall reimburse to Claimant-1 overpayment of US\$280,000.00 stipulated in the Agreement dated 1st October, 1993, attached to the Contract-1 (Evidence 015A-2).
- (3) Respondent shall pay to Claimant-1 US\$399,460.00 as the cost of repairing Vessel-1's defects. As the Certificate of Classification of Vessel-1 issued by Nippon Kaiji Kyokai had some remarks, Vessel-1 had to be repaired at the Claimant-1's earliest convenience not later than 14th January, 1996. Claimant-1 repeatedly requested Respondent to carry out the repair work, but Respondent rejected the request. The repair work was carried out at another dock.
- (4) On 30th October, 1995 which was mentioned as the delivery date in the Notice of Delivery (Evidence 015A-4), Respondent suddenly demanded a rise in the contract price of Vessel-1 and asserted that if Claimant-1 would not accept it, Respondent would not deliver Vessel-1. Claimant-1 rejected Respondent's demand. Finally Vessel-1 was delivered two days after the revised delivery date. Claimant-1 suffered damage of US\$141,700.00 as lost hire.

Consequently Claimant-1 suffered damage of US\$1,497,555,20 in total.

2. Vessel-2

- (1) Claimant-1 and Respondent entered into a Shipbuilding Contract dated 1st October, 1993, (Evidence 016A-1, hereinafter referred to as the "Contract-2") for an 8,000DWT general cargo vessel (Vessel-2). Although the delivery date stipulated in the Contract-2 was on or before 30th January, 1995, delivery of the Vessel-2 was made on 10th May, 1996. Claimant-1 claims US\$68,400.00 of compensation for delay of delivery in accordance with Article III.1(b) of the Contract-2.
- (2) Respondent shall pay to Claimant-1 US\$280,000.00 as refund of overpayment stipulated in the Agreement dated 1st October, 1993.

- (3) Respondent shall pay to Claimant-1 US\$76,412.33 of interest which was paid by Claimant-1 to the Claimant-1's finance companies calculated from Contract Delivery Date to the actual delivery date.
- (4) Respondent shall pay to Claimant-1 US\$137,903.23 of superintendent cost and incidental cost.
- (5) Respondent shall pay to Claimant-1 US\$5,000.00 of bottom survey cost for erasing the NK recommendation.

Consequently Claimant-1 suffered damage of US\$567,715.56 in total.

3. Vessel-3

- (1) Claimant-2 and Respondent entered into a Shipbuilding Contract dated 29th January, 1994, (Evidence 017A-1, hereinafter referred to as the "Contract-3") for an 8,000DWT general cargo vessel (Vessel-3).
- (2) Under Article 11.6 of the Contract-3, Respondent were required to submit a Refundment Guarantee "in time" (i.e. prior to the Claimant-2's payment of first installment). In accordance with the Agreement on Cash Flow Table made by both parties on 18th November, 1993 (Evidence 017A-3), Claimant-2 paid the first installment to Respondent despite their failure to provide a Refundment Guarantee. Respondent refunded US\$100,000.00 to Claimant-2 after Respondent received a nominal amount of US\$760,000.00 for the 2nd installment for Vessel-2 as per the Cash Flow Table. Respondent, however, gave Claimant-2 a notice of cancellation of the Contract-3 on 5th October, 1994 and they did not start construction work.
- (3) As Claimant-2 have already committed Vessel-3 to charterers and financial companies, Claimant-2 must build a substitute vessel for Vessel-3 by a shipbuilder in Japan. The estimated contract price for a new contract was US\$1,517,628.32 higher than the price under the Contract-3. Claimant-2 suffered damage because of the Respondent's non-fulfilment of the Contract-3. Respondent shall pay to Claimant-2 US \$1,250,000.00 as the difference in prices and lost hire.

All of the above-mentioned contracts contain an arbitration clause XIII which stipulated for arbitration by The Japan Shipping Exchange, Inc.

4. Defence to Respondent's first pleadings

Claimant has never agreed amicably with Respondent to rescind the arbitration proceedings. As for the Preliminary Protocol dated 10th May, 1996 (Evidence B'-3), Mr. W, the president of Claimant, signed it under duress of Respondent. Claimant was prepared to accept delivery of the Vessel-2 in accordance with the CONFIRMATION (Evidence 016A-13), but Respondent refused to deliver her unless Claimant signed the Protocol. Claimant had no choice but to follow the Respondent's requirement in order to recover the Vessel-2.

5. Claimant filed Evidence 015-A-1 to 14, Evidence 016-A-1 to 20 and Evidence 017A-1 to 7 and applied to present Mr. G as witness, who appeared before the Arbitrators.

Pleadings made by Respondent

1. As the Preliminary Protocol of Delivery of the Vessel-2 dated 10th May, 1996 (Evidence B'-3, hereinafter referred to as "Protocol"), showed that both Claimant and Respondent had mutually agreed to terminate the proceedings of arbitration. Therefore this arbitration application should be dismissed.

If the Protocol was issued by Claimant under duress, then there is no reasonable ground to explain the fact that Respondent sent the draft (Evidence B'-2) to Claimant by telefax on 25th April for their study and asked for their comments. By the return fax Claimant gave a few comments after they had spent 11 days to study this document. In addition, this document and other delivery documents were signed by both parties in a friendly atmosphere at the meeting room of The International Commercial Bank of China in the presence of the bank's employees.

Respondent do not agree that the Protocol was signed and issued under duress, since Claimant had the opportunity and time to reject this document.

Notwithstanding above-mentioned pleadings, Respondent retained the following claims for fear that above pleadings would not be acknowledged by the Arbitrators.

2. Vessel-1

(1) When the delay in delivery of the Vessel-1 continued more than a period of 90 days from the 31st day after the delivery date, Claimant-1 had the option of rescinding the Contract-1 in accordance with Article III.1(c) and VIII.4 thereof. The fact that Claimant-1 did not rescind the Contract-1 means that they agreed to change the delivery date and the changed delivery date was 30th October, 1995. The actual delivery was made on 1st November, 1995, two days after the agreed delivery date. But, this delay was caused by negotiation for adjusting the contract price. Therefore, Respondent are not

responsible for the delay.

- (2) Respondent agree to pay US\$280,000.00 of the overpayment claimed by Claimant-1.
- (3) According to the Preliminary Agreement dated 1st November, 1995, (Evidence 015B-3) Claimant-1 have no right to claim US\$399,460.00 of the cost of modifying the system or material changed due to the Claimant-1's operation requirement.
- (4) Respondent are not responsible for the damage of US\$141,700.00 claimed by Claimant-1. As Claimant-1 were not prepared to negotiate with Respondent for adjustment of the contract price, the Vessel-1 was delivered two days after the original delivery date.
- (5) Respondent claim US\$435,408.00 of the cost of Over Specification (Evidence 015B-2).
- (6) Respondent claim US\$4,512.00 of extra banking charge incurred by Respondent in obtaining the Refundment Guarantee for the 1st installment, US\$2,533.00 of the telephone fee and the Claimant-1's crew's daily supplies from Respondent, US\$4,770.61 for the stores remaining on board the Vessel-1, US\$120,000.00 for the modification of automation design and equipment and US\$300,000.00 for the amount of over budget.

Consequently Respondent claim US\$867,223.61 in total.

3. Vessel-2

- (1) Respondent informed Claimant-1 of the actual delivery date on 23rd April, 1996 in order to comply with the Claimant-1's requirement. And as Respondent delivered the Vessel-2 to Claimant-1 on 10th May, 1996, there was no delay of her delivery.
- (2) Respondent claim US\$435,408.00 of the cost of Over Specification (Evidence 016B-3).
- (3) Claimant-1 shall pay to Respondent US\$8,380.00 for the extra banking charge incurred by Respondent in obtaining the Refundment Guarantee for the 1st Installment.
- (4) Claimant-1 shall pay to Respondent US\$120,000.00 of the cost for modification of automation design and equipment.
- (5) Claimant-1 shall pay to Respondent US\$300,000.00 for the amount of over cost.
- (6) Claimant-1 shall return to Respondent US\$100,000.00 of over payment for the loan

to Claimant-1 pursuant to the Contract-2 and the Agreement dated 1st October, 1993.

Consequently Respondent claim US\$963,788.00 in total.

4. Vessel-3

- (1) According to the Contract-3 and Agreement (Evidence 017A-2), Respondent should remit US\$140,000.00 to Claimant-2 as a loan, then Claimant-2 should remit US\$900,000.00 as the 1st installment. However, Claimant-2 required of Respondent that the 2nd installment for the Vessel-2 should be used as the 1st installment for the Vessel-3. As Respondent had already issued the Refundment Guarantee for the 2nd installment of 760,000.00 for the Vessel-2, the Respondent could not accept the Claimant-2's requirement. Finally the Respondent cancelled the Contract-3 on 5th October, 1994 (Evidence 017A-4), since Claimant-2 had failed to comply with the provisions regarding the 1st installment in the Contract-3. Accordingly the Claimant-2's claim on the Vessel-3 should be dismissed.
 - (2) Claimant-2 shall return to Respondent US\$100,000.00 plus interest at eight percent per annum from the date of 26th April, 1994, since this money was remitted to Claimant-2 in accordance with their requirement.
5. Respondent filed Evidence 015B-1 to 12, 016B-1 to 11, 017B-1 to 7, B'-1 to 3 and C'1-2.

REASONING

1. At first Claimant applied for arbitration in accordance with the arbitration clause of each contract and Respondent applied for arbitration of counterclaim. Then on 20th June, 1996, Respondent filed the Preliminary Protocol of Delivery (Evidence B'-3) signed by both parties on delivery of the Vessel-2 dated 10th May, 1996, and contended that both parties had mutually agreed to terminate the arbitration proceedings as was stipulated therein. On the contrary Claimant argued that the Protocol had been signed under the Respondent's duress and that it was therefore void under Art. 74 of the Civil Code of the Republic of China. Then we consider the validity of the Protocol. As for the governing law, Contract-2 by Art. XX.1. provided:

The parties hereto agree that the validity and interpretation of this Contract and of each Article and part thereof shall be interpreted under the laws of the country where the VESSEL is built.

Civil Code of the Republic of China by Art. 74 provided (Evidence 016A- 20, hereinafter referred to as the “Code”):

A juristic act that takes advantage of the difficulties, indiscretion or inexperience of another in exchange for pecuniary gain or the promise of pecuniary gain, which is patently unfair under the applicable circumstances, may be cancelled (or the gain resulting therefrom may be reduced) by the court upon application of the injured party.

And Claimant referred to one of the published judgments interpreting Art. 74 of the Code (ROC Supreme Court Judgment, 50th Year (1961), Tai Shang Tze No. 707, Evidence 016A-20). This case dealt with the situation where a contractor who was completing a construction project incurred numerous debts during the project that was to be paid off with construction price to be paid by the owner. The owner learned of the contractor’s plight and took advantage of the contractor’s urgent need for the construction money by delaying payment until the contractor was forced to accept a much lower price than originally agreed upon. The court found that the owner’s ploy was patently unfair at the time and justified the invalidation of the new price.

It is clear beyond doubt, in our judgment, that the Protocol was properly signed by the presidents of both parties without any defect. Then we consider whether Claimant was forced to sign the Protocol by the Respondent’s duress in view of Art. 74 of the Code and the said Supreme Court Judgment. There is no such evidence nor witness as to persuade us that Claimant was forced to sign the Protocol on delivery of the Vessel-2 under duress of Respondent. On 25th April, 1996, Respondent faxed a draft of the Protocol which included item 8 “The Owner and Builder mutually agree that Owner will terminate of conciliation proceeding of Arbitration and all cost of Arbitration including lawyer’s fee and potential cost shall be for the account of Claimant-1.” Then it was returned by facsimile to Respondent on 6th May, 1996, with some handwritten words, i. e., “We would like to amend item 8 as follows. PLS. give me your comments.” and “8... cost shall be paid by both parties at own expense” instead of the words “8... cost shall be for the account of Claimant-1.” We hold that the Protocol was made after negotiation between the parties as stated above and that if they did not agree to terminate the instant arbitration, Claimant should have insisted on continuing the arbitration proceedings in that fax. As there is no evidence showing that Claimant could not protest against the Respondent’s proposal in that fax, the expressions without any reference to the continuation of arbitration proceedings should be understood that Claimant acceded to terminate them without reserve.

Even assuming that there was a situation where Claimant hastened to take delivery of the Vessel-2, it would be difficult to say that Claimant could not carry on negotiations with Respondent and had no choice but to sign the Protocol.

In conclusion, we cannot help saying that Claimant may have decided to terminate the arbitration proceedings after their deliberate consideration following their business judgment. As we could not find any reasonable ground for the Claimant's argument on invalidity of the Protocol, this application for arbitration must be dismissed in accordance with the Protocol.

2. The matter on the costs of arbitration shall be decided by the Arbitrators in accordance with Section 33 of the TOMAC Rules, notwithstanding any agreement thereon between the parties. We deem it appropriate that the costs of arbitration shall be Yen4,758,600 which shall be equally shared between Claimant and Respondent.

We hereby award as above after due consideration of the totality of the arguments of both parties, the documentary evidence, the hearings of Claimant and the testimony of Mr. G as witness. Respondent never appeared before the Arbitrators despite their giving a notice of hearing.

18th March, 1997

Tokyo Maritime Arbitration Commission of The Japan Shipping Exchange, Inc.

Arbitrator: Shigeto Yunoki

Arbitrator: Tsutomu Kishida

Arbitrator: Jozo Yajima



Deductions from Time Charter Hire

Greg O'NEILL*

Most standard forms of contract deliberately seek to establish a clear distinction between the rights and liabilities of the respective parties. Regrettably they unintentionally establish the no man's land between the two contracting parties where at its most vulnerable points there are frequent skirmishes over disputed territory. Charterparties and in particular time charterparties are no exception. This martial metaphor is particularly apposite. Both parties seek to establish bridgeheads sometimes by re-drafting the contract but unavoidably there are always shifting battle fronts.

In time charterparties these battle fronts are well known and easily identifiable. Safe ports is a typical example. In recent years, the oil company time charter forms have sought to limit the charterer's responsibility by qualifying their obligation with a formula intended to dilute their responsibility to one of "due diligence". Curiously, instead of limiting and clarifying the charterer's responsibility, it has only succeeded in muddying the waters (the metaphors may well become mixed hereafter). The "*Kanchenchunga*"¹, the "*Saga Cob*"² and the "*Chemical Venture*"³ have in the author's view demonstrated how difficult it is to distinguish both practically and philosophically between a so-called absolute obligation to nominate a safe port and one qualified by due diligence. It would seem that frequently the difficulty in discharging the burden of proving compliance with due diligence is barely distinguishable from the exception of abnormal occurrence to the absolute obligation. This is because in the absence of an abnormal occurrence, the safety of the port should normally be ascertainable by the exercise of due diligence. If a ship suffers an accident in port, in the absence of an abnormal occurrence, courts and tribunals frequently take the view that it would not have happened had charterers exercised due diligence. This renders the due diligence obligation almost identical to the absolute obligation. Clearly, that result was not what the draftsman intended. However, until it is more clearly established or spelt out it will continue to cause problems between the owner and charterer.

* Solicitor, Penningtons, London.

¹ (1990) 1 Lloyd's Rep., 391

² (1992) 2 Lloyd's Rep., 545

³ (1993) 1 Lloyd's Rep., 508

Another area very much in vogue is the (alleged) obligation on the part of a charterer to supply bunkers fit for use by the vessel. This area too continues to be a minefield with little or no judicial authority but a wealth of disparate arbitral precedent all reaching different conclusions on the basis of different criteria. An analysis of that particular battlefield merits an article in its own right.

This article will concentrate on another long-established battlefield, deductions from charter hire⁴. Tension arises in this area because neither the courts nor the shipping business has decided whether hire should benefit from the same inviolability as freight (which must be paid in full without deductions) and be treated as “time-freight” or be treated in the same way as any other common or garden debt and be susceptible to the law of set-off, counterclaim and cross-claim.

The standard forms use language which suggests that the intention of the original draftsman was to ensure hire was paid in full. Thus typical standard forms will provide as follows:-

BALTIME: “Payment of hire to be made in cash ... without discount every 30 days in advance”.

NYPE: “Payment of said hire to be made ... in cash ... otherwise failing the punctual and regular payment of the hire ...”

SHELLTIME: “Payment of hire shall be made in immediately available funds ... in default of such proper and timely payment ...”

Most forms then provide in a dedicated off-hire clause for deduction from hire in specific circumstances.⁵ Again, most forms allow deduction from hire for owners’ disbursements,

⁴ It is not intended to be an exhaustive analysis of off-hire and off-hire clauses.

⁵ NYPE off-hire clause thus provides as follows:-

Offhire

In the event of loss of time from deficiency and/or default and/or strike of officers or crew, or deficiency of stores, fire, breakdown of, or damages to hull, machinery or equipment, grounding, detention by the arrest of the vessel (unless such arrest is caused by events for which the charterers, their servants, or agents or sub-contractors are responsible), or detention by average accidents to the vessel or cargo unless resulting from inherent vice, quality or defect of the cargo, dry-docking for the purpose of examination or painting bottom, or by any other similar cause preventing the full working of the vessel, the payment of hire and overtime, if any, shall cease for the time thereby lost. Should the vessel deviate or put back during a voyage, contrary to the orders or directions of the charterers, for any reason other than accident to the cargo or where permitted in lines 257 to 258 hereunder, the hire is to be suspended from the time of her deviating or putting

usually linked to specific categories closely connected with the operation of the vessel.

Legal precedent certainly tends to support this approach by limiting the charterer's right to deduct to those instances where the charterers have not had the benefit of the use and hire of the vessel due to some fault or self-interested purposes of the owner. Hostilities traditionally flare up where the owner takes advantage of the charterer's dead time (eg. waiting for berth) to repair the vessel and/or conduct the owner's business. This is because the classic wording of an off-hire clause limits off-hire to those circumstances where the charterers are deprived of the use of the vessel for their present purposes. If a vessel does not lose her turn in waiting for a berth while the owners choose to do repairs, the charterers have not in effect suffered a loss of use. Whatever the rights and wrongs of that analysis that is the way the courts have interpreted such clauses. To counter that situation these days, it is no longer uncommon to find clauses which in effect provide that whether or not the charterer is deprived of "use" certain circumstances will put the vessel off-hire irrespective of whether it inconveniences the charterer.⁶ (See Penningtons Shipping Notes Dec/Jan 1997/8).

In the absence of such a clause, however, it is not enough that the charterers have for some reason suffered delay - it must be as a result of a cause within the categories of the off-hire clause preventing the "full working" of the vessel. To some people in the industry's surprise, the *Aquacharm* in 1982 graphically illustrated this principle.⁷ In that

back until she is again in the same or equidistant position from the destination and the voyage resumed therefrom. All bunkers used by the vessel while off hire shall be for the owners' account. In the event of the vessel being driven into port or to anchorage through stress of weather, trading to shallow harbours or to rivers or ports with bars, any detention of the vessel and/or expenses resulting from such detention shall be for the charterers' account. If upon the voyage the speed be reduced by defect in, or breakdown of, any part of her hull, machinery or equipment, the time so lost, and the cost of any extra bunkers consumed in consequence thereof, and all extra proven expenses may be deducted from the hire.

⁶ Owners agreeing time charterparties should be careful not to abbreviate additional off-hire events by providing that in such events the vessel "shall be off-hire". The mechanism of, for example, the NYPE form, depends on time being lost to the charterer before it actually qualifies as an off-hire event.

If the parties to time charter agree without qualification that in a certain event the vessel will be "off-hire", there is no room in the wording for implying a term that she shall not be off-hire if the vessel is available for the service immediately required of her by the charterers.

Owners who agree to supplement the list of off-hire events should do so by adding to the list in clause 17 of the NYPE form, or by reproducing the "time lost" formula in any additional clause.

⁷ *Actis Co. Ltd -v- The Sanko Steamship Co. Ltd* (1982) 1 Lloyd's Rep., p 7 also at (1980) Lloyd's Rep. 237.

case, it was found as a fact by the Arbitration Tribunal that the Master had failed to use reasonable care to comply with the charterers' orders as to loading under clause 8 of the NYPE form (but that she was not unseaworthy merely because she was an inch or two over her permitted draft of 39'6" for passage through the Panama Canal). The Court of Appeal also agreed that the owners were entitled to rely on Article 4, Rule 2A of the Hague Visby Rules⁸ and more importantly that at all stages the *Aquacharm* was efficient as a ship and remained at all times capable of "full working" within the meaning of the off-hire clause. They found that the decision of the Canal Authorities to disallow passage through the canal because she was overloaded in no way reflected on the efficiency of the vessel. The decision may in retrospect seem harsh from the charterers' point of view, but the fact is that were it not for the Hague Visby Rules exception for Masters and crew negligence, the charterers would have had a viable claim for damages against the owners.

Perhaps the real point is that, in contrast to civil law, common law applies no overall concept of fairness, neither does it attempt consciously to arrive at a decision empirically by deciding what may be fair and then finding legal justification for its decision.⁹

In practice, English Law has always developed on lines of certainty and sought to establish rules and principles on the basis of precedent so that parties know better where they stand. In effect, a degree of fairness is inevitably sacrificed on the altar of certainty. Perhaps only in English law would the oft quoted sayings, "the exception which proves the rule"

⁸ 2. Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from:
(a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship;

⁹ Bingham L.J.: *Interfoto Picture Library Ltd -v- Stiletto Visual Programmes Ltd* (1989) 1 QB 433.

"... *English law has characteristically committed itself to no such overriding principle but has developed piecemeal solutions to demonstrated problems of unfairness.*"

Lord Ackner in a 1975 case *Lloyds Bank -v- Bundy* (1975) QB 326 stated:-

"The concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial position of the parties when involved in negotiations ... and unworkable in practice."

Finally, Slade L.J., *Banque Keyser Ullmann SA -v- Skandia (UK) Insurance Co. Ltd* (1990) 1 QB 665, 772:-

"In the case of commercial contracts, broad concepts of honesty and fair dealing, however laudable, are a somewhat uncertain guide when determining the existence or otherwise of an obligation which may arise even in the absence of any dishonest or unfair intent."

and “hard cases make bad law” have such force in an advocate’s armoury.¹⁰ Thus English law has developed a sophisticated set of rules of construction.¹¹

This is precisely the way deductions from charter hire are in the course of being crystallised into a limited number of categories. The present authoritative foundation for these categories is the case of *Nanfri, Lorfri, Benfri* (1978) 1 Lloyd’s Report, p. 132. In that case, the charterers threatened to make deductions (and eventually did so) in the respect of a claim for loss of speed during the charterparty.¹² In dealing with the issue as to whether deductions from hire for slow speed would ordinarily be legitimate, the Court of Appeal found that such deductions were allowable within the ordinary of law set off and on a proper construction of the charterparty. Lord Denning said at pages 141 and 976:-

“I would as at present advised limit the right to deduct to cases when a shipowner has wrongly deprived the charterer of the use of the vessel or has prejudiced him in the use of it. I would not extend it to other breaches or default of the shipowner such as damage to cargo arising from the negligence of the crew.”

Later, in the *Aliakmon Progress*, Lord Denning further observed:-

*“So far as the other items are concerned the only ones that need mention are the cross-claims for damages. It is said that when the vessel got to Antwerp she had to be repaired. In consequence, she lost her previous arrangements for cargo and had to wait a long time before she got the cargo of cement. She had to wait 39 days. It is said that the damage sustained on that account would be a ground for equitable set-off within the recent cases of the, *Benfri* (see *Nanfri, Lorfri* above).. I doubt whether any such claims would be admissible as equitable set-off. Equitable set-off as we indicated in those cases is only available where the charterers have been deprived of the use of the ship by the fault of the owner. Here the charterers had the use of the ship, but could not get a cargo.”*

¹⁰ The latter translates as “cases of hardship make for bad law if used to modify an otherwise well-established law.”

¹¹ See Lewison’s excellent book on *The Interpretation of Contracts* designed to unlock the meaning of the language used by the parties with minimal recourse to pre-contractual written negotiations and oral evidence.

¹² The principal point of the case was in fact the legitimacy of the owners’ orders (as a consequence of the deduction) to the Master to refuse to sign bills of lading marked “freight pre-paid” or which did not bear an endorsement incorporating the terms of the charter. The Court of Appeal decided that such an order was illegitimate and a repudiation of the charter.

This concept of the vessel being available for use and fully working but time being lost to the charterers due to some cause external to the ship (even if it is the owners' fault or the result of a breach by the owners) has found expression in several cases. In the "*Trade Nomad*" (1998) 1 Lloyd's Report 57 the vessel suffered an engine breakdown in the Mississippi which not only delayed her while she was being repaired but involved her in subsequent restrictions on shipping movements enforced by the coastguard. Coleman J. takes up the story:-

"By 13.00hrs on 5 March the ship herself was, in the words of lines 227/228 of the charter 'again ready and in an efficient state to resume her service' from a position not less favourable to charterers ...".

"The fact that she could not actually resume that service had nothing to do with her condition and everything to do with an entirely extraneous cause. Whilst it is true that she would not have suffered any delay as a result of that cause but for the original breakdown, there does not seem to me to be any warrant in clause 21 of the charter to justify continuing the period of off-hire beyond 13.00hrs on 5 March."

The same principle was applied in *Courtline -v- Dant & Russell* (1939) 44 (Time loss as a result of a boom across a river blocking the vessel's progress); the *Berge Sund* (1993) 2 Lloyd's Report, p.453 where the requirement by the charters for further tank cleaning was held not to affect the efficiency of the vessel and the *Roachbank* (1987) 2 Lloyd's Report, p.498 where time was lost while a vessel picked up refugees in the South China Sea.

On the basis of precedent therefore, deductions may be made in the following cases:-

- In relation to any loss of time (and bunkers consumed during such period) falling squarely within a charterparty of off-hire clause (eg, lines 65 and 66 and clause 15 of the NYPE form).
- Any period specifically stipulated as off-hire by the terms of the charterparty.
- Any deduction from hire expressly allowed by the terms of the charterparty (eg, owners' disbursements).
- Damages in respect of claims against the owner arising out of breaches directly related to the availability of the vessel for the service required of her by the charterer. This is provided there is no clause prohibiting such deductions.

Examples of instances where deduction may be safely made, include the following:-

- breach of the speed warranty (but not consumption warranty), see the “*Chrysovalandou Dyo*” (1981) 1 Lloyd’s Report 159. Mocatta J. decided that the charterers were not only permitted to deduct the owners’ disbursements from hire against presentation of vouchers but also a telex breakdown of estimated disbursements, and to deduct from hire an amount equivalent to the time lost and/or the cost of any extra fuels consumed in the event of a breach of a speed warranty, and furthermore, it would be sufficient if such deductions were made reasonably and in good faith.¹³
- failure to load a full cargo. See the “*Teno*” (1977) 2 Lloyd’s Report 289. The deduction in this case was in respect of cargo shut out as a result of the Master’s decision to load less than the full cargo because the consequent draft restriction would have delayed the vessel. Mr Justice Parker held that this claim could be deducted from the owners’ claim for hire. Lord Denning (per the *Nanfri*) would say that the charterers have been prejudiced in their “use” of the vessel.
- time/hire lost while disposing of cargo damages through breach by the shipowner.
- time lost due to the owner’s breach in failing to clean holds. The “*Aditya Vaibhav*” (1991) 1 Lloyd’s Report 573.
- time lost while a Master wrongfully refuses to enter a port or consequent on a refusal to obey the charterers’ orders: see the *Charalambos N Pateras* (1971) 1 Lloyd’s Report, p.42, where the Master’s wrongful refusal to obey orders deprived the charterers of the use of the vessel for some days. In the event that claim failed because the owners were covered by an exceptions clause.
- time lost due to the physical condition of the vessel which may include its particular characteristics and susceptibility (eg. liability to arrest by cargo owners) (see the *Mastrogeorgis* (1983) 2 Lloyd’s Rep, p. 66.

This latter category is probably the most contentious and controversial and perhaps least safe ground on which to rely when considering making deductions from charter hire.

Deductions may not be safely made in the following cases:-

- Consequential wasted hire following an accident to the ship due to crew negligence. The “*Aliakmon Progress*” (1978) 2 Lloyd’s Report 499.
- Damages in respect of a cargo claim. The “*Lok Manya*” unreported (1979).
- Under Shetime 4, for damages or failure to “restore” the vessel to a better condition than on her delivery under the time-charter. The “*Trade Nomad*” (1998) 1 Lloyd’s Report 57.

¹³ See Bulletin of The Japan Shipping Exchange, March 1998, No. 36, page 1 - “Good Faith and Reasonableness in Relation to Representations.”

Finally, it is worth noting the words of Mr Justice Hobhouse in the “*Lyon*” (1985) 2 Lloyd’s Report 470:-

“In fields of commercial law, certainty of contractual rights and remedies is of the greatest importance. The right to be paid timecharter hire and the right to withhold payment are particularly clear examples of where such certainty of the law must exist. The Court of Appeal has formulated a simple rule which represents the relevant application of the underlying principle.” [A reference to the “*Nanfri*” (1978) 1 Lloyd’s Report 581]. ■

ARREST OF SURROGATE SHIPS IN AUSTRALIA

**LAEMTHONG INTERNATIONAL LINES CO LTD
V BPS SHIPPING 149 ALR 675**

Alan POLIVNICK*

Australia's *Admiralty Act* ("the Act"), which came into force in 1988, is one of the most modern and accessible Admiralty laws of any jurisdiction in the world. The underlying rationale for the new *Admiralty Act* was that it was "*in Australia's interest to support a broad Admiralty jurisdiction, which is dependent principally on the presence in the jurisdiction of the ship or sister ship in relation to which a maritime claim arises*", within the boundaries of *international trends and internationally acceptable limits*¹. In common with most jurisdictions, claims lie against the vessel at fault, and a sister ship owned by the same owners, but as a result of a 1997 decision of the High Court of Australia, the Australian provisions extend the definition of a vessel which can be arrested to a surrogate ship, where the vessel at fault is not necessarily owned by the owners of the arrested vessel.

As a consequence, the Act defines the concept of maritime claims very broadly to protect the rights and interests of those seeking redress for maritime claims. As a nation of shippers rather than shipowners, the Act seeks to protect the rights of cargo interests and others seeking redress against a vessel or her operators rather than protecting shipowners. There is no distinction in the Act between Australian and non-Australian claimants and applicants. The Act offers significant and substantial protection to shipping entities such as charterers, providores, crew members and others with a claim against a particular ship.

The most significant bases upon which to proceed *in rem* under the Act are general maritime claims, set out in section 4(3) of the Act. These include, *inter alia*, the following categories of claims:

- claims for damage done by a ship (whether by collision or otherwise);
- claims for loss of life or personal injury;

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¹ Attorney General of the Commonwealth of Australia, Second Parliamentary Reading of the Admiralty Bill to the House of Representatives of the Parliament of Australia.

- claims for damage to goods carried on a ship;
- claims arising under charterparties;
- salvage claims;
- general average claims;
- towage or pilotage claims;
- claims arising in respect of goods, materials or services (including stevedoring and lighterage services) supplied or to be supplied to a ship for its maintenance or operation;
- claims arising from a vessel's construction, alteration, repair or the supply of equipment;
- claims arising from port, harbour or canal tolls, charges or dues;
- claims by a vessel's charterer or agent for disbursements incurred;
- claims for insurance premiums, including P&I calls;
- claims for crew wages;
- claims for the enforcement of an arbitration award, including foreign awards made in respect of any maritime claim, including proprietary claims.

As a result of the Act, Australia became one of the few countries in the world that has provided specific legislation for the arrest of surrogate ships for many types of maritime claims. The definition of a surrogate ship has recently been significantly expanded by the decision of the High Court of Australia in *Laemthong International Lines Co Ltd v BPS Shipping*. By rejecting the argument that the references to a charterer in the surrogate ship arrest provisions referred solely to a demise charterer and in fact referred to any type of charterer, the High Court has made Australia one of the easiest jurisdictions in the world in which to enforce a maritime claim.

THE FACTS

BPS Shipping was the disponent owner of the “*Nyanza*”. Laemthong International Lines (“Laemthong”) entered into a voyage charterparty with BPS Shipping for the carriage of a shipment of rice from Thailand to Mauritania on board the “*Nyanza*”. The cargo was rejected on discharge in Mauritania because of a beetle infestation and the “*Nyanza*” was arrested in Mauritania. As a result of the arrest and the disruption to the vessel’s schedule, BPS incurred considerable losses. BPS claimed that the arrest and the losses it had incurred were the result of Laemthong’s negligence in failing to have the vessel’s holds properly fumigated. BPS then had the “*Laemthong Pride*”, which was owned by Laemthong, arrested in Darwin, the capital of Australia’s Northern Territory. Laemthong sought to have the arrest set aside on the basis that it was wrongful. The Supreme Court of the Northern Territory refused to set aside the arrest and this was upheld by the Court of Appeal of the Supreme Court of the Northern Territory. Leave was granted to Laemthong to appeal the decision of the Supreme Court of the Northern Territory to the High Court and the leave to appeal was limited to the issue of whether the “*Laemthong Pride*” was a surrogate ship for the “*Nyanza*” within the terms of the Act on the basis that Laemthong was the charterer of the “*Nyanza*” and the owner of the “*Laemthong Pride*”. The High Court of Australia is the final court of appeal under Australian law and is broadly equivalent to the United States Supreme Court. The case was heard by the High Court of Australia in June 1997 and judgment was handed down on 9 December 1997.

THE LEGISLATION

The appeal related to the interpretation of the following sections of the Act:

INTERPRETATION

“Relevant person”, in relation to a maritime claim, means a person who would be liable on the claim in a proceeding commenced as an action in personam.

3 (6) *For the purposes of this Act, where:*

- (a) a proceeding on a maritime claim may be commenced against a ship under a provision of this Act (other than section 19); and*
- (b) under section 19, a proceeding on the claim may be commenced against some other ship;*

the other ship is, in relation to the claim, a surrogate ship.

RIGHT TO PROCEED IN REM AGAINST SURROGATE SHIP

19. *A proceeding on a general maritime claim concerning a ship may be commenced as an action in rem against some other ship if:*

- (a) a relevant person in relation to the claim was, when the cause of action arose, the owner or charterer of, or in possession or control of, the first mentioned ship; and*
- (b) that person is, when the proceeding is commenced, the owner of the second-mentioned ship.*

RIGHT TO PROCEED IN REM ON DEMISE CHARTERER'S LIABILITIES

18. *Where in relation to a maritime claim concerning a ship, a relevant person:*

- (a) was, when the cause of action arose, the owner or charterer of, or in possession or control of, the ship; and*
- (b) is, when the proceeding is commenced, a demise charterer of the ship;*

a proceeding on the claim may be commenced as an action in rem against the ship.

THE JUDGMENT

Laemthong's fundamental submission was that the references in section 19 to "charterer" were in fact references to a demise charterer. Laemthong argued that the wording of section 19 could only be interpreted as a reference to a charterer who was the disponent owner of a vessel with the power to control the commercial operation of the vessel and determining the ports of call for the vessel's voyages and her cargoes². Since Laemthong was merely the voyage charterer, it asserted that it could not satisfy the relevant person test as set out in section 19(a) and consequently that the "*Laemthong Pride*" could not be a surrogate ship of the "*Nyanza*".

² 149 ALR 675 at 680, 688

The Full Bench unanimously rejected Laemthong's submissions as to the definition of charterer in section 19 of the Act. The High Court rejected considerable English authority put before it because Australia is not a party to the 1952 *International Convention Relating to the Arrest of Sea-going Vessels* ("the Brussels Convention"), which was the basis of many of the English authorities. Instead the High Court found the decisions of the Hongkong Supreme Court³, the New Zealand High Court⁴ and the Court of Appeal of Singapore⁵ more persuasive authority than many of the English authorities. Ultimately the High Court agreed with the English Court of Appeal, in *The Span Terza* [1992] 2 LLR 225, that

If only a demise charter were meant, one would have of course expected the word 'demise' to have been inserted before the word 'charterer'. Alternatively the word 'charterer' could have been omitted altogether, because a demise charterer would be included in the words 'the person in possession or control'.

The High Court looked to the Act as the basis of *in rem* proceedings and indicated that the wording of the Act must take precedence over any authority, Australian or foreign⁶. In view of the unambiguous wording of sections 18 and 19 of the Act, the High Court held that *the conclusion is inevitable that no limitation was intended in..[the] provisions...[of s.19]*⁷. This was based on the differences in the references to charterer in sections 18 and 19. In reaching this conclusion, the High Court looked to the very specific definition in section 18 and the more general definition in section 19.

In particular, three of the five Judges held that it was impossible for one entity or person to be the "owner or the charterer...or...in possession or control" [emphasis added] of the vessel at the time the cause of action arose, which is the first limb of the test under sections 18 and 19. By the very wording of section 19 (a), the Act contemplates that only one of the entities set out in section 19 (a) can fall within the limbs of that test⁸. The High Court noted that possession and control could lie with separate entities and accordingly the reference to a charterer could not refer solely to a demise charterer.

The operation of section 19 was not dependent on a cause of action arising under section

³ The "*Sextum*" [1982] 1 LLR 532

⁴ *Reef Shipping Co Ltd v The Ship "Fua Kavenga"* [1987] 1 NZLR 550

⁵ The "*Permina 108*" [1978] 1 LLR 311

⁶ At 681, 688-9

⁷ At 681

⁸ At 688

17 or 18, but simply where a general maritime claim could be enforced by *in rem* proceedings against the relevant person who fell within the scope of section 19 (a). In so doing, the High Court highlighted the differences between sections 3(6), particularly the references to a “maritime claim” in section 3(6) and the narrower references to a “general maritime claim” in section 19⁹. Since the heading to section 19 contained the only reference in the section to a “*surrogate ship*”, the High Court rejected Laemthong’s submissions that section 3 (6) defined a charterer for the purposes of section 19.

The judgment of the High Court has made Australia one of the most attractive jurisdictions in which to enforce a maritime claim and the decision will have a substantial and wide ranging impact. This decision is authority for the proposition that a vessel can be arrested where the relevant person, within the meaning of s.19(a), was a slot, demise, voyage, time or any other charterer. The High Court clearly and unambiguously rejected any attempt to link possession with the definition of a charterer. To a significant extent, this decision acknowledges the commercial and practical realities of liner shipping conferences and slot charterparties, particularly from the perspective of nations like Australia, which are not significant shipowning nations.

The Act merely requires the presence of a vessel in Australian territorial waters to found jurisdiction for *in rem* proceedings, which will then be heard by an Australian courts. The Act also confers jurisdiction on Admiralty courts over all vessels, irrespective of their residence, domicile or ownership and over all maritime claims, irrespective of where the claim arose¹⁰. Accordingly, claims against slot charterers, for example, can be heard by an Australian Court even where the owner of the vessel is not Australian and where the cause of action arose outside Australian territorial waters.

An interesting application of this decision and the provisions of the Act concerns the doctrine of sovereign immunity and the operation of government owned or operated vessels. Australian law does not recognise a doctrine of sovereign immunity in the context of commercial transactions. This is in marked contrast to the laws of several prominent maritime jurisdictions, for example the United States. Accordingly, state-owned shipping companies are treated by the Australian courts in exactly the same manner as privately-owned shipping companies and their vessels.

There is a very narrow and restricted definition of a government ship in the Act and this

⁹ At 689

¹⁰ Section 5 (1) of the Act

is specifically limited to vessels owned, demised or sub-demised to a government but does not include vessels which are owned by or demised or sub-demised to a government owned trading corporation, even if it is an agency of the government¹¹. The practical effect of this is to allow for *in rem* proceedings to be validly commenced against vessels owned or operated by government owned trading corporations. A defence of sovereign immunity by the owners or operators of a government owned trading corporation would not be valid under Australian law, given that proceedings could be run in Australia.

Large numbers of vessels owned by Japanese interests call at virtually all Australian ports. In light of this decision and in view of the provisions of the Act, many of these vessels could be subject to arrest for claims which, when the cause of action arose, they were simply a slot, time or voyage charterer. For example, Minami Taiheiyo Shipping is a slot charterer of a vessel operating between Japanese and North American ports. The vessel is owned by or demised to Kita Taiheiyo Shipping (“the Kita Taiheiyo Vessel”). Minami Taiheiyo also owns a vessel which occasionally calls at Australian ports (“the Minami Taiheiyo Vessel”). Cargo carried on board the Kita Taiheiyo Vessel, pursuant to bills of lading issued by Minami Taiheiyo, is damaged and the cargo owners seek recourse and protection of their rights. The first limb of the test for surrogate or sistership arrest is that Minami Taiheiyo was the “owner or charterer of” the Kita Taiheiyo Vessel, at the time the cause of action arose, namely when the cargo was damaged. That Minami Taiheiyo is merely a slot charterer does not exclude it from the scope of section 19 (a)¹². The second limb of the test is that Minami Taiheiyo was the owner of the Minami Taiheiyo Vessel at the time the proceedings were commenced. Accordingly, under Australian law, the Minami Taiheiyo vessel could validly be arrested as a surrogate ship of the Kita Taiheiyo Vessel in respect of the claim against Minami Taiheiyo.

ARREST PROCEDURES UNDER AUSTRALIAN LAW

In practical terms, an arrest in Australian waters is a relatively straightforward and cost-effective exercise. The Federal Court has national jurisdiction and the arrest documents can be lodged with the Federal Court in Sydney to arrest a vessel anywhere in Australian waters. The proceedings would still be conducted in the Federal Court at Sydney.

The solicitor instructed prepares all of the necessary documentation, including the arrest warrant. The documentation is presented to an officer of the Court, not a judge, who

¹¹ *Admiralty Act*, section 8(4)

¹² At 681 and 692. See also *The “Span Terza”* [1982] 1 LLR 225 at 227

will automatically issue the warrant assuming the papers are in order. Depending on the circumstances of the claim and the location of the vessel, an arrest can be effected within a few hours of the receipt of instructions, even after business hours, on weekends and on national and local holidays.

The Act does not require an arresting party to demonstrate a prima facie case, but merely to act reasonably since the Act only requires brief details of the nature of the claim and its amount. There is no requirement to prepare and file a statement of claim at the time the vessel is arrested. There is also no requirement that an arrest application be heard by a Judge or other judicial officer before the arrest warrant is issued and acted upon nor Australia does not require an arresting party to provide counter-security. The solicitor acting for the arresting party is required to provide a personal undertaking to the Court to pay the Admiralty Marshal's fees and expenses of and relating to the arrest.

The Act provides a means of redress for the owners of arrested vessels, who are entitled to seek damages arising from any wrongful arrest. Wrongful arrest is specifically defined to be where *“a party unreasonably and without good cause demands excessive security or obtains the arrest or fails to consent to the release from arrest, that party is liable in damages to any person who has suffered loss or damage as a direct result.”*¹³. Damages are limited to losses directly consequential on the arrest or refusal to release the vessel from arrest. ■

¹³ Section 34 of the Act

Japanese Sentiment, Today and Tomorrow

- Service -

Takao TATEISHI - *Editor*

Are Japanese people unwilling to pay for intellectual services they receive, however useful they may be? The answer may be yes. It seems as if anything intangible never appeals to their conscience. What can be valued must be visible and touchable - with such conviction the Japanese people may have worked hard in order to pull the Japanese economy out of the ashes during the difficult time in the wake of World War II, putting emphasis in particular upon the reconstruction of the manufacturing industry. And their indulgence in materialism now tends to lead them to the view that whatever is provided in the form other than you can readily confirm is less than what you should pay for.

Thus, services are so much taken for granted in their daily lives that the word *saabisu* (for service) has made a considerable departure from its original meaning. Most of the time you hear the Japanese say *saabisu*, it is meant to be “free of charge” or “souvenirs as a token of good will”. When you step in a cafe to have a cup of coffee, they feature a set of “morning service”, which comprises coffee, toast and salad for the price of either one of the three, although they will give you a polite bow instead of prayer. If you are rich enough to buy a condominium or a flat in Tokyo, your salesperson will try to attract your attention by saying that they can now provide a more spacious one with an additional “service room” in the same price category. Or if you are a frequent visitor at the restaurant, they will normally return your courtesy by adding one free dish to your main course, saying *saabisu desu* (literally, this is part of our “service”).

Much obsessed with such modes of thought, I was surprised and needed some time to put the conflicting ideas into a comfortable fit when I heard the voices of concern from the users of the TOMAC arbitration over the “one-off” nature of arbitration under Japanese law. Have they become willing to fight all the way up to the Supreme Court to their satisfaction in settling their disputes despite their hatred of confrontation? Have they turned their policy of not using money in dispute resolution notwithstanding it is intangible? The answer might be found elsewhere. In my view, the Japanese still hate being involved in dispute resolution. But what matters is whether you can swallow the bitter pill once it proves inevitable to take one to cure the disease. There should always be an alternative or better solution. It is understandable if they wish, as part of their risk management, to retain a last resort in order to avoid the worst case.

Under the current Arbitration Act, the only recourse an unsatisfied party to the arbitration

can take, once an award was issued, is bring a motion to the court to have the award vacated*¹. Such other measures as an appeal from the award are not available. In addition, the Act remains silent on what will become of the arbitration if the court decides the award should be vacated. It would of course be beneficial to the party against whom an enforcement is sought that the court decides to set aside the award. However, it is crucial where the arbitral award dismissed the claim of the applicant in the first place. He would virtually have no redress at all if to set aside an adverse award does not mean a remittance of the award to the tribunal for review.

The Arbitration Act is now under review on the basis of the Draft Text made in 1989 by Arbitration Law Study Group. Probably because of the trend in the opposite direction worldwide, the Draft does not provide for the parties' right to appeal from an award. In addition, as the Draft does not adopt Article 34(4) of the UNCITRAL Model Law*², it seems still unclear whether the court would give an opportunity to the arbitrator of reviewing their award where there are grounds for setting aside. Furthermore, in cases where the court declares that the arbitration agreement is null and void, whether the parties would then be allowed to bring suit to the court is anyone's guess. Let's keep an eye on this. ■

Correction: The index title of the article about the *Jasmine* in the contents page of the JSE Bulletin No. 37, ie, "The Supreme Court affirmed the validity of the demise clause in a bill of lading" was misleading. The Supreme Court did not review the validity of the demise clause, although it did not intervene in the conclusion of the Tokyo High Court, which held that the demise clause in a bill of lading was valid.

*¹ Article 800

An award shall have the same effect as a judgment which is final and conclusive between the parties.
Article 801

1. Motion for dismissal of an award may be made in the following cases: (1) In case an arbitration procedure should not be allowed; (2) In case an award condemns a party to perform an act the performance of which is prohibited by law; (3) In case the parties were not represented in accordance with the provisions of law; (4) In case the parties were not examined in the arbitration procedure; (5) In case the award is not accompanied by reasons; (6) In the case of Article 420 items (4) to (8) of the Code of Civil Procedure, there exist conditions allowing a suit for retrial.
2. Dismissal of an award may not be made by the reasons as mentioned in items (4) and (5) of this Article in case parties have otherwise agreed.

*² Article 34(4)

The court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside.

The JSE Bulletin

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