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THE ENFORCEMENT OF FOREIGN ARBITRAL AWARDS IN JAPAN

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INTRODUCTION

There appears to be little difficulty to have foreign arbitral awards recognised and enforced in Japan. The party who wishes to have an award enforced against a Japanese party should bring an action to a competent court for enforcement under the New York Convention¹ and/or a bilateral treaty. According to the reported cases where the parties applied for enforcement of foreign awards before the New York Convention took effect for Japan, the Japanese courts had duly granted enforcement either under the Geneva Convention² or bilateral treaties. After the New York Convention came into force, again, in all reported cases, the Japanese courts have enforced foreign awards under the New York Convention and/or bilateral treaties. There is one reported case where a claim based partly on a foreign arbitral award was not admitted. However, this was not for enforcement of the award but concerned with inheritance of real property in Japan by a Chinese party who relied upon the award in order to prove his relationship with the deceased.³

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¹ The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 1958.

² The Geneva Convention on the Execution of Foreign Arbitral Awards of 1927.

³ A Tokyo District Court's dismissal judgment on 26 December 1985; Docket: Showa 57 (gyo-u) 91; 32 *Somu Geppo* 2124; *Hanrei Jiho* No 1181 p 91.

The court held:

“The facts that an original arbitral award has a description of inheritance in its reasoning and/or that an execution judgment for the award has been granted, should not constitute grounds to certify the inheritance. In case a foreigner who owned real property in Japan died, the issue of who is to inherit that property should be determined in accordance with the national law of the deceased pursuant to Article 25 of the Horei. The national law of the deceased is uncertain as to whether it is the law of the People's Republic of China or that of the Republic of China. The claim of the applicant should be dismissed because the registered documents submitted for grant of inheritance, although duly certified by the Republic of China, could also not serve for that purpose.”

The only problem in getting foreign awards enforced in Japan may lie in the length of the procedure one will have to endure until enforcement is granted. According to the reported cases, it tends to last about a year, often two or more, which is long enough to impair the timesaving aspect of arbitration,⁴ particularly from the viewpoint of TOMAC arbitration.⁵

Why does it have to take that long? One may wonder. In contrast to statute law of major common law countries,⁶ Japanese law recognises it as illegal to bring suit to the court in respect of a dispute where an arbitration agreement validly exists for resolution of that dispute; Japanese courts will dismiss such suit in favour of arbitration.⁷ However, Japanese law retains a measure of checking an arbitral award when it was not voluntarily performed and suit was brought for its enforcement. That is the statutory provision which requires the court to render a judgment for compulsory execution of an award only if satisfied that the award is admissible (see below). In respect that an arbitral award needs to be granted a judgment for execution, there exists no difference under Japanese law between foreign arbitral awards and those rendered in Japan, although the granting of such judgment has apparently been made easier for foreign awards with the advent of the New York Convention.

I. ENFORCEMENT UNDER THE NEW YORK CONVENTION

Japan ratified the New York Convention on 20 June 1961 and put it into force on 18 September 1961. The Japanese courts, when deciding enforcement of foreign arbitral awards under the New York Convention, normally apply domestic rules of procedure as provided for in Article III of the Convention:⁸ i.e. Article 22 of the Civil Execution Code⁹

⁴ Arbitration in itself is less time consuming but it should also be noted: (1) there is normally no appeal against the award; (2) discovery is limited in arbitration.

⁵ TOMAC renders awards in international arbitrations in 13 months on average.

⁶ Section 9 of the English Arbitration Act 1996 provides: "(1) A party to an arbitration agreement against whom legal proceedings are brought ... may ... apply to the court ... *to stay the proceedings* so far as they concern that matter ... (4) On an application under this section the court shall *grant a stay* unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed." (*emphasis added*)

Section 3 of the US Federal Arbitration Act provides: "If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court ... shall on application of one of the parties *stay the trial of the action* until such arbitration has been had ... " (*emphasis added*)

⁷ Takao Tateishi, "The Enforcement of the Arbitration Agreement under Japanese Law," *The JSE Bulletin* No 39 p 1 *et seq.*

⁸ Article III of the Convention provides: "Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied

and/or Article 802(1) of the Arbitration Act,¹⁰ and grant an execution judgment pursuant to those domestic rules if they are satisfied that the awards comply with the requirements under the Convention.

Public Policy Considered

Most recently, the Tokyo District Court granted an execution judgment for a Chinese arbitral award against a Japanese party on 19 June 1995,¹¹ after having been satisfied that the award complied with the requirements provided for in Articles IV and V of the New York Convention. The court interpreted Article VII of the Convention as inapplicable where a bilateral treaty imposes heavier limitations than the Convention itself in enforcing foreign awards.¹²

In that case, a Chinese state-run corporation and a Japanese corporation entered into a joint-venture contract for the purpose of manufacturing of bricks in China on 21 February 1989. The contract provided for arbitration by CIETAC.¹³ Disputes developed between the parties in respect of the performance of the contract and were finally referred to arbitration on 14 August 1990. The Japanese party failed to present themselves before the arbitrators at the noticed hearing date and ignored further instructions from the arbitrators. CIETAC handed down its final award in favour of the Chinese party on 12 April 1991. The Chinese party brought an action to have the award enforced in 1994.

The defendant refuted that they were not liable for non-performance of the contract because the contract became null and void when the actual investor did not take part and the joint venture was dissolved, and that therefore the arbitration award was meaningless. They further contended that the arbitrators, being partial and ignoring the submissions of the defendant, decided the disputes on the basis of their unilateral and misplaced understanding of facts. They asserted that to enforce such award would violate public policy of Japan.

upon, under the conditions laid down in the following articles...”

⁹ Article 22 [Title of Debt] of the Civil Execution Code provides at paragraph (6) to the effect that foreign judgments and arbitral awards shall be executed compulsorily only on a final execution judgment.

¹⁰ Article 802(1) of the Arbitration Act provides: “Execution by virtue of an arbitral award shall be made only when an execution judgment has been rendered for the admissibility thereof.”

¹¹ Docket: Heisei 6 (wa) 1125; *Hanrei Times* No 919 p 252; 24 *Kokusai Shoji Homu* No 12 p 1311.

¹² Article VII of the New York Convention provides: “The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States ...”

¹³ China International Economic and Trade Arbitration Commission.

As to the rules of procedure applicable to the case the court held:

“As China and Japan are both signatories to the New York Convention and both countries declared, upon the principle of reciprocity, to apply the provisions of the New York Convention in recognising and enforcing arbitral awards so far as they were rendered in other signatory states to the Convention. Pursuant to Article 802(1) of the Arbitration Act,¹⁴ which comes into effect in accordance with Article III of the Convention, an execution judgment must be rendered for enforcement of the instant award. And, in that procedure, compliance of the instant award with the provisions of Article IV *et seq.* of the Convention will be considered. Article VII of the Convention is inapplicable here because the Sino-Japanese Trade Agreement imposes at Article 8(4) heavier limitations¹⁵ than the Convention itself in that it would invoke the application of Articles 802(2) and 801 of the Arbitration Act.”¹⁶

The court went on to deny the defendant’s allegations:

“The first allegation of the defendant did not contradict the effect of the arbitration agreement and therefore it does not come within the scope of Article V.1 of the Convention for refusal of enforcement. The second allegation is concerned with procedural irregularities but does not come within that scope either. Furthermore, on the evidence the arbitrators cannot be said to have been partial; the arbitrators were duly appointed in accordance with the rules; the arbitrators calculated the amount of damages with detailed reasons after scrutiny of the defence of the defendant. In summary, neither the composition of arbitrators nor the arbitral

¹⁴ Article 802

“1. Execution by virtue of an arbitral award shall be made only when an execution judgment has been rendered for the admissibility thereof.

2. The above judgment shall not be rendered in case there exists a ground on which a motion for setting aside the award may be brought.”

¹⁵ Article 8(4) of the Sino-Japanese Trade Agreement provides: “The two member countries shall cause a related organ to enforce the award according to the laws of the country in which the enforcement thereof is sought.”

¹⁶ Article 801

“1. Motion for setting aside an award may be brought in the following cases:

(1) In case an arbitration procedure should not be allowed; (2) In case an award directs a party to perform an act 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 items (4) to (8) of Article 338 paragraph 1 of the Code of Civil Procedure, there exist grounds allowing a suit for retrial.

2. Setting aside 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.”

procedure has any bearing on the scope of Article V.2 (b) and therefore the allegation on the violation of public policy should also fail.”

No Review of Validity of Contract

In a similar case of the Tokyo District Court on 27 January 1994,¹⁷ the court appears to have considered the provisions of the New York Convention alone in enforcing a Chinese arbitral award.¹⁸ In that case, the plaintiff Chinese buyer entered into a sale contract with the defendant Japanese maker of a plant for manufacturing storage batteries on 27 October 1985. The defendant failed to deliver the plant at all and the plaintiff brought arbitration to CIETAC on 7 October 1988 pursuant to the arbitration agreement claiming damages. An arbitral award was rendered by CIETAC on 19 May 1990. The plaintiff asked for enforcement pursuant to Article III of the New York Convention in 1993.

The defendant contended that, due to the default of the buyer to secure the payment of the purchase money within the agreed period, the agreement had become null and void on 18 February 1986. They also took issue with the composition and impartiality of the arbitral tribunal and argued that the award should therefore be invalid.

The court held:

“Both Japan and China are signatories to the New York Convention. Therefore the plaintiff can demand enforcement of the instant award under Article III of the Convention. And the issues as regards the requirements for enforcement of the award are solely subject to the provisions of the New York Convention. This court does not review the validity of the contract because it does not come within the scope of Article V of the Convention for refusal. On the evidence the court also rejects the allegations on the composition and impartiality of the arbitral tribunal.”

Principles of Reciprocity

On 14 July 1993 the Okayama District Court applied both the New York Convention and a bilateral treaty, and granted an execution judgment for a Chinese award.¹⁹ In that case, a Chinese corporation entered into a contract on 12 May 1985 with a Japanese corporation

¹⁷ Docket: Heisei 5 (wa) 11636; *Hanrei Times* No 853 p 266; *Jurist* No 1102 p135.

¹⁸ Sino-Japanese Trade Agreement came into force from 5 January 1974. China became a signatory to the New York Convention as recently as 27 November 1986.

¹⁹ Docket: Heisei 4 (wa) 8; *The JSE Bulletin* No 31 p 10; *Hanrei Times* No 857 p 271; *Hanrei Jiho* No 1492 p 125.

to import equipment for manufacturing of knitted bags and agreed that any disputes arising out of the contract should be resolved by arbitration at CIETAC. On 22 March 1990 the plaintiff Chinese brought arbitral proceedings to CIETAC claiming damages for the poor performance of the equipment, etc. CIETAC gave an award in favour of the plaintiff on 30 January 1991. The Chinese party brought suit in the Japanese court for enforcement of the award in 1992.

The defendant asserted that, according to the Preamble of the Sino-Japanese Trade Agreement concluded between Japan and China, the Agreement was based on the principle of reciprocity, and that, in view of that principle and Article VII of the New York Convention, Japan may refuse recognition and enforcement of Chinese arbitral awards so long as China imposes restrictions on recognition and enforcement of Japanese arbitral awards. The gist of their allegations was the fact that the Chinese Code of Civil Procedure limited at Article 219 the period of applying for execution of foreign awards to six months if the parties are corporations, whereas this case was brought in the Okayama District Court after six months had elapsed from the last day of the performance period.

The court recognised the award pursuant to Article III of the New York Convention as well as under the provisions of the Sino-Japanese Trade Agreement, holding:

“The Sino-Japanese Trade Agreement shall be applied preferentially over the New York Convention to the extent the Agreement so provides. The Agreement provides at Article 8(4) that the two member countries shall cause a related organ to enforce the award according to the laws of the country in which the enforcement thereof is sought. Article III of the New York Convention provides that an award meeting the requirements is to be enforced according to the procedural rules of the region in which the enforcement is claimed. It is sufficient that the procedure for recognition and enforcement of foreign arbitral awards complies with the laws of the country in which the award is being claimed under the New York Convention and the Agreement. Reciprocity as defined in Article I.3 of the New York Convention is the principle which is only concerned with the scope of arbitral awards to which the Convention is applied. The Agreement also does not adopt reciprocity for the procedure of enforcement. The assertion of the defendant’s is inadmissible. The award was found valid under both the Convention and the Agreement, and is enforceable.”

Opportunity for Representation

The Osaka District Court in its decision of 22 April 1983 granted enforcement of an American arbitral award under the New York Convention by rejecting the defendant's arguments based on Article V. 1 (b) of the Convention that he had not been given proper notice of the appointment of the arbitrator and of the arbitral proceedings and that the defendant was unable to present his case.²⁰

In that case, a UK shipowner and a Japanese charterer entered into a time charter of a vessel on 10 April 1970 which contained such arbitration clause that any and all differences and disputes of whatsoever nature arising out of the charter should be put to arbitration in New York. On 16 March 1977 the plaintiff shipowner called for arbitration in respect of disputes over the cargo damage and the charterer's breach of the charter. The arbitral tribunal informed the defendant charterer of the date of the first hearing on 17 June 1977. But at the request of the defendant the first hearing was postponed. On 20 July 1979 the tribunal closed the hearing in the absence of the defendant after confirming that further notice of a hearing had been delivered to the defendant. An award was rendered in favour of the shipowner on the same day. Since the defendant did not voluntarily perform the award the plaintiff brought an action in the court in 1981. The defendant refuted that recognition and enforcement of the award should be refused in accordance with Article V.1(b).

The court granted enforcement on the following grounds:

“The defendant had enough opportunity to present his case in the arbitral proceedings since notice of a hearing was twice given on 18 July 1977 and 29 November 1978 to the defendant's counsel before he resigned as the defendant's counsel on 16 May 1979.”

II. ENFORCEMENT UNDER BILATERAL TREATIES

As seen above, Japanese courts did not necessarily apply preferentially bilateral treaties as provided for in the New York Convention in enforcing foreign arbitral awards. However, the Tokyo District Court granted an execution judgment for a Chinese award on 20 July 1993,²¹ applying solely the Sino-Japanese Trade Agreement.

²⁰ Docket: Showa 56 (wa) 4919; Kazuo Iwasaki, “Application of New York Convention by Japanese Courts,” *The JSE Bulletin* No 10 at p13; 34 *Kakyu Minshu* 169; *Hanrei Times* No 501 p 182; *Hanrei Jiho* No 1090 p 146.

²¹ Docket: Heisei 3 (wa) 10297; *Hanrei Jiho* No 1494 p 126; *Hanrei Times* No 859 p 255; 22 *Kokusai Shoji Homu* No 8 p 923.

In that case, a Chinese importer and a Japanese exporter entered into a sale contract of video recorders and parts on 28 October 1989. The buyers remitted the purchase money but the sellers failed to ship the goods within the agreed period. The buyers cancelled the contract on 1 June 1990 and brought arbitral proceedings to CIETAC in accordance with the arbitration agreement in the contract, claiming the refundment of the remittance and damages for the sellers' non-performance of the contract. The parties reached an amicable settlement and the award was rendered by CIETAC on 5 November 1990. The buyers brought an action for an execution judgment on 30 July 1991.

The court held:

“Article 802 of the Arbitration Act should apply *mutatis mutandis* to foreign awards because domestic and foreign awards are no different in substance in the sense that both are resolution by third party arbitrators of the disputes between private persons in accordance with their agreement. The New York Convention to which both Japan and China are signatories should apply as to the requirements for enforcement. However, according to Article VII.1 of the New York Convention, it should not affect bilateral agreements between the contracting states as regards enforcement of awards ... and therefore the Sino-Japanese Trade Agreement shall be applied preferentially over the New York Convention. The Agreement provides at Article 8(4) that the two member countries shall cause a related organ to enforce the award according to the laws of the country in which the enforcement thereof is sought. In the end Article 802 of the Arbitration Act should apply to the instant case and on the facts found it is recognised that the award was rendered without any irregularities or contradiction so as to invoke the provisions for refusal of enforcement.”

Governing Law of the Award and Public Policy Issue

The Nagoya District Court considered the enforcement of an award more generously in its decision on 26 February 1987²² under the Treaty of Friendship, Commerce and Navigation between Japan and the US.²³ In that case, an American corporation entered into a distributorship agreement with a director of a Japanese maker on 1 February 1981. The agreement specified Japanese law as governing the agreement. The Japanese party unilaterally terminated the agreement towards the end of 1983 and the American party

²² Docket: Showa 60 (wa) 239; *Hanrei Times* No 645 p 239; *Hanrei Jiho* No 1232 p 138.

²³ The Treaty came into force as from 30 October 1953. The US became a signatory to the New York Convention later in 1971.

brought arbitral proceedings in Hawaii claiming damages. On 6 December 1984 the arbitrator gave an award in favour of the American party. The plaintiff American brought an action to have such award enforced against the defendant Japanese in 1985.

The court held:

“The law governing the formation and effect of an arbitration agreement should be decided in accordance with Article 7 of the Horei;²⁴ i.e. the law designated by the parties, or, failing which, the law of the place of conduct. The law governing the arbitral procedure and the award should, unless otherwise specifically agreed upon between the parties or save special circumstances to the contrary, be the governing law of the arbitration agreement. In the instant case the parties had agreed that the governing law of the arbitration agreement should be the law of Japan. However, the parties selected Hawaii as place of arbitration and arbitral proceedings by AAA,²⁵ and the award was rendered in accordance with the AAA rules. Therefore the parties are deemed to have designated American law as governing the arbitral procedure and the award.

Under American law as agreed between the parties as governing the arbitral procedure and the award, the award may be enforced. Thus the award may be submitted for enforcement in Japan as well but for grounds for setting aside. Even if the employee of the Japanese corporation who entered into the distributorship agreement was not entitled to do so, on the evidence the defendant did not bring a motion to vacate the award in the US competent court within the required period under American law. Accordingly, the award is enforceable in accordance with Article 4(2) of the Treaty of Friendship, Commerce and Navigation between Japan and the US; grant for an execution judgment would not also violate public policy of Japan. After all, where a foreign arbitral award was properly rendered in accordance with the agreement between the parties, if the award has become final and enforceable under the law of the place of arbitration, the enforcement in Japan would not be contrary to public policy.”

²⁴ Article 7 of the Horei

“(1) As regards the formation and effect of a juristic act, the question as to the law of which country is to govern shall be determined by the intention of the parties.

(2) In case the intention of the parties is uncertain, the law of the place where the act is done shall govern.”

²⁵ American Arbitration Association.

Uniform Rules for Enforcement

On 27 November 1961 the Osaka District Court also granted enforcement of a New York arbitral award under the Treaty of Friendship, Commerce and Navigation between Japan and the US.²⁶ In that case, an American party brought arbitral proceedings in New York in accordance with the agreement with a Japanese corporation in respect of a dispute between them. The American party obtained an award in their favour and brought an action in order to have the award enforced. The court recognised the requirements for enforcement under Section 4(2) of the Treaty as being: (1) that a valid arbitration agreement exists; (2) that an arbitral award was duly rendered in accordance with the arbitration agreement; (3) that the award became final irrevocably and enforceable under the law of the place of arbitration; and (4) that it is not against public policy of the country in which the award is to be enforced.

The court, after having been satisfied that the above four requirements were fulfilled, held:

“The Arbitration Act recognises arbitration as a voluntary means of dispute resolution chosen by the parties and there should be no difference between domestic arbitrations and foreign arbitrations in that respect. Therefore Article 802(1) of the Act would apply to foreign arbitral awards and Articles 801 and 802(2) would in turn apply as to the requirements for enforcement. However, for the purpose of unification of the rules for enforcement of foreign arbitral awards as intended by international treaties, the Treaty of Friendship, Commerce and Navigation between Japan and the US should apply preferentially to the instant case. In accordance with Section 4(2) of that Treaty the said award is enforceable.”

III. ENFORCEMENT BEFORE THE NEW YORK CONVENTION

Before the New York Convention took effect but when the Geneva Convention was already in place, the Japanese courts had applied domestic procedural rules in the same way as under the New York Convention; i.e. Article 802(1) of the Arbitration Act, and granted enforcement when satisfied there were no grounds for setting aside under the Geneva Convention or bilateral treaties.²⁷ At the time when there was no international mechanism for this purpose, the courts considered foreign arbitral awards the same as

²⁶ Hironori Tanimoto, “Sources of Law relating to Maritime Arbitration in Japan,” *The JSE Bulletin* No 29 at p 13.

²⁷ Both the US and China are non-signatory states to the Geneva Convention.

domestic ones pursuant to Articles 800 and 802 of the Arbitration Act²⁸ and expressed a view that an execution judgment could be rendered but for grounds for setting aside under Article 801 of the Act.

Enforcement under the Geneva Convention

On 20 August 1959 the Tokyo District Court granted enforcement of a London arbitral award under the Geneva Convention.²⁹ In that case, an Italian corporation and a Japanese corporation entered into a sale contract of a vessel which provided for arbitration in London and English law as governing the contract. The Italian party brought arbitral proceedings in London claiming damages for non-performance of the contract by the Japanese and obtained an award in their favour. They brought an action to have the award enforced in 1958.

The court held:

“The contract inclusive the arbitration clause was validly entered into between the parties in accordance with English law to which both of them agreed. The award should be subject to the Geneva Convention and therefore there should be no application of the provisions of Articles 801 and 802 (2) of the Arbitration Act. A foreign arbitral award could be given an execution judgment pursuant to Article 802(1) of the Arbitration Act so far as the award complied with the requirements provided for in the Geneva Convention. The present award complies with the requirements under the Convention and therefore is enforceable.”

Enforcement for Balance of Payment

The Tokyo District Court granted enforcement on 23 October 1959 as per the balance of payment after setoff on the basis of an arbitral award.³⁰ In that case, an American shipowner and a Japanese charterer entered into bareboat charters of vessels on 23 March 1957 which provided for arbitration in New York. Disputes arose and were referred to arbitration in New York and an award was rendered on 27 February 1959. The American party, after setting off his payment against that of the Japanese, brought an action to recover the balance in 1959.

²⁸ Article 800 provides: “An arbitral award shall have the same effect as a judgment of court which is final and conclusive between the parties.”

²⁹ Docket: Showa 33 (wa) 109; Iwasaki, *supra* at p 15; 10 *Kakyu Minshu* 1711; *Hanrei Times* No 93 p 59.

³⁰ Docket: Showa 34 (wa) 3939; 10 *Kakyu Minshu* 2232.

The court held:

“In case where an arbitral award directs both parties to pay certain sums of money to each other, one party can, after setting off payments, properly bring action in order to have the payment of the balance enforced against the other.”

Arbitral Awards as only Remedy between the Parties

The Osaka District Court affirmed on 11 May 1959 that foreign arbitral awards could be enforced in Japan pursuant to the Arbitration Act, dismissing a suit for damages in defiance of an arbitration agreement.³¹ In that case, the plaintiff Japanese importer purchased phosphates from the sellers and the sellers in turn entered into a contract of affreightment on 27 January 1958 with the defendant Japanese shipowner to carry the cargo. The COA provided for arbitration in London. Bills of lading incorporating the terms and conditions of the COA were issued in respect of the cargo on 1 April 1958. The cargo was allegedly wet-damaged during discharge and the plaintiff B/L holder brought an action in the Osaka District Court claiming damages.

The court dismissed the action, holding:

“The arbitration clause in the COA had been properly incorporated into the bill of lading. Foreign arbitral awards rendered in such arbitration could be enforced by applying *mutatis mutandis* the provisions of Articles 800 and 802 of the Arbitration Act.”

Against the defendant’s argument that arbitral proceedings contravened Article 32 of the Constitution³² so that the arbitral award would be unenforceable, the court further held:

“Arbitration is a means of dispute resolution to be conducted, in accordance with an agreement between the parties, by third party arbitrators of their own choices, instead of the national court of justice. As long as the parties voluntarily wish to choose such dispute resolution, the Government is to be satisfied that enforcement of an award rendered in such arbitral proceedings should be the only remedy as between the parties.”

The Tokyo District Court decided similarly on 10 April 1953.³³ In that case, an American shipowner and a Japanese charterer entered into a charterparty in respect of a vessel on 29

³¹ Docket: Showa 33 (wa) 5389; Tanimoto, *supra* at p 13; 10 *Kakyu Minshu* 970.

³² Article 32 of the Constitution provides: “No one shall be deprived of his or her right of trial at court.”

³³ Docket: Showa 27 (wa) 4517; 4 *Kakyu Minshu* 502.

March 1952. The charterparty provided for arbitration in New York and specified American law as governing the charter. The charterer failed to ship the cargo within the agreed period and the shipowner cancelled the charter on 14 June 1952. The shipowner brought suit in the court claiming damages.

The court dismissed the suit, holding:

“The arbitration agreement was valid in American law and that could serve as a demurrer under the Arbitration Act of Japan which was the law of the court. A foreign arbitral award to be rendered in New York in accordance with the agreement between the parties would be judged similarly as domestic arbitral awards pursuant to Articles 800 and 802 of the Arbitration Act. They would be enforceable but for grounds for setting aside under Article 801 of the Act.”

IV. ENFORCEMENT OF ARBITRAL AWARDS RENDERED IN JAPAN

In order to help infer whether the Japanese courts would grant enforcement of foreign arbitral awards in different circumstances than seen above, it may be useful to refer to the cases in which the courts considered enforceability of arbitral awards rendered in Japan. Of course, where there was no valid arbitration agreement in respect of a dispute, an arbitral award so rendered was held void. The Supreme Court on 2 May 1977 set aside an award on the ground of non-existence of the arbitration agreement.³⁴

Procedural Flaw Cured

The Kobe District Court dismissed a motion to set aside a TOMAC award in a controversial case on 29 September 1993, after satisfied that the procedural flaw had been cured.³⁵ In that case, an arbitral award was given in favour of the claimant in the disputes over a bareboat charter. The winning party sought an execution judgment for the award. The losing party moved to set aside the award invoking Article 801(1)(i) and contended *inter alia* that the arbitrators’ refusal to the party’s request for access to the minutes of the hearing of a witness constituted a gross violation of procedure and that the award based on such procedure should be vacated. The TOMAC Arbitration Rules at that time

³⁴ Docket: Showa 52 (o) 194; *Kinyu Shoji Hanrei* No 548 p 41.

The court held:

“An award, issued in the arbitral proceedings while there was no arbitration agreement entered into between the parties, should not take the same effect as a final court judgment.”

³⁵ Dockets: Heisei 2 (wa) 103 and 147; *The JSE Bulletin* No 30 p 1; *Hanrei Times* No 863 p 273; *Hanrei Jiho* No 1517 p 128.

provided that only the parties to the arbitration might for a due cause be permitted to inspect relevant documents.

The court, while warranted the parties' rights of access to such documents and acknowledged the infringement of the Rules, nevertheless held that the procedural flaw had been cured:

“Wherever an important witness is examined in the absence of the parties, it is necessary, as a procedural guarantee, that the parties be given access to the evidence acquired through examination. It naturally follows that the arbitrators' rejection of the party's application for access to the witness's examination record was an abuse of their discretion and that a flaw in the procedure by way of a breach of the Rules is recognised. However, only such procedural flaws as are serious enough to be equivalent to the enumerated causes as provided for in Article 801(1) shall amount to the grounds for setting aside. The arbitrators' refusal did not constitute gross procedural irregularities under Article 801(1)(i). In addition, there is no sufficient evidence to support the assertion that the defendant expressed objections to the refusal. Accordingly, the procedural flaw in question had been properly cured by waiver of the right of examination.”

Deficient Reasoning to the Award

The defendant further argued invoking the provisions of Article 801(1)(ii) and (v) that the arbitrators ignored the facts and clearly erred in imposing for ill founded reasons an obligation on the defendant charterer to restore the conditions of the vessel and that the award ran counter to public policy as provided for in Article 90 of the Civil Code.³⁶

The court went on to hold:

“The arbitrators may properly render an award, unlike a judgment of court, based principally on equitable considerations with due allowance for all the circumstances that are deemed, in their discretion, concerned with the particular case in question. The arbitrators need not even make recourse to certain provisions of law... In so far as the arbitrators manifest certain reasons from which one can easily infer how they reached their conclusion, the court is not properly to decide whether their conclusion is right or wrong, much less set aside the award for reasons of impropriety. (The court referred to the judgment by the Great Court of

³⁶ Article 90 [Public Policy] of the Civil Code provides: “A juristic act which has for its object such matters as are contrary to public policy or good morals is null and void.”

Cassation on 27 October 1928.)³⁷ ³⁸ The present arbitral award gives manifestly in its reasoning an outline of the process of decision. It does not contain any irregularities or contradiction and its reasoning does not fall short in any way.”

Why Execution Judgment Necessary

As regards the necessity of judgments for execution of arbitral awards, the court also added:

“It must be admitted that an award is, compared with a court judgment, liable to be flawed by one or another procedural defect. In view of the provisions of law as at Article 802(1) of the Arbitration Act and Article 22(6) of the Civil Execution Code that an arbitral award needs endorsement by a final judgment in order to be effective as a legal means of compulsory enforcement, the award should be conferred with such power only after the court has examined the presence of procedural flaws.”

The Osaka High Court on 30 March 1978 also held that an execution judgment must be rendered for an arbitral award if the party wishes to register property on the basis of the award,³⁹ which was affirmed by the Supreme Court on 25 January 1979. The Osaka High Court held:

“Arbitration is a private means of dispute resolution and an award rendered in such procedure cannot warranty that anything therein contained does not fall foul of national laws. Therefore, an arbitral award could not have the power of compulsory

³⁷ Docket: Showa 3 (o) 891; Tanimoto, *supra* at p 12; 7 *Minshu* 848.

The former Supreme Court held:

“Unlike a judgement of court, an arbitral award may be rendered not supported by legal provisions alone but from a viewpoint of impartiality and equity in consideration of the facts and circumstances, and is not required to specifically cite evidence for the facts which are deemed to be the basis of the award; an award rendered without demonstration of the validity of the evidence as the basis of the award cannot be held as invalid for lack of reasons; so long as an arbitrator can explain the basis of the award, the justice of that basis should not be examined by a court. Even if the reason of the award is deemed unjust, it does not constitute grounds for setting aside of the award.”

³⁸ See also a Tokyo District Court’s decision on 30 August 1985; Docket: Showa 58 (wa) 13644; Tateishi, *supra* at p 3; *Hanrei Times* No 594 p 113; *Hanrei Jiho* No 1194 p 92.

The court held in that case:

“The reasons to the award are validly sufficient if the general process of the arbitrators in reaching their conclusion is known from them.”

³⁹ Docket: Showa 52 (gyo-ko) 30; 24 *Somu Geppo* 679.

execution as such and it could have such power only if the court granted a judgment for its execution.”

In a case where the defendant resisted the enforcement of a TOMAC award on the grounds that the award lacked reasons as provided for in the Article 801(1) of the Arbitration Act, the Kobe District Court had also dismissed the submission on 16 November 1990, holding:⁴⁰

“Arbitration exists, in accordance with the parties’ agreement, as a means of dispute resolution not by the court but by arbitrators. It should not be understood that the arbitrators must solely rely on the provisions of law in reaching their award. They may consider and judge the relevant facts from the point of fairness and arrive at a reasonable conclusion. Accordingly, the reasons to the award should be sufficiently valid if those show the general process of the arbitrators reaching their conclusion and if the inference of law is such that it may not be impossible. The grounds for setting aside an award under Article 801(1)(v) of the Arbitration Act only arise where there was no reasoning sufficient enough to show the general process of the arbitrators’ decision. In the instant case where the tow was lost in a bad weather while towage was in progress, the arbitrators dismissed the claims of the tow owner, after reviewing the relevance of the capacity of the tug and denying the navigational errors of the tug master. One can clearly know in their award the process of their reaching the conclusion.”

Relations with Third Parties

The Tokyo District Court on 20 October 1967 recognised the right of an intervener who had taken transfer of the rights under an arbitral award.⁴¹ In that case, a building contractor who had won an award in respect of the payment of the construction cost brought suit to have the award enforced. The court held:

“An arbitral award shall have the same effect as a final judgment of the court under the Arbitration Act and such effect should remain the same with the third parties after the rights and duties under the award have been transferred to them. It would be contrary to the spirit of the Arbitration Act if the binding effect of the award could be readily lost when the winning party transferred their rights or the losing

⁴⁰ Docket: Showa 63 (wa) 2241; *Hanrei Times* No756 p 258; *Hanrei Jiho* No 1396 p 120.

⁴¹ Dockets: Showa 40 (wa) 3835 and 5737; 18 *Kakyu Minshu* 1033; *Hanrei Times* No 215 p 169.

party transferred their duties to third parties. In the instant case, the right created by the award can be assigned to a third party and is still enforceable. The binding effect of an award extends to an assign so that that person can lawfully bring an action to have the award enforced.”

The Osaka High Court appears to have held to the contrary on 29 May 1984.⁴² In that case, a company drew promissory notes and the bank paid a third party endorsee against the notes. The company, resisting the bank’s debiting of the amount, had won an arbitral award which affirmed that the act of drawing was void and that thus the company owed no obligation to the bank. The company argued that the effect of the award should be extended to the endorsee.

However, the court denied the validity of the arbitration agreement and of the award against the endorsee, holding:

“An arbitration agreement exists only between the drawer and the drawee of the notes. Therefore the award rendered in accordance with that agreement should have no effect as against the bank or the endorsee. The award should not be binding on a *bona fide* endorsee of the notes.”

Costs Awarded

The Osaka High Court on 26 August 1971 dismissed a motion to set aside an arbitral award which awarded legal costs to the claimant.⁴³ In the arbitration the arbitrators had dismissed the main claim while awarding the legal costs to the claimant. The court held:

“Even where the grounds for damages relied upon by the claimant was inadmissible, the legal costs incurred by the claimant could be directed to the respondent particularly from the point of fairness and under such circumstances as in this case.”

CONCLUSION

I cited cases where the Japanese courts considered the enforcement of foreign arbitral awards as well as of those rendered in Japan. The awards rendered in Japan may theoretically be categorised into two in accordance with the nationalities of the parties involved: domestic and international arbitral awards. However, the Japanese courts

⁴² Docket: Showa 59 (ne) 342; *Hanrei Times* No 533 p 166.

⁴³ Dockets: Showa 45 (ne) 1338 and 1445; 24 *Kosai Minshu* 305; *Hanrei Times* No 269 p 200.

appear not to have bothered to distinguish one from the other; actually I could not find a case where an award rendered in an international arbitration in Japan had been put before the court for enforcement. I trust it is not because Japanese parties hardly lose in international arbitrations in Japan but they comply with the awards rendered in such arbitrations.



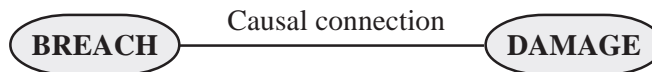
THE LAW OF DAMAGES: ASPECTS OF CAUSATION AND FORESEEABILITY

Stewart DUNN*

1. INTRODUCTION

In the law of damages¹ different *causal scenarios*, illustrated by figures 1, 2/3 and 5, give rise to different issues of law. Figure 1, which illustrates the simplest/basic scenario, identifies the matters which the claimant must prove in all cases. Obvious potential issues are: whether there was a *breach of duty*;² whether the loss/damage was *caused by* the breach and; how much³ damage was caused thereby. A further, not so obvious, potential issue is whether the loss/damage was the *foreseeable*⁴ consequence of the breach.

Fig 1: Simplest scenario - what the claimant must prove (all cases)



This article is concerned with the issues surrounding 3 particular situations/causal scenarios. Part 2 is concerned with the issues (of causation) raised by *concurrent* and *supervening* causes. Part 3 is concerned with the issues (of foreseeability) raised when a breach is followed by a *consequential* act or event (*chain of events/causation* situation).⁵

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¹ So far as general principle is concerned there is no distinction between contract and tort.

² 2 further potential issues/matters which the claimant must prove are: whether there was a contract or relationship of proximity and whether there was an express or implied term/duty (contract) or implied duty (tort). Breach of duty = *fault*. *Negligence* is one example thereof. *Fault + causation = liability*.

³ Otherwise referred to as the *quantum*/amount of damage.

⁴ This issue is sometimes referred to as the *remoteness* issue. The view taken in “*The Law of Damages*,” however, is that foreseeability does not depend on remoteness/probability of occurrence.

⁵ There are other distinct scenarios which are not covered by this article. These include situations in which damage is caused by the *combined* effect of more than one causative factor (*composite/compound* causation/joint fault) and situations in which damage is the *cumulative* effect of a number of causative factors (global loss situation).

2. CAUSATION

2.1 Concurrent causes

Introduction. If two factors, when considered in isolation, would each/independently⁶ have caused the same type/kind of damage of the same or overlapping amount then they may be referred to as *concurrent* causes of that damage. In such situations the first in time to cause *prospective*, that is expected/likely/inevitable, future loss/damage⁷ of the particular type/kind in the particular amount is the causative factor (figures 2 and 3).⁸

Fig 2: Concurrent causes of the same damage



Application of the first in time rule. In *The Haversham Grange*,⁹ a vessel named *The Maureen* was damaged in two successive collisions, each collision causing distinct (non-identical) physical damage (separate causes of separate damage) and each rendering the vessel unseaworthy (concurrent causes of the same/overlapping damage). If carried out in isolation, the first collision repairs would have taken 22 days and the second collision repairs 6 days. Both sets of repairs were carried out concurrently in a period of 22 days. The owners of the *Haversham Grange* were responsible for the second collision (and therefore the costs of repairing the distinct physical damage attributable thereto) but were not liable for the loss of profits incurred while the ship was laid up during the repairs,

⁶ In a *composite* cause/joint fault situation the inference is that all factors were necessary for the occurrence of the relevant damage.

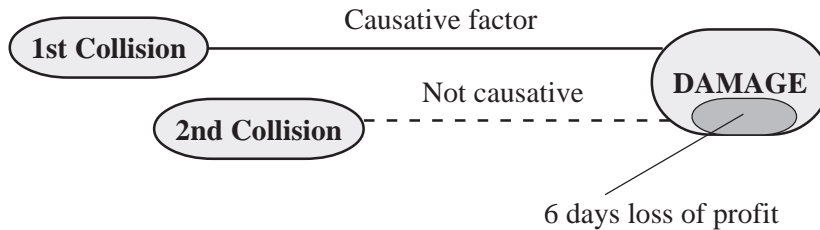
⁷ A prospective loss may not be recoverable if a subsequent *supervening* cause/event prevents the loss from being incurred.

⁸ In deciding, therefore, whether damage would have been incurred in any event/*but for* a particular breach, only earlier and not subsequent events/breaches should be taken into account.

⁹ [1905] P 307. Other examples include: *Performance Cars Ltd v Abraham* [1962] 1 QB 33; [1961] 3 WLR 749; [1961] 3 All ER 413, CA. (2 separate collisions requiring the same part of the claimant's vehicle to be resprayed); *Baker v Willoughby* [1970] AC 467; [1969] 3 All ER 1528, HL (accident causing severe leg injury followed by shooting resulting in amputation); *Balfour Beatty Building Ltd v Chestermount Properties Ltd* (1993), 62 BLR 1 at 31 (example of Architect issuing instructions requiring additional work during a period in which the construction contract is already in delay due to the fault of the contractor).

since the 6 days loss of profit (the same/overlapping damage) was concurrently caused by/attributable to the earlier collision (figure 3).

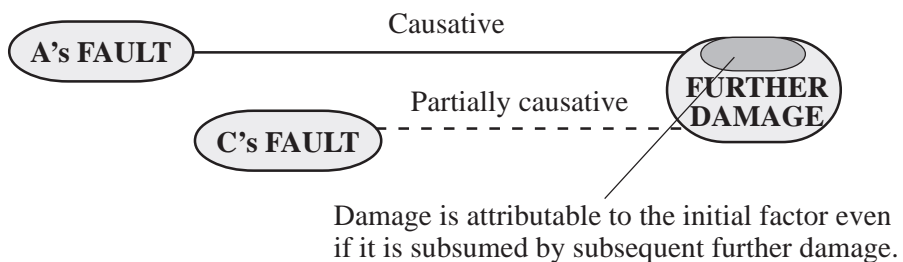
Fig 3: Concurrent causes of the same damage
(Loss of profits: The Haversham Grange)



Subsequent factor causes further damage. If a subsequent factor is a cause of further/additional damage then the subsequent wrongdoer is liable for that further damage.¹⁰ If necessary the total damage should be apportioned between the causative factors.

Subsequent damage subsumes the initial damage. Any damage caused by the initial factor remains the liability of the initial wrongdoer even if the damage attributable to the subsequent factor would independently have subsumed or caused greater damage than whole of the (same) damage attributable to the earlier factor (figure 4).¹¹ It is the first in time rule rather than the *dominant cause theory* or *dominant test* which applies.

Fig 4: The dominant test is not the correct one



¹⁰ In The Haversham Grange for example, the owners of the Haversham Grange were liable for the cost of carrying out the necessary repairs/the distinct physical damage.

¹¹ In The Haversham Grange therefore, the owners of the Haversham Grange would have been liable for the 6 days loss of profit if they had caused the first collision and the subsequent wrongdoer would have been liable for the remaining 16 days. Note that a dominant cause does not prevent earlier damage from being incurred as is the case with a supervening cause. The dominant factor may be described as an independent but not a supervening factor/event.

In *Fairweather (H) & Co Ltd v London Borough of Wandsworth*,¹² the arbitrator found that the whole of an 81 week delay had been caused by strikes and combination of workmen, a neutral event¹³ under the contract. The contractor, in order to recover part of his loss, sought to argue that part of the extension of time should be reallocated to the provision relating to architect's instructions (a concurrent cause of delay). The arbitrator had awarded the entire extension pursuant to the strike on the ground that it was the greater/dominant delay. In relation to this approach, His Honour Judge Fox-Andrews QC said that:

“.....an architect and in his turn an arbitrator has the task of allocating, when the facts require it, the extension of time to the various heads. I do not consider that the dominant test is correct.”¹⁴

The necessary findings of fact were matters for the arbitrator to decide. On the assumption however, that the relevant instructions were the first in time to cause prospective delay and/or damage, then an appropriate amount of the delay/damage should have been allocated to the relevant instructions.

Concurrent causes which cannot be separated in time. If it cannot be inferred that one concurrent cause rather than another was the first in time to cause loss/prospective loss then one possibility would be a finding that it had not been proven that either factor was causative/that there had been a failure to discharge the burden of proof on the issue of causation.¹⁵ An alternative approach would be to hold that each factor was causative (concurrent fault), neither being eliminated by the but for test/first in time rule, in which case liability could (as in the case of composite causation/joint fault) be apportioned between the concurrent wrongdoers.

2.2 Supervening causes

Effect of supervening causes/events on recovery of prospective loss. The general rule

¹² (1987) 39 BLR 106. The case concerned an action under JCT 1963, Local Authorities edition, With Quantities.

¹³ That is, an event in respect of which an extension of time may be granted but no loss/damage is recoverable.

¹⁴ (1987), QBD 39 BLR 106 at 120.

¹⁵ This approach could be regarded as giving rise to an unjust result particularly if the claimant was not concurrently at fault/the loss was caused (concurrently) by the fault of more than one (concurrent) wrongdoer.

is that a party can recover *prospective*, that is expected/likely/inevitable, future loss where breach of duty and causation have been proved. When a ‘prospective’ loss is awarded, however, it is based on the assumption that the claimant will in fact incur the loss claimed. The loss will not, therefore, be recoverable if a *supervening* factor has occurred between the date of the breach and the date of the trial of the action to prevent all or part of the loss from being incurred.¹⁶ The general rule is that:

“...when damages which would be otherwise prospective come to be assessed, facts which have actually happened may be taken into account...”¹⁷

In *The Glenfinlas*,¹⁸ the vessel had been damaged and was in need of repair. Before the repairs could be carried out, however, she was lost at sea (the independent and supervening event). The loss of profits which would have been incurred whilst repairs were being carried out (the prospective loss) could no longer be recovered since the repairs never could or would have been done and the vessel was no longer capable of profitable employment. The cost of the repairs was, however, recoverable since, at the time of sinking, the ship was of less value to the owners and the cost of repairs represented the diminution in value of the vessel. Diminution in value is not, therefore, a head of claim which is to be regarded as prospective loss.¹⁹

¹⁶ A concurrent cause may be distinguished in that it causes the same or overlapping damage of the same type/kind. It does not prevent the loss from being incurred. Similarly, a dominant cause merely causes greater loss of the same type/kind. A supervening factor must be an independent factor/event and not a consequential factor/event. If the factor/event is a consequence of the initial wrong then the wrongdoer may be liable for that consequence and in respect of any additional damage attributable thereto (part 3 below).

¹⁷ per Scrutton LJ in *The Kingsway* [1918] P. 344 at 362. Such a situation could arise in a construction contract, for example, if the building was destroyed before delay caused by the contractor results in actual loss to the employer. If the completion date had already passed, however, at the time the building was destroyed the contractor would be liable for the damage caused up to that point: See, for example, *Associated Portland Cement v Houlder Brothers & Co* (1917) 86 LJKB 1495.

¹⁸ [1918] P 363n, [1918-19] All ER Rep 365n.

¹⁹ See also *Beoco Ltd v Alfa Laval Co Ltd and Another* [1994] 4 All ER 464; (1993) 66 BLR 1, CA and *Carslogie Steamship Co Ltd v Royal Norwegian Government, The Carslogie* [1952] AC 292, HL; [1952] 1 All ER 20, HL. Note that in “*The Law of Damages*” it is suggested that *The Carslogie* could have been regarded as a concurrent cause/*Haversham Grange* situation rather than a supervening cause/*Glenfinlas* situation.

²⁰ These are often referred to as *intervening* acts and events.

3. LIABILITY FOR CONSEQUENTIAL ACTS AND EVENTS²⁰

The issue. An act or event is a consequence of a breach if it would not have been a factor at all but for the breach. Whether the original wrongdoer ought to be liable for/ought to have foreseen such consequences is the issue which is being considered here. The issues of law are very closely related, if not identical, to those raised on a question of *foreseeability* of type/kind of damage.

Chain of events/causation/liability. If a consequential act or event is one which the wrongdoer ought to have foreseen then it is said that the *chain of causation* is not broken and the wrongdoer will be liable for the cumulative loss (figure 5). In the case of a consequential act/failure to act (3.1) a finding of joint fault may be appropriate if there was negligence on the part of the party performing the consequential act (considered below).

Fig 5: Consequential act or event is attributable to the breach



Breaking the chain/new cause. If, on the other hand, the subsequent factor is one which the wrongdoer ought not to be taken to have foreseen/is not attributable to the breach then the chain of causation is said to have been broken and the wrongdoer will only be liable for any initial damage caused by the breach and not in respect of any further damage attributable to the consequential act or event (figure 6). In such circumstances the consequential act or event may be referred to as a *new and independent cause*²¹ of damage.

Fig 6: Consequential act or event is not attributable to the breach



(The 'chain of causation' is said to have been broken and the wrongdoer is relieved of liability for any further damage)

²¹ Sometimes referred to as a *novus actus interveniens*.

3.1 Liability for Consequential Acts

Test. In the case of a consequential act²²/failure to act²³ the wrongdoer will be liable if the injured party acted reasonably (by what he did or by what he failed to do) in the circumstances in which he was placed as a result of the breach.²⁴ The burden of proof is on the wrongdoer to show that the claimant's actions were unreasonable in the circumstances/that he ought not to be taken to have foreseen them.²⁵

The *Metagama*²⁶ concerned an action arising out of a collision between 2 vessels on the river Clyde. It was alleged that the master of the claimant's vessel had been negligent in that he had failed to keep the engines running after 'beaching.' This failure had resulted in total loss when the ship slipped into the river.²⁷ On the facts, the master of the ship was not negligent and there was no break in the chain of causation (initiated by the collision)/no new and independent cause. The relevant principle of law was stated in the following terms by Viscount Haldane (at p254):

“...what those in charge of the injured ship do to save it may be mistaken, but if they do whatever they do reasonably, although unsuccessfully, their mistaken judgment may be a natural consequence for which the offending ship is responsible, just as much as any physical occurrence.”²⁸

²² These include, for example, acceleration measures taken by a contractor in an attempt to mitigate delay caused by employer's default or actions by the master of a ship in an attempt to save her following a collision at sea. Acts of third parties generally fall into the category of consequential events (3.2).

²³ The same test applies where the allegation is one of failure to mitigate loss.

²⁴ In order to reconcile this with the principles applicable on a question of 'foreseeability,' it could be said that only reasonable acts of the claimant will be held to be within the reasonable contemplation of/ reasonably foreseeable by the wrongdoer.

²⁵ *Roper v Johnson* (1873) LR 8 CP 167; The onus was described as being a 'heavy' one by Lord Shaw in *The Metagama* (considered below) at p259. See also Lord Blanesburgh at p265. Note, however that in *Selvanayagam v University of the West Indies* [1983] 1 All ER 824, PC at 827 it was held that the claimant must prove that in all the circumstances his failure to take the steps in question was reasonable.

²⁶ (1927) 29 LI LR 253 (HL), also referred to as *Canadian Pacific Ry Co v Kelvin Shipping Co Ld.* (1927) 138 L.T. 369.

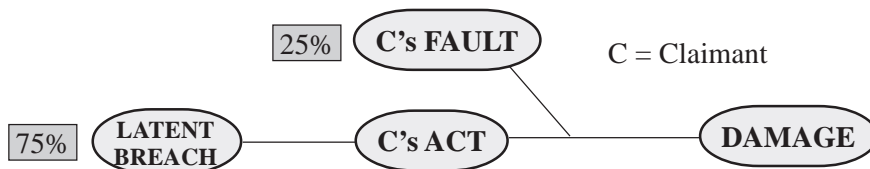
²⁷ This was effectively an allegation of failure to mitigate: per Lord Blanesburgh at p264, Viscount Haldane at p254 and Viscount Dunedin at p256.

²⁸ This was referred to as an important statement of principle by Lord Wright in *The Oropesa* [1943] P. 32 at p40.

Chain not broken but finding of joint fault. As an alternative to a finding that either one party or the other should be wholly responsible for the damage in question, a finding of joint fault could be considered. This may be appropriate if the claimant's actions in consequence of the breach were negligent (in the circumstances)²⁹ but not so negligent as to lead to a conclusion that the chain of causation had been broken.

The case of *Sayers v Harlow Urban District Council*³⁰ (figure 7) concerned an action for breach of duty (negligence) pursuant to an implied contract and/or tort/delict. The claimant, having paid to use the amenity, found herself locked inside a public toilet as there was no handle on the inside of the door. This was a 'latent' or 'dormant' breach by the council. The claimant attempted to climb out by standing on the toilet and then placing one foot on the toilet roll and fixture. On discovering that she would be unable to climb out she attempted to descend at which point the toilet roll rotated causing her to fall and injure herself. To attempt to climb out was reasonable in the circumstances and that was therefore a consequence in respect of which the council were liable (the chain of causation had not been broken). Damages were reduced by 25%, however, since the claimant was found to have been careless in the process of returning to the ground by allowing her balance to depend on the toilet roll.

Fig 7: Sayers v Harlow UDC



²⁹ It may be that a finding of contributory negligence would be less likely than it would be in the case of 'non-consequential' acts. Allowance is made for the fact that the claimant is in a position of difficulty as a result of the breach.

³⁰ [1958] 1 WLR 623; [1958] 2 All ER 342, CA. Other cases illustrating the same point include *Admiralty Comrs v Owners of SS Volute* [1922] 1 AC 129, [1921] All ER Rep 193, 91 LJP 38, 126 LT 425, 15 Asp MLC 530, HL, 42 and *Carlsholm (Owners) v Calliope (Owners)*, *The Calliope* [1970] P 172; [1970] 2 WLR 991; [1970] 1 All ER 624. In *The Wagon Mound (No1)*, considered below, there was potential joint liability (contributory negligence) on the part of the owners of the wharf. Note that an element of negligence may be excusable (considered below).

3.2 Liability for Consequential Events

Nature of consequential events. An occurrence is a consequential event if it would not have been a factor at all but for the breach. This category is concerned with any occurrence which is not in the category of a consequential act of the claimant.

Examples of consequential events. Examples include ‘knock-on effects’ of the breach, acts of god,³¹ outbreak of war, strikes by workmen,³² fire, explosion and acts of independent third parties.³³ In a construction contract it would not be uncommon for a neutral event,³⁴ such as bad weather³⁵ or a strike by workmen³⁶ to further affect progress during a period of culpable delay.³⁷

Test. The test is whether the wrongdoer ought³⁸ to have contemplated/foreseen the occurrence of the event³⁹ and, if so, he will be liable for any damage/further damage

³¹ Flood, lightning, typhoon, earthquake and the like.

³² In *HMS London* [1914] P. 72, a wrongdoer who had caused a collision at sea was held to be liable for further loss arising due to a strike by dockworkers occurring during the repair of the damaged ship.

³³ Illustrated by *Home Office v Dorset Yacht Co Ltd* [1970] AC 1004; [1970] 2 WLR 1140; [1970] 2 All ER 294, HL. In *Burrows v March Gas & Coke Co* (1870) LR 5 Exch. 67, a gas company, in breach of their contract, supplied a defective pipe. There was an escape of gas and a third party went negligently to investigate with a lighted candle (the consequential act/event). The gas company was held liable in full for the damage. A finding of joint fault could, however, have been made due to the negligence on the part of the party investigating the escape of gas.

³⁴ Neutral events are events which might foreseeably affect progress but which are generally outwith the control of either party. Accordingly a provision for extension of time may be made in the contract but any loss attributable to the event will generally not be recoverable from the other party.

³⁵ See Colman J in *Balfour Beatty Building Ltd v Chestermount Properties Ltd* (1993), 62 BLR 1 at 31 at 34-35, concerning the situation where the contractor is in culpable delay and the works are further delayed, eg by a storm and flooding which would, but for the non-completion, have been avoided altogether. At p35 he said: “In such a case it is hard to see that it would be fair and reasonable to postpone the completion date to extend the contractor’s time.”

³⁶ See judgment of HHJ Fox-Andrews in *Fairweather (H) & Co Ltd v London Borough of Wandsworth* (1987) 39 BLR 106 at 118-119 - example of direct loss and expense being recoverable by the contractor where strikes (normally a neutral event) cause further delay during a period of culpable delay by the employer.

³⁷ ‘Culpable delay’ is a period of delay which is the fault of one of the parties and in respect of which that party is liable to pay damages.

³⁸ The test is an objective one, that is ‘whether a reasonable man in the position of the wrongdoer’ ought to have contemplated/foreseen the occurrence of the event.

³⁹ *Monarch Steamship Co Limited v Karlshamns Oljefabriker (A/B)* [1949] AC 196, HL.

caused thereby.

In *Monarch Steamship Co Limited v Karlshamns Oljefabriker (A/B)*,⁴⁰ the leading case in contract, the owner's breach in providing an unseaworthy vessel necessitated diversion for repair. But for this delay to the voyage, the vessel would have reached her Swedish destination before outbreak of the second world war. As a result of the outbreak of war she was ordered by the British Admiralty to proceed to Glasgow. The owner was held liable for the further delay caused by the war/diversion to Glasgow (the consequential event) and for the costs of transshipment to Sweden. At p216, Lord Porter said that:

“..the diversion to Glasgow, brought about through the delay in carrying out the contract of carriage in the present case, is attributable to the default of the owners of the ship, because in the conditions existing in April, 1939, they ought to have foreseen that war might shortly break out and that any prolongation of the voyage might cause the loss of or diversion of the ship.”

Imputed knowledge/knowledge of technical matters. Whether the wrongdoer should be taken to have contemplated/foreseen the occurrence of the event depends on knowledge of matters, which may include matters of a technical nature, which he had or ought to have had.

This point is well illustrated by two contrasting decisions of the Privy Council arising out of the same set of circumstances. The circumstances were that, as a result of the negligence of engineers on board the vessel *The Wagon Mound*, a large quantity of furnace oil was spilt onto the surface of the waters in Sydney Harbour. The oil drifted into a wharf where the plaintiffs (in the first action) were working and caught fire as a consequence of an act of manager of the plaintiffs in resuming oxy-acetylene welding and cutting while the wharf was surrounded by oil.⁴¹ The fire caused extensive damage to the wharf and to vessels moored therein. The first action, *The Wagon Mound (No 1)*,⁴² was brought by the owners of the wharf in the torts of negligence and nuisance.⁴³ One of the

⁴⁰ [1949] AC 196; [1949] 1 All ER, 1, HL.

⁴¹ The act of the manager was not a consequence of the spillage so the issue is one concerning a consequential event. The consequential event was the fire, caused by the welding/decision to recommence same.

⁴² *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd, The Wagon Mound (No1)* [1961] AC 388; [1961] 2 WLR 126; [1961] 1 Lloyd's Rep 1; [1961] 1 All ER 404, PC; [1961] ALR 569.

⁴³ The decision of the Privy Council was concerned with the claim in negligence only.

findings of fact was that the wrongdoers did not know and could not reasonably have been expected to know that the furnace oil was capable of being set alight when spread on water as they **could not have had** the necessary technical knowledge at the material time. It was held that, although pollution was a foreseeable consequence of the spillage, an outbreak of fire was not.

In the second action, *The Wagon Mound (No 2)*,⁴⁴ however, the trial judge held that the engineers knew or ought to have known that it would be possible, although very difficult, to set the furnace oil alight and that it would rarely happen/happen only in exceptional circumstances.⁴⁵ With the trial judge's findings in mind Lord Reid said that:

“It follows that in their lordships view the only question is whether a reasonable man having the knowledge and experience to be expected of the chief engineer of the Wagon Mound would have known that there was a real risk of the oil on the water catching fire in some way”⁴⁶

The answer to the question was ‘yes’ and the outbreak of fire was, therefore, attributable to the owners of the Wagon Mound.



⁴⁴ *Overseas Tankship (UK) Ltd v The Miller Steamship Co Pty Ltd and Another, The Wagon Mound (No 2)* [1967] 1 AC 617; [1966] 3 WLR 498; [1966] 1 Lloyd's Rep 657; [1966] 2 All ER 709, PC. The second action was commenced by the owners of vessels moored in the wharf, again in negligence and nuisance. It was held that the same test of reasonable foreseeability, as applies to actions in negligence, applies to actions in nuisance: per Lord Reid at [1966] 2 All ER 709 at 717.

⁴⁵ The findings of fact were materially different as a result of differences in the evidence led by the plaintiffs in the first action. Lord Porter explained this as follows ([1966] 2 All ER 709, at 717 PC):

“So if the plaintiffs in the former case had set out to prove that it was foreseeable by the engineers of the Wagon Mound that this oil could be set alight, they might have had difficulty in parrying the reply that then this must also have been foreseeable by their manager. Then there would have been contributory negligence and at that time contributory negligence was a complete defence in New South Wales.”

⁴⁶ [1966] 2 All ER 709 at 718-719. The words “real risk” are a reference to *remoteness* of damage. As stated earlier however, the view taken here is that foreseeability does not depend upon risk of occurrence. The issue could have been expressed as being “whether the engineer ought to have foreseen the outbreak of fire.”

JSE Revised Memorandum of Agreement for Ship Sale

Background

The sellers and buyers who have used the NIPPONSALE 1993 for sale and purchase of their vessels may have felt that the form was somewhat out of their practical needs: there was no provision for divers' inspection which is normally the case for this transaction. There may also have arisen certain legal uncertainties: whether the sellers were entirely free from liability for defects of the vessel after the delivery; when and where the sellers were actually entitled to give an NOR; whether if the buyers did not exercise their option of cancelling the agreement the sellers still had the right to deliver the vessel after the cancelling date.

The Subcommittee Meetings

In early September 1998 the Documentary Committee of the JSE decided to set up a subcommittee for the revision of the NIPPONSALE so as to eliminate the above problems. The Subcommittee, headed by Mr. S. Shimizu, then General Manager of Law and Insurance Group, Nippon Yusen Kaisha, held 12 meetings from October 1998 to September 1999. The Subcommittee had thoroughly reviewed the NIPPONSALE 1993 and remodelled it to "NIPPONSALE 1999" in an A-4 size box layout form. The Documentary Committee held on 2 November 1999 approved the draft NIPPONSALE 1999 and announced its issue on the same day.

Major Changes of "NIPPONSALE 1999"

Part I - Front Box

"Place and Date of Agreement"

In view of the fact that the governing law of an agreement may be decided in accordance with the law of the place where the parties entered into the agreement, the "Place" of Agreement is added.

Box 9 "Place/Date of Superficial Inspection"

The "Date" of the superficial inspection is added.

Box 15 “Places”

It varies from country to country that a certain day is a holiday. Therefore if the places in which the parties are to perform their obligations under this Agreement are left undecided, it may give rise to a dispute as to the validity of the performance. The parties are to specify such places in this Box.

Part II - Clauses**Clause 2. Payment**

A definition of banking days is inserted. Because it is indispensable that the bank is open when and where the payment is to be made, this clause has a reference to the place in Box 15.

Clause 3. Documentation

Sub-clause (a) (i): The Bill of Sale is now to be duly notarized, instead of being attested.

Sub-clause (a) (ii): The Sellers are obliged to supply a Deletion Certificate from the Registry as soon as practicable after the Vessel’s delivery.

Sub-clause (b): Execution and exchange of a Protocol of Delivery and Acceptance is added in accordance with Clause 2(b).

Clause 4. Delivery Place and Time

Sub-clause (a): The Sellers are to ensure that the Vessel is ready within the Delivery Range in the agreed period.

Sub-clause (c): The Buyers have the option of cancelling this Agreement when the Sellers fail to deliver the Vessel on or before the Cancelling Date, provided such option is to be exercised within 2 Working Days from the Cancelling Date. However, if the delay is due to a cause over which the Sellers have no control, the Cancelling Date is to be extended accordingly within the limits of 30 days.

Sub-clause (d): If the Buyers do not exercise the option, the Buyers are entitled to designate a new Cancelling Date for delivery. If the Buyers do not designate a new date within 2 Working Days, the Sellers are obliged to deliver the Vessel as soon as practicable.

Sub-clause (e): On the other hand, in case the Sellers anticipate that the Vessel will not be ready by the Cancelling Date despite their exercise of due diligence, they may notify the Buyers of the fact and propose a new Cancelling Date for delivery, which the Buyers have the right to refuse.

Clause 5. Delivery Condition

Sub-clause (b): The Sellers are not responsible for any fault or deficiency in their description of the Vessel or for any defects in the Vessel, whether apparent or latent, upon delivery and acceptance of the Vessel, thereby eliminating the statutory obligation under Article 570 [Warranty against Defects] of the Civil Code. The same kind of exemption was found in Clause 9 of the old form.

Clause 6. Underwater Inspection

This clause has been completely re-drafted in accordance with the practice that the parties normally conduct divers' inspection instead of dry-docking prior to delivery.

Sub-clause (a): The Sellers may deliver the Vessel without dry-docking under the following conditions.

Sub-clause (b): The Buyers are entitled to have the Vessel diver-inspected.

Sub-clause (c): The Buyers are required to notify the Sellers of their intention of such underwater inspection.

Sub-clause (d): The cost of inspection is to be for the Buyers' account unless damage affecting the class is found.

Sub-clause (e): If any damage affecting the Class was found this sub-clause applies. The sub-clause is further divided into 2 paragraphs:

one is for the case where damage is of such nature as repairs are not required before the next Class survey. In this case, the Sellers have the option either to repair the damage prior to delivery or to deliver the Vessel with the damage with a reduction from the Purchase Price of such repair cost as estimated by 2 shipyards of their respective choices.

Where repairs are required prior to the next Class survey, the Sellers are to repair at their own cost and deliver the Vessel.

Sub-clause (f): The Sellers are entitled to designate the place of dry-docking, as far as it is located within the Delivery Range, as the place of delivery if the damage is to be repaired pursuant to sub-clause (e). In this case, the Buyers have the right to do their work at their own risk and expense.

Sub-clause (g): The Cancelling Date is to be extended by the time lost to effect repairs within the limits of 30 days.

Clause 7. Notice of Readiness and Liquidated Damages

In accordance with the changes to Clause 6 above, the requirement of approval by the Class for tendering Notice of Readiness ("deeming provision") has been removed.

Sub-clause (c): If the failure of the Buyers to take delivery of the Vessel lasts more than 10 days, the Sellers have the right to cancel this Agreement and to claim damages.

Clause 8. Total Loss and Force Majeure

The title of this clause has been changed from “Force Majeure” to better reflect the stipulation. In case any cause under this clause occurs, the Agreement is to become null and void and neither party is to be liable to the other.

Clause 9. Transfer of Title and Risk

The Sellers’ exemption from the warranty as to defects, etc. of the Vessel has been shifted to Clause 5. A new provision as to transfer of title and risk to the Vessel is specified here. The title of the clause is changed accordingly.

Clause 13. Encumbrances, etc.

“Mortgages” is added.

Clause 14. Default and Compensation

Sub-clause (a): In case of default in payment by the Buyers, whether it be the failure to pay the deposit or the balance as agreed, the Sellers are entitled to cancel the Agreement immediately. In any other breach of the Agreement by the Buyers, Sellers are obliged to give 7 days’ notice before cancellation. In any case under this sub-clause the Sellers have the right to forfeit the Deposit if already paid or claim the equivalent amount to the Deposit if unpaid. The Sellers are entitled to claim further compensation if the above sum does not cover the loss incurred.

Sub-clause (b): In case of default by the Sellers in delivering the Vessel as agreed, the Buyers have the right to cancel the Agreement immediately. In any other breach by the Sellers, the Buyers are to give 7 days’ notice before cancellation. In any case under this sub-clause the Sellers are obliged to return the Deposit, if already paid, together with the equivalent amount to the Deposit to the Buyers. The Buyers are entitled to further compensation if the above sum does not cover their loss.

The above sub-clauses have provisions as to interest earned on the Deposit.

Clause 15. Arbitration

The parties are entitled to bring arbitral proceedings to TOMAC in respect of any and all disputes arising out of or in connection with the Agreement.



Editorial and Book Review

* Legal Systems and Behaviour *

I wonder if Japanese people are actually keen to debate and bring clear-cut decisions to their disputes, as against a long-standing hypothesis that they prefer amicable settlement. According to the statistics made public last June by the Supreme Court, the number of small claims brought in the summary courts nationwide more than doubled, from 200 to nearly 500, in the months of January and February 1998. This should be a result of the law reform made earlier that year: the revised Code of Civil Procedure which came into force from 1 January 1998. Under the new Code, small claims for payment of the sum not exceeding Yen 300,000 are to be adjudicated in a single day with no appeal basically granted against judgment. In addition, representation by a lawyer is not required in small claims. The Code also imports the ideas of discovery and class action.

The new system has apparently intrigued disputing people. From March 1998 to February 1999 monthly applications never fell below 600, topping out at about 1,000 in March 1999. Consequently, the cases of small claims which were adjudicated in 1998 reached 6,819 in total. There was the same trend earlier in 1993 when the Commercial Code was revised. The courts saw a big jump in the number of cases where stakeholders brought suits claiming damages from representatives of their corporations. One can say that people's behaviour in their pursuit of dispute resolution is highly dependent upon the legal system under which they live. If it is true that people, Oriental or Occidental, dare to debate against each other only due to a strong desire for the betterment of society, life, etc., those who live under a user-friendly legal system may become more prone to bring actions.

The Japanese government is said to have promulgated important laws with the purpose of developing the nation under the resurrection policy pursuant to the end of World War II. In other words, the government put the interests of the country and of suppliers/manufacturers ahead of individual/consumer interests. Japanese law is statute based and there are currently no clear guidelines as to its interpretation/construction. Thus court judgments should make up for that deficiency and these judgments should be readily accessible to the public for analysis. However, judgments are not necessarily reported in a systematic way and databases, if any, are only available at hefty prices. The legal/court system is very unfriendly for users of litigation, although some improvements have been made as seen above. It may look as if the Japanese have been forced to suppress their wish to tell right from wrong. The dramatic increase in small claims cases brought to the

courts in the wake of the law reform appears to prove that hypothesis.

On the other hand, in common law countries such as the US, UK, Australia and Canada, where court judgments are (in addition to statute) an important source of law, a huge body of case law has developed over centuries of law reporting. In these countries law reports are either accessible to the public at reasonable charges or free of charge on the internet. In view of the fact that most shipping contracts are still governed by UK or US law, it is a good thing that businessmen involved in such transactions should have access to the relevant legal information. However, the volume of case law which may be relevant to disputes under UK and US law is, generally, so huge that even lawyers, let alone laymen in the commercial sector, may easily get lost while looking for the right answer to the dispute. Particularly from the viewpoint of the claims people in civil law countries, a compact analysis of the law of damages is much needed.

Stewart Dunn has written and published such a book. “*The Law of Damages*” (<http://www.damages.freeserve.co.uk>) is a 103 page, easy-to-read, systematic analysis of the law of damages in English law. It should be a manual for those who handle claims arising in contract or in tort. It may also help preclude certain types of claims they face in day-to-day transactions so that they could avoid unnecessary costs and time. Above all it is a compact book, a feature of particular importance to non-native speakers. Stewart is now working on the second edition. I look forward to his new edition in the near future.

Takao TATEISHI - *Editor*

The Contracts (Rights of Third Parties) Act 1999 Came into Force

The Contracts (Rights of Third Parties) Act 1999 came into force on 11 November 1999, when it received Royal Assent. The new Act only applies to contracts which are entered into during the six month period after Royal Assent (i.e. after 11 November 1999) if the contract expressly provides for it to do so. Where there is no such express provision, it will not apply to contracts entered into before the end of that six month period. For details of the Act, please see “Privity of Contract - English Law Yields at Last,” the JSE Bulletin No 39 at p 28 *et seq.*

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