

# WaveLength

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## Editorial: Japanese Sentiment, Today and Tomorrow

### *Society of Envy*

In her book “The Chrysanthemum and the Sword – Patterns of Japanese Culture,” American Socio-anthropologist R. Benedict once described Japan as having a shame culture as compared with a guilty culture in the West. That was in 1946. More than half a century has passed since and if Benedict’s analysis was solely based on the positive aspect of “shame,” her conclusion may have been out of focus by now. The impact of “shame culture” is actually two-faceted: both positive and passive. True, Japanese people were, out of a positive sense toward shame, quite disciplined and refrained from doing wrongs. In reality, they are in general law-abiding and promise-keeping so that they have had less necessity to bring suits, which has greatly contributed to the low levels of utilizing litigation/arbitration in Japan. However, today that sense towards shame is gradually fading away.

Conversely, shame in a passive form appears continuously to take a firm grip on all people. They have traditionally been hesitant to take initiatives for fear that they would be disgraced when they fail (in Japanese society failure can be a critical blow and very often humiliated upon). This may negatively influence the people in many ways: slowness to change; requisition for uniformity; hatred for standing-out. In the event, anyone who sticks up can invite a bashing. When Miss Naoko Takahashi (nicknamed “Q-chan”) won the gold medal in Women’s Marathon at Sydney Olympics last year, the nation exulted from the bottom of the heart. But when she became so renowned everywhere from giving lectures on how she managed to win to featuring commercial films and variety shows on TV, Q-chan bashing set in. Or when Takanohana, a Grand Champion of the traditional Sumo-wrestling, had won most of the tournaments a couple years ago, ordinary people were turned on and rampantly engaged in Takanohana bashing. It seems that the passive aspect of shame and a feeling of envy are the two sides of the same coin.

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### *TOMAC Goes Electronic*

TOMAC revised its Arbitration Rules and put them into force on 1 September 2001 (for details see page 3 *et seq*). TOMAC placed a big step forward on the way to online arbitration. Parties are now permitted to submit statements/produce evidence via e-mail

and may also be heard via internet (See, e.g., Sections 9(5) and 21(6) of the Ordinary Rules). The role of TOMAC, as an arbitration institution, is not however limited to dispute resolution. It should also extend to online dispute risk management (Online DRM). From the beginning of this year, as part of Online DRM, members of JSE can tap in our website and retrieve information which can be relied upon for the purpose of prevention and early settlement of their disputes: for example, we have databases of over 1,800 Anglo-American cases/arbitrations with excerpts in the Japanese language; over 100 most recent arbitration awards of TOMAC; more than 230 FAQs in relation to day-to-day claims.

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### ***8<sup>th</sup> and 9<sup>th</sup> Co-operation Agreements***

In March 2001, TOMAC entered into a co-operation agreement (MOU) with Singapore International Arbitration Centre and Singapore Mediation Centre respectively. They are our 8<sup>th</sup> and 9<sup>th</sup> agreements for co-operation with prominent world arbitration institutions: the first was Sino-Japanese Maritime Arbitration Agreement in 1978, followed by agreement with AALCC/Kuala Lumpur Regional Centre for Arbitration in 1982; with Australian Centre for International Commercial Arbitration in 1988; with Cairo Regional Centre for International Commercial Arbitration in 1992; with Hong Kong International Arbitration Centre in 1994; with Indian Council of Arbitration and with Korean Commercial Arbitration Board respectively in 1996. Co-operation agreements with the two major ADR bodies of Singapore are particularly significant since they were reached prior to the conclusion of the Japan-Singapore Free Trade Agreement, which will provide for a certain mechanism of dispute resolution.

*Takao Tateishi* – General Editor

## **TOMAC MOVES FOR ONLINE ARBITRATION**

TOMAC (Tokyo Maritime Arbitration Commission) approved the sub-committee's draft amendment to its Arbitration Rules on 15 June 2001. The revised Rules will come into force as from 1 September 2001. Major changes are as follows.

### **“Med/Arb” System**

The “Med/Arb” system is introduced (Section 8 [Attempt of Conciliation] of the Ordinary Rules, which is also applicable to proceedings under Simplified Rules and SCAP Rules), in which parties to arbitration may, at the recommendation of Secretariat, try to conciliate their dispute so as to save time and cost. In view of the fact that about 30% TOMAC cases are withdrawn after officially filed, most of which are believed to be settled between the parties after eliminating the problem of a time-bar, parties may find a good reason in utilizing Section 8 at the very beginning of the proceedings.

### **Party Autonomy**

Parties will have the option to nominate their preferred persons for arbitrators (Section 14 [Appointment of Arbitrators]) in the proceedings under Ordinary Rules.

### **Utilizing Internet**

Submissions of statements/evidence may be made through e-mails (Section 9(5) of Ordinary Rules, Section 5(6) of Simplified Rules and Section 5(5) of SCAP Rules); a hearing may also be held via internet (Section 21(6) of Ordinary Rules, Section 8(5) of Simplified Rules and Section 9(4) of SCAP Rules).

### **Documents Only**

However, proceedings should in principle be on documents only for small claims (Section 9(1) of SCAP Rules) and therefore parties will not even be heard via internet unless special circumstances require.

### **Apportionment of Costs**

Parties to arbitration proceedings under Simplified Rules should now equally pay the arbitration fee (Section 12(2)). In older Rules the claimant was required to pay double the sum when filing the claim under Simplified proceedings. Of course, apportionment of the costs is finally to be decided by the arbitrator in the award.

# THE RULES OF ARBITRATION OF TOKYO MARITIME ARBITRATION COMMISSION (TOMAC) OF THE JAPAN SHIPPING EXCHANGE, INC.

[ORDINARY RULES]

Made 13th September, 1962

Last amended 15th June, 2001

In force 1st September, 2001

**Section 1. [Purpose of these Rules]** These Rules apply to arbitrations to be held at The Japan Shipping Exchange, Inc. (hereinafter referred to as “the JSE”).

**Section 2. [Tribunal of Arbitrators]** (1) Arbitration described in the preceding Section shall be performed by the Tribunal of Arbitrators (including the case of a sole arbitrator, hereinafter referred to as “the Tribunal”) to be constituted by arbitrators appointed in accordance with Section 14 hereof.

(2) The Tribunal shall perform arbitration independently of the JSE and the Tokyo Maritime Arbitration Commission (hereinafter referred to as “the TOMAC”).

**Section 3. [Relation between an Arbitration Agreement and these Rules]** Where the parties to a dispute have, by an arbitration agreement entered into between them or by an arbitration clause contained in any other contract between them, stipulated that any dispute shall be referred to arbitration of the JSE or arbitration in accordance with its rules, these Rules (or whichever version of these Rules is in force at the time the application for arbitration is referred) shall be deemed to constitute part of such arbitration agreement or arbitration clause.

**Section 4. [Secretariat of Arbitration]** The Secretariat of the JSE shall assume and conduct for the TOMAC or the Tribunal all business provided for in these Rules or directed by the TOMAC or the Tribunal.

**Section 5. [Documents to be Filed for Application for Arbitration]** (1) Any party desirous to apply for arbitration (hereinafter referred to as “the Claimant”) shall file with the TOMAC the following documents:

1. Two (2) originals of Statement of Claim;

2. A document evidencing the agreement that any disputes shall be referred to arbitration of the JSE or arbitration in accordance with its rules;
  3. Documents in support of his claim, if any;
  4. Where a party is a body corporate, a document evidencing the capacity of its representative;
  5. Where an agent or attorney is nominated by the Claimant, a document empowering that person to act on behalf of the Claimant.
- (2) The documents under the preceding Sub-Section shall be submitted in the number of copies as instructed by the Secretariat.

**Section 6. [Particulars to be Specified in Statement of Claim]** The following items must be particularized in the Statement of Claim:

1. The names and addresses of the parties (in case of a body corporate, the address of its head office or main place of business, its name, the name of the representative and its capacity);
2. The preferred place of arbitration;
3. The factual substance and grounds of the claim.

**Section 7. [Acceptance of Application for Arbitration]** (1) Where the Secretariat has acknowledged that the application for arbitration conforms with the requirements of the preceding two (2) Sections, the Secretariat shall accept it, provided that where special circumstances are acknowledged, the Secretariat may accept the application for arbitration on condition that the documents required in Nos. 3 to 5 of Section 5 shall be filed later.

(2) The date when the Secretariat accepts the application for arbitration in accordance with the preceding Sub-Section shall be deemed to be the date of commencement of the arbitration proceedings.

**Section 8. [Attempt of Conciliation]** (1) The Secretariat may, after it accepted the application for arbitration, recommend the parties to first conciliate the dispute which is the subject of arbitration.

(2) Where the parties agree to conciliate their dispute in accordance with the preceding Sub-Section, TOMAC suspends the arbitration proceedings until the termination of conciliation proceedings.

(3) The conciliation shall be conducted by one conciliator, who shall be appointed by Chairman of TOMAC, within 60 days from the day on which the above agreement is reached between the parties.

(4) The conciliation proceedings shall be in accordance with the Conciliation Rules of the

JSE (hereinafter referred to as the “Conciliation Rules”) unless otherwise provided for in this Section.

(5) If the dispute is resolved by conciliation, the Filing Fee for arbitration shall be appropriated as part of the preliminary investigation fee and conciliation fee under the Conciliation Rules.

(6) The conciliator may become an arbitrator in the arbitration proceedings subsequent to the failure of the conciliation attempt only if the parties so agree.

(7) The Arbitration Fee for the resumed arbitration proceedings shall be the sum in accordance with the Tariff of Fees for Arbitration, minus the conciliation fee if paid.

### **Section 9. [Instruction for Filing of Defense and Supplementary Statements]**

(1) Where the Secretariat has accepted the application for arbitration, it shall forward to the other party (hereinafter referred to as “the Respondent”) an original of the Statement of Claim together with the respective copies of the documentary evidence submitted, and shall instruct the Respondent to send to the Secretariat and the Claimant respectively the Defense and documents in support of the defense (if any) within twenty-one (21) days from the day of receipt of such instruction, provided that an allowance of a reasonable longer period will be granted to the Respondent where its address, its head office or main place of business is located in a foreign country, or special circumstances are acknowledged.

(2) Where the Respondent nominates its agent, the Respondent shall file, on filing of the Defense, a document empowering the agent to act on its behalf.

(3) When the Claimant has received the Defense and documentary evidence (if any), the Claimant shall, if it has any objection to the Defense, send to the Secretariat and the Respondent respectively within fourteen (14) days from the day of receipt thereof its Supplementary Statement and further documentary evidence, if any.

(4) In the event of any further Supplementary Statement and documentary evidence being filed, the procedures provided in the preceding Sub-Section shall be repeated.

(5) The Defense, Supplementary Statements and documentary evidence may be submitted via e-mail or fax, provided that the sending party shall bear the burden of proving that the copies are identical to the originals and that it has in fact forwarded those to the other party.

(6) The documents under this Section shall be submitted in the number of copies as instructed by the Secretariat.

**Section 10. [Service of Documents]** Documents relating to arbitration shall, unless handed in person to the other party or his agent, be served to the address of the party indicated in the Statement of Claim, to the address of his agent or to the place which the



party designates.

**Section 11. [Counterclaim by the Respondent]** (1) If the Respondent wishes to apply for arbitration of a counterclaim arising out of the same cause or matter, as a rule, he must do so within the period stipulated in Section 9(1).

(2) Counterclaim applications made within the period specified in the preceding Sub-Section shall, in principle, be heard concurrently with the arbitration applied for by the Claimant.

**Section 12. [Amendment of the Claim]** Amendment of the claim (if any) must be made prior to appointment of the arbitrators, with the exception, however, where approval of the Tribunal is obtained, even after the arbitrators are appointed.

**Section 13. [Place of Arbitration]** (1) Arbitration shall be performed in Tokyo or Kobe.

(2) Where no place of arbitration is designated in the arbitration agreement or the arbitration clause, Tokyo shall be the place of arbitration.

(3) Where it is not clear whether the arbitration agreement or the arbitration clause designates Tokyo or Kobe as the place of arbitration, and no mutual consent of the parties is obtained, arbitration shall be performed in Tokyo.

**Section 14. [Appointment of Arbitrators]** (1) The arbitrator(s) shall be appointed from among the persons who are listed on the Panel of TOMAC Arbitrators and who have no connection with either of the parties or with the matter in dispute. However, TOMAC may appoint a person or persons not on the Panel if TOMAC deems such appointment necessary.

(2) The Claimant may, when filing its Application for Arbitration, and the Respondent may, when sending its Defense, inform the Secretariat of preferred nominations of up to seven (7) arbitrators respectively (hereinafter referred to as “the nominees”) who may satisfy the requirements in the text of the preceding Sub-Section. The parties must not however contact the preferred nominees as regards the matter in dispute.

(3) Where the parties have informed of the nominees in accordance with the preceding Sub-Section, TOMAC shall appoint one arbitrator from each set of the nominees and a further third arbitrator. In case the parties agree to nominate one person and have no objection to a sole arbitrator, TOMAC may appoint such nominee as a sole arbitrator. Where the parties do not provide nominees, or where TOMAC deems it inappropriate to appoint arbitrators from among the nominees, TOMAC shall appoint either a sole or three arbitrators taking into account the further preferences of the parties.

(4) Appointment of arbitrators shall be made by consultations of Chairman and Vice-Chairmen of TOMAC.

(5) Where appointment was made in accordance with the preceding Sub-Section, the Secretariat shall advise the parties of the names and resumes of the arbitrators.

**Section 15. [Appointment of Substitute Arbitrators]** (1) Where a vacancy occurs amongst the arbitrators due to death, resignation or other reasons, a substitute arbitrator shall be appointed in accordance with the provisions of the preceding Section.

(2) In the case of the preceding Sub-Section, the Tribunal shall determine whether any prior hearings shall be repeated.

**Section 16. [Obligations and Punitive Provisions for Arbitrators]** (1) Arbitrators shall carry out their duties fairly and justly, treating the parties equally.

(2) Arbitrators shall not privately associate with the parties, their agents or other related persons in regard to the matter in question.

(3) Arbitrators shall not reveal to third parties the contents of the arbitration, the names of the parties or anything else related to the matter in question.

(4) An arbitrator in violation of any of the preceding three (3) Sub-Sections shall resign immediately.

(5) The TOMAC may remove the arbitrator in the preceding Sub-Section from the Panel of Arbitrators.

**Section 17. [Disclosure by Arbitrators]** (1) Arbitrators appointed in accordance with Sections 14 or 15, shall, within seven (7) days of being appointed, provide to the TOMAC a document indicating any circumstances which may give rise to doubts concerning their impartiality or independence, and the Secretariat shall forward copies of same to the parties.

(2) The disclosure in the preceding Sub-Section shall include whether the arbitrator has any close personal, commercial or other relationship with the following:

1. Parties to the arbitration
2. Subsidiary companies or other companies related to the parties
3. Parties' agents
4. Other appointed arbitrators

(3) When a party does not file a motion to challenge the appointment of the arbitrator within seven (7) days from the day of receipt of the disclosure document in the preceding Sub-Section (1), it shall be deemed that the party has no objection to the disclosure in the preceding two (2) Sub-Sections.

**Section 18. [Challenge to an Arbitrator]** (1) Where a party desires to challenge the appointment of an arbitrator, it must do so by making a motion of challenge to the TOMAC in writing showing the name of the arbitrator to be challenged and the reason for challenge.

(2) Where the motion of the preceding Sub-Section is made, the arbitration proceedings shall be suspended until the advice provided in Sub-Section (4) of this Section is given. The TOMAC shall constitute an Arbitrator Challenge Review Committee of three (3) persons whom TOMAC shall, by consultations of Chairman and Vice-Chairmen, appoint from among those on the Panel of Members of the TOMAC to decide whether the challenge to the arbitrator shall be accepted or dismissed.

(3) Where the aforesaid Committee decides that the challenge to the arbitrator is reasonable, a substitute arbitrator shall be appointed in accordance with the provisions of Section 15.

(4) Where a substitute arbitrator is appointed in accordance with the preceding Sub-Section or where the aforesaid Committee concludes that the challenge to the arbitrator is not reasonable, the Secretariat shall so advise the parties.

(5) In the case where a challenge has been filed, the arbitrator may voluntarily resign from the matter. However, in such a case it shall not be deemed that the challenge was a reasonable one.

**Section 19. [Parties' Obligations]** (1) The parties must follow the instructions the Tribunal gives for the purpose of facilitating the arbitration proceedings.

(2) Where a party, whether willfully or in gross negligence, fails to submit its statements or documentary evidence within a reasonable period or delays in applying for the hearing of a witness or expert witness such that the Tribunal deems it to unreasonably delay the conclusion of the proceedings, the Tribunal may dismiss such submission or application.

(3) The arbitration proceedings and record are not public information and the parties, their agents or any other persons concerned shall not reveal to third parties the contents of the arbitration, the names of the parties or anything else related to the pending matter in question.

**Section 20. [Hearings]** (1) The Tribunal shall conduct the hearing in the presence of all parties. However, where the Tribunal deems it necessary, separate hearings may be held for the parties.

(2) The Tribunal shall fix the date and time (hereinafter referred to as "the fixed date") and the place for the hearing, and give notice thereof to the parties at least seven (7) days prior to the fixed date, unless prevented by special circumstances.

**Section 21. [Appearance of Parties, Witnesses, etc.]** (1) The parties (in case of a body corporate, representative thereof) or their agents must appear in person before the Tribunal at the fixed date, in order to gain hearing.

(2) Where any party wishes to have the person in charge of the matter in dispute appear at the hearing, it must submit to the Tribunal a document empowering such person to act on its behalf.

(3) The parties may bring their witnesses or expert witnesses before the Tribunal at the fixed date, in order to evidence their claim or statement.

(4) The parties must advise the Secretariat in writing, prior to the fixed date, of the names of the parties, agents, witnesses or expert witnesses who are expected to appear, and in case of witnesses or expert witnesses, the contents of testimonies or appraisals to be given by them.

(5) Where the Tribunal is unable to hold a hearing consequent upon the non-appearance of a party or agent thereof at the fixed date, the Tribunal may make its award on the basis of the documentary evidence or other documents filed by the party.

(6) The Tribunal may, after taking into consideration the views of the parties, hold a hearing of any of the parties, agents, witnesses or expert witnesses, who are unable to attend because of illness, inconvenient location of residence or other unavoidable reasons, in such a manner as to enable the absentee and all the attendees to communicate with each other through two-way telecommunications technology. In this case, the person who has provided evidence through telecommunications shall be deemed to have attended the hearing.

**Section 22. [Hearings, etc. of Witnesses by the Tribunal]** The Tribunal may, irrespective of there being any request by either party, request from the witnesses or expert witnesses their voluntary appearance, or from the parties presentation of further documents, and examine them by hearing and in any other way, in order to elucidate the points in dispute.

**Section 23. [Pronouncement of Conclusion of Hearings]** The Tribunal shall pronounce the conclusion of hearings when the Tribunal deems it appropriate. But the Tribunal may, if the Tribunal deems it necessary, re-open the hearing at any time before an award is given.

**Section 24. [Immunity of the TOMAC and the Arbitrators]** The TOMAC, the Arbitrators and the Secretariat have complete civil immunity from liability regarding the arbitration proceedings and the arbitration award.

**Section 25. [Language]** The language employed in the Statement of Claim, the Defense, the Supplementary Statements, the hearings and the arbitration award in domestic arbitrations shall be the Japanese language, and that in international arbitrations shall, as a rule, be the English language. However, except where the Tribunal has specified otherwise, it is not necessary to translate documentary evidence.

**Section 26. [Interpreting]** The parties who will need interpreters at the hearings may, at their own expense, arrange for interpreters to be present at the hearings.

**Section 27. [Mediation]** (1) The parties shall be allowed to settle the dispute amicably during the course of the arbitration proceedings.

(2) The Tribunal may, at any stage of the arbitration proceedings, mediate between the parties for the whole or a part of the dispute.

(3) In case mediation conducted in accordance with the preceding Sub-Section fails, the Tribunal resumes the arbitration proceedings, provided however that it must not issue an award based on any of the information it gained during the mediation proceedings.

**Section 28. [Dismissal of Application for Arbitration or Other Decisions]** In any of the following cases the Tribunal may, without examining the contents of the dispute, dismiss the application for arbitration or make such other decisions as it deems fit:

1. Where it is found that the arbitration agreement is not lawfully made or is void, or the said agreement is canceled;
2. Where it is found that either of the parties is not lawfully represented or his agent has no authority to act on his behalf;
3. Where both parties fail to appear without cause at the fixed date for hearing;
4. Where both parties fail to comply with such directions or requirement of the Tribunal as it deems necessary for a proper performance of the arbitration proceedings;
5. Where the Tribunal finds that the Claimant has wrongfully delayed the speedy prosecution of the arbitration proceedings (where the Respondent has filed a counterclaim the same applies to the Respondent's counterclaim).

**Section 29. [Assessment of Damages]** Where it is recognized that a loss was incurred, but it is extremely difficult to prove the amount of the loss due to the nature of such loss, the Tribunal may assess a reasonable amount on the basis of the results of examination.

**Section 30. [When Award Given]** Where the Tribunal has pronounced the

conclusion of hearings in accordance with Section 23, it shall in principle within thirty (30) days thereof give its award.

**Section 31. [How Award, etc. to be Determined]** The award and other decisions by multiple arbitrators must be made by majority voting of the arbitrators.

**Section 32. [Written Award and Items to be Described]** (1) When the Tribunal decides its award, it shall be in writing and shall include the following items, and shall be signed and sealed by all the arbitrators. However, where for an unavoidable reason an arbitrator cannot sign or seal the award, this fact shall be noted on the award and the arbitrator's signature and seal shall be omitted:

1. The names and addresses of the parties (in case of a body corporate, the address of its head office or main place of business, its name, the name of the representative and the capacity), and in case an agent is nominated, its name;
2. The decision given;
3. The summary of the facts and points at issue;
4. The reason for the decision;
5. The date on which the written award is prepared;
6. The costs of arbitration and proportion thereof to be borne by respective parties;
7. The competent court (Tokyo District Court or Kobe District Court, same shall apply hereunder).

(2) The Tribunal may omit No. 4 of the preceding Sub-Section, when the consent of both parties is obtained.

**Section 33. [Amicable Settlement of Dispute]** Where both parties have settled amicably the whole or part of the dispute by themselves during the process of the arbitration proceedings, the Tribunal may, so far as request is made to do so by both parties, describe the contents of the settlement in the text of the award.

**Section 34. [Service and Deposit of the Award]** Authentic copies of the award signed and sealed by the arbitrators shall be served on the parties by the Secretariat or the competent court and the original text thereof shall be deposited by the Secretariat with the competent court in accordance with Section 799(2) of the Law of Public Notice Procedure and Arbitration Procedure.

**Section 35. [Rectification of Errors on the Award]** If any miscalculation, mistyping, miswriting or any other apparent error is discovered on the face of the written award within thirty (30) days after its service, the Tribunal may rectify it.

**Section 36. [Publication of the Award]** The award given by the Tribunal may be published unless both parties beforehand communicate their objections.

**Section 37. [Documents not Returnable]** Documents filed by the parties shall, as a rule, not be returned. Where any document is desired to be returned, it must be marked to that effect at the time of its filing, and a copy thereof must be attached thereto.

**Section 38. [Costs of Arbitration]** (1) The Claimant shall pay a Filing Fee of One Hundred Thousand Japanese Yen (¥100,000) to the Secretariat on its application for arbitration. This provision shall also apply where an application for counterclaim is filed.

(2) Each party shall, within seven (7) days after the receipt of notice from the Secretariat, pay to the Secretariat the fee (hereinafter referred to as “the Arbitration Fee”) which the Tribunal shall determine in accordance with the Tariff of Fees for Arbitration.

When no amount of claim can be stated at the time of filing, the Tribunal shall determine the Arbitration Fee taking into consideration the contents of the claim, subject to adjustment in accordance with the Tariff of Fees for Arbitration as soon as an amount can be disclosed.

In case the amount of claim cannot be finally disclosed, the Arbitration Fee as provided in the foregoing paragraph shall be deemed the final one.

(3) Where the sum claimed is in a foreign currency, such sum shall, for the purpose of calculating the prescribed Arbitration Fee of the preceding Sub-Section, be converted into Japanese currency by calculation at the average rate on the Tokyo Foreign Exchange Market on the date when the application is filed.

(4) Where the Respondent files his application for arbitration of a counterclaim and the Tribunal considers that such arbitration can be performed concurrently with the Claimant’s application, the amounts claimed and counterclaimed respectively shall be aggregated and the aggregate sum shall be taken as the amount of claim in the Tariff of Fees for Arbitration.

(5) The Tribunal may direct the Claimant to pay the Arbitration Fee due from the Respondent on his behalf.

(6) Where the number of hearings held exceeds four (4), beginning with the fifth (5th) hearing, each party must pay a fee of Fifty Thousand Japanese Yen (¥50,000) per additional hearing to the Secretariat. Regardless, however, of the number of hearings held on one (1) day, hearings held on one (1) calendar day shall be counted cumulatively as only one (1) hearing.

(7) The expenses caused by the particular nature of the subject of dispute and the expenses incurred on account of calling for witnesses or expert witnesses by requirement of the Tribunal shall be additionally paid by the parties.

(8) The Filing Fee shall not be returned after the application for arbitration is accepted. The Tribunal may return a part of the Arbitration Fee, so far as such partial amount of the Arbitration Fee has been decided to be returned by the Tribunal, on the ground that the application for arbitration was abandoned or the dispute was settled by mediation.

(9) Each party shall pay the consumption tax imposed on the amount of the each fee as provided in the foregoing (1) to (7).

**Section 39. [Apportionment of Costs of Arbitration]** The costs of arbitration shall be paid from the Filing Fee and Arbitration Fee paid to the Secretariat under the preceding Section and the ratio in which they shall be borne by the parties shall be decided by the Tribunal.

**Section 40. [Remunerations for Arbitrators]** The remunerations for arbitrators shall be paid out of the Arbitration Fee of Section 38. The amount of the said remunerations shall be determined by consultation of Chairman and Vice-Chairmen of the TOMAC considering the degree of difficulty of the case and other circumstances.

**Section 41. [TOMAC]** Matters relating to the TOMAC shall be provided for in the Rules of the Tokyo Maritime Arbitration Commission.

**Section 42. [Interpretation of these Rules]** The Tribunal shall determine the interpretation of these Rules and the procedural matters not provided for in these Rules.

**Section 43. [Amendment of these Rules]** Any amendment of these Rules shall be made by the TOMAC at the initiative of Chairman of the TOMAC.

**Section 44. [Bylaws]** Bylaws shall be made to put these Rules into practice.

### **Supplementary Provisions (15<sup>th</sup> June, 2001)**

Section 1. These Rules shall be put into force as from 1st September, 2001.

Section 2. The former Rules shall apply to the case of which application for arbitration is filed prior to the enforcement of these Rules.

### **The Tariff of Fees for Ordinary Arbitration**

The amount of the Arbitration Fee to be paid by each party shall be as follows:

When the amount of claim is ¥20,000,000 or less, the fee is ¥450,000;

When the amount of claim exceeds ¥20,000,000 but is ¥120,000,000 or less, the fee is the



fee to be paid for ¥20,000,000 plus ¥10,000 for each additional ¥1,000,000;

When the amount of claim exceeds ¥120,000,000, the fee is the fee to be paid for ¥120,000,000 plus ¥20,000 for each additional ¥10,000,000.

# THE RULES OF SIMPLIFIED ARBITRATION OF TOMAC

[SIMPLIFIED RULES]

Made 25th April, 1985

Last amended 15th June, 2001

In force 1st September, 2001

**Section 1. [Definition]** Simplified Arbitration in the present Rules shall mean arbitration which is performed with speed and simplicity, regarding a dispute over a claim not exceeding Twenty Million Yen (¥20,000,000), under the present Rules in place of the Ordinary Rules of TOMAC, by agreement between both parties.

**Section 2. [Relation between the present Rules and the Ordinary Rules]** All matters which are not covered by the present Rules shall be governed by the Ordinary Rules. In the event of a conflict between the two sets of Rules, the present Rules shall prevail over the Ordinary Rules to the extent of such conflict.

**Section 3. [Application for Simplified Arbitration]** Any party wishing to apply for Simplified Arbitration under the present Rules (hereinafter referred to as “the Claimant”), shall file with the TOMAC the documents stipulated in Section 5 of the Ordinary Rules. The Statement of Claim shall be marked with the note to specify that the application is for Simplified Arbitration.

**Section 4. [Acceptance of Application for Simplified Arbitration]** (1) When the Secretariat acknowledges that the application complies with the requirements of the preceding Section, it shall accept the application.

(2) The date of acceptance of the application in accordance with the preceding Sub-Section shall be deemed to be the date of commencement of the arbitration proceedings.

**Section 5. [Filing of Defense and Supplementary Statement in Simplified Arbitration]** (1) When the Secretariat has accepted the application for Simplified Arbitration, it shall forward to the other party (hereinafter referred to as “the Respondent”) an original of the Statement of Claim in Simplified Arbitration together with the respective copies of the documentary evidence submitted, and shall instruct the Respondent to send to the Secretariat and the Claimant respectively the Defense in Simplified Arbitration and any supporting evidence within fifteen (15) days from the day

of receipt of such instruction.

(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 Simplified Arbitration 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 Simplified Arbitration under these Rules.

(3) Where the Respondent nominates its agent, the Respondent shall file, on filing of the Defense, a document empowering the agent to act on its behalf.

(4) When the Claimant has received the Defense and documentary evidence (if any), the Claimant shall, if it has any objection to the Defense, send to the Secretariat and the Respondent respectively within ten (10) days from the day of receipt thereof its Supplementary Statement and further documentary evidence, if any.

(5) Further arguments by the parties shall be submitted orally to the Tribunal at the hearing.

(6) The Defense, Supplementary Statement and documentary evidence may be submitted via e-mail or fax, provided that the sending party shall bear the burden of proving that the copies are identical to the originals and that it has in fact forwarded those to the other party.

(7) The documents under this Section shall be submitted in the number of copies as instructed by the Secretariat.

**Section 6. [Counterclaim by Respondent]** (1) If the Respondent wishes to apply for Simplified Arbitration of a counterclaim arising out of the same cause or matter, it must do so within the period stipulated in Sub-Section (1) of the preceding Section.

(2) When such an application is made within the period stipulated, Simplified Arbitration of such counterclaim shall, in principle, be performed concurrently with the Simplified Arbitration applied for by the Claimant.

**Section 7. [Appointment of Arbitrators]** The TOMAC shall, within ten (10) days from the day when the Respondent's Defense is filed, appoint an uneven number of arbitrators or a sole arbitrator from among persons listed on the Panel of Arbitrators who have no connection with either of the parties or with the matter in dispute.

**Section 8. [Hearings]** (1) The Tribunal shall, unless prevented by special circumstances, organize hearings within thirty-five (35) days from the day when the

Supplementary Statement under Section 5(4) was filed or should have been filed, whichever is sooner.

(2) The Tribunal shall hold the hearing in the presence of all parties. However, where the Tribunal deems it necessary, separate hearings may be held for the parties.

(3) The parties shall be allowed to have witnesses attend the hearing(s) and give evidence. However, if for whatever reason a witness is unable to attend the hearing(s), a written and signed statement shall be accepted in place of its appearance.

(4) When the parties have submitted an agreement stipulating no hearings, the Tribunal shall omit the hearings referred to in this Section.

(5) The Tribunal may, after taking into consideration the views of the parties, hold a hearing of any of the parties, agents, witnesses or expert witnesses, who are unable to attend because of illness, inconvenient location of residence or other unavoidable reasons, in such a manner as to enable the absentee and all the attendees to communicate with each other through two-way telecommunications technology. In this case, the person who has provided evidence through telecommunications shall be deemed to have attended the hearing.

**Section 9. [Mediation]** If either or both of the parties request mediation, or the Tribunal deems it suitable and advisable, the Tribunal may, at any time while the Simplified Arbitration is proceeding, make a mediation proposal. Such mediation shall occupy a maximum of thirty (30) days.

**Section 10. [When Award Given]** The Tribunal shall give its award on the case in principle within thirty (30) days from the conclusion of the hearings.

**Section 11. [Description of Items in the Award]** In the Simplified Arbitration Award, Nos. 3 and 4 of Section 32(1) of the Ordinary Rules shall be fully satisfied by as brief a description as practicable of the matters referred to therein.

**Section 12. [Costs of Simplified Arbitration]** (1) The Claimant shall, when he applies for Simplified Arbitration, pay to the Secretariat a Filing Fee of One Hundred Thousand Yen (¥100,000). This provision shall also apply where an application for Simplified Arbitration of a counterclaim is filed.

(2) Each party shall, within seven (7) days after the receipt of notice from the Secretariat, pay to the Secretariat the fee (hereinafter referred to as “the Arbitration Fee”) which the Tribunal shall determine in accordance with the Tariff of Fees for Simplified Arbitration.

(3) If the Respondent applies for Simplified Arbitration of a counterclaim arising out of the same cause or matter and the Tribunal considers that such Simplified Arbitration can

be performed concurrently with the Claimant's application, the amounts claimed and counterclaimed respectively shall be aggregated and the aggregate sum shall be taken as the amount of claim in the Tariff of Fees for Simplified Arbitration.

(4) Each party shall pay the consumption tax imposed on the amount of the each fee as provided in the foregoing (1) to (3).

**Section 13. [Apportionment of Costs of Arbitration]** The costs of Simplified Arbitration shall be paid from the Filing Fee and Arbitration Fee paid to the Secretariat under Section 12 and the ratio in which they shall be borne by the parties shall be decided by the Tribunal.

### **The Tariff of Fees for Simplified Arbitration**

The amount of the Simplified Arbitration Fee to be paid by each party shall be as follows:

When the amount of claim is ¥10,000,000 or less, the fee to be paid is ¥300,000;

When the amount of claim exceeds ¥10,000,000, but does not exceed ¥20,000,000, the fee to be paid is ¥350,000;

When the amount of claim exceeds ¥20,000,000, the fee to be paid is the amount to be paid in accordance with the Tariff of Fees for Ordinary Arbitration, less 10%.

# THE RULES OF THE SMALL CLAIMS ARBITRATION PROCEDURE (SCAP) OF TOMAC

Made 3rd February, 1999

Last amended 15 June, 2001

In force 1st September, 2001

**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 Ordinary Rules, by agreement between both parties.

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

**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 TOMAC 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 of the JSE 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 document empowering the attorney to act on behalf of the Claimant.

**Section 4. [Acceptance of Application for the Small Claims Arbitration Procedure]** When the Secretariat acknowledges that the application complies with the requirements of Section 3, it shall accept the application.

**Section 5. [Filing of Defense and Supplementary Statement in the Small Claims Arbitration Procedure]** (1) When the Secretariat has accepted the application for the Small Claims Arbitration Procedure, the Secretariat shall forward to the other party (hereinafter referred to as “the Respondent”) an original of the Statement of Claim

in the Small Claims Arbitration Procedure together with copies of the documentary evidence, and instruct the Respondent to send to the Secretariat and the Claimant respectively within fifteen (15) days from the day of receipt of such instruction a Defense in the Small Claims Arbitration Procedure and any supporting evidence.

(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.

(3) When the Claimant has received the Defense and documentary evidence (if any), the Claimant shall, if it has any objection to the Defense, send to the Secretariat and the Respondent respectively within ten (10) days from the day of receipt thereof its Final Supplementary Statement and further documentary evidence, if any.

(4) When the Respondent has received the Final Supplementary Statement and documentary evidence (if any), the Respondent shall, if it has any objection thereto, send to the Secretariat and the Claimant respectively within ten (10) days from the day of receipt thereof its Final Supplementary Statement and further documentary evidence, if any.

(5) The Defense, Final Supplementary Statements and documentary evidence may be submitted via e-mail or fax, provided that the sending party shall bear the burden of proving that the copies are identical to the originals and that it has in fact forwarded those to the other party.

(6) The documents under this Section shall be submitted in the number of copies as instructed by the Secretariat.

**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. [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 (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 8. [Appointment of Arbitrator]** TOMAC shall, within ten (10) days from the day when the Respondent’s Defense 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 9. [Hearings]** (1) The Arbitrator shall conduct a hearing by way of the examination of documents, in principle, within fifteen (15) days from the day of appointment. There shall be no oral hearing unless the Arbitrator deems it necessary.

(2) Where the Arbitrator deems it necessary to give an oral hearing, the Arbitrator shall, in principle within fifteen (15) days from the day of appointment, hold the hearing in the presence of all parties. There must be only one (1) oral hearing in the absence of exceptional circumstances.

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

(4) The Arbitrator may, after taking into consideration the views of the parties, hold a hearing of any of the parties, agents, witnesses or expert witnesses, who are unable to attend because of illness, inconvenient location of residence or other unavoidable reasons, in such a manner as to enable the absentee and all the attendees to communicate with each other through two-way telecommunications technology. In this case, the person who has provided evidence through telecommunications shall be deemed to have attended the hearing.

**Section 10. [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 11. [The Award]** (1) The Arbitrator shall issue an award on the case promptly after conclusion of the hearing pursuant to Section 9.

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

**Section 12. [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 counter-claim in whole or in part to the Respondent, the preceding Sub-Sections shall also apply thereto.

**Section 13. [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 notarisation 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 counter-claim to the Respondent, the preceding Sub-Sections shall also apply thereto.

**Section 14. [Apportionment of Costs of Arbitration]** The costs of the Small Claims Arbitration Procedure shall be paid from the Filing Fee and Arbitration Fee paid to the Secretariat under Section 7 and the ratio which each party shall bear shall be decided by the Arbitrator.

**Section 15. [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**

The amount of the Small Claims Arbitration Procedure Fee to be paid shall be as follows: Five percent (5%) of the amount of the claim and of the counter-claim, if any, but not less than One Hundred Thousand Yen (¥100,000).



# Preliminary Issues - Vintage Wine in Old Bottles

*Greg O'Neill\**

## Introduction

Decisions of the Chancery Division of the High Court in London are normally unlikely to be of interest to the international shipping fraternity. However, the recent case of *Steele v Steele* before Mr Justice Neuberger (30 April 2001) helpfully summarised the factors that the judge thought should be taken into account when considering the merits of a preliminary issue. Briefly, a preliminary issue is one identified by the Court either of its own motion or on the application of the parties which is likely to resolve an important issue in the case and thereby save unnecessary and costly litigation. One can immediately appreciate why a greater awareness of this procedure could be of great benefit to shipping and commercial litigants and why its adoption by other non-common law derived jurisdictions should be seriously considered. Indeed the writer understands that this procedure does not at present prevail in the Japanese Legal System.

## History - a brief survey

The English High Court has always had an inherent power to order a preliminary issue to be tried. Before the Civil Procedure Rules 1998 (CPR) the power was reflected in the Rules of the Supreme Court (Order 14A)<sup>1</sup>. The CPR under Part 24 perpetuates that power by permitting the Court to summarily dispose of preliminary issues where the Court “is satisfied that those issues do not need full investigation and trial.”

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<sup>1</sup> 14A/1

1. The Court may upon the application of a party or of its own motion determine any question of law or construction of any document arising in any cause or matter at any stage of the proceedings where it appears to the Court that -
  - (a) such question is suitable for determination without a full trial of the action, and
  - (b) such determination will finally determine (subject only to any possible appeal) the entire cause or matter or any claim or issue therein.
2. Upon such determination the Court may dismiss the cause or matter or make such order or judgement as it thinks just.
3. The Court shall not determine any question under this Order unless the parties have either -
  - (a) had an opportunity of being heard on the question, or
  - (b) consented to an order or judgement on such determination....

The Courts in England (and for that matter, in many other jurisdictions) have an autocratic command of their procedure and in theory could order a hearing on a preliminary point at will. However in practice they have been slow to wield this power when confronted with the complexities of pleaded cases and evidence generated by two or more litigants (urged on by their lawyers) set upon maximising the issues and arguments in an attempt to overwhelm or divert the opposing party. The adversarial characteristic of the common law procedure almost inevitably leads to a proliferation of issues and an entrenched tendency to include in one's case or pleadings every last ditch argument that can be dredged up.

This is much less a feature of inquisitorial systems of law where the Judge takes a more hands-on approach in the conduct and management of a case. The adversarial system on the other hand inherently militates against the isolation of one or two key issues that may substantially resolve the dispute between the parties. It has in the past been all too easy for a litigant with a weak case to persuade a Court or Arbitration Tribunal that to deal with one particular issue will not resolve the matter as there are so many other issues which have to be decided and which (inevitably) are related to the main issue. Courts and arbitration tribunals alike, wary of unwittingly conspiring in an injustice or being railroaded by an enthusiastic single issue litigant, have historically been somewhat reluctant to allow preliminary issues for these reasons.<sup>2</sup>

Even recently (since the CPR) the writer has had experience of an arbitration which could have been resolved at an early stage by the consideration of a single legal issue arising out of what would have been agreed facts. Sadly, the application failed for the sort of reasons outlined above only for the case to be won two years later on exactly that ground. In the meantime, the costs had quadrupled. The only people who suffer in these

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<sup>2</sup> However for an example of a robust approach taken by Mr Justice Gatehouse pre-1998 and endorsed by the House of Lords, see *Ashmore v Corporation* [1992] 2 Lloyd's Rep. p1, per Lord Templeman at p7:

“When a judge decided that a particular course should be followed in the conduct of the trial in the interests of justice, his decision ought to be respected by the parties and upheld by the appellate Court unless there were very good grounds for thinking that the learned Judge was plainly wrong; it was the duty of the parties to co-operate with the Court by chronological brief and consistent pleadings which defined the issues and left the Judge to draw his own conclusions about the merits of the case; the control of the proceedings rested with the Judge and not with the plaintiffs; an expectation that the trial would proceed to a conclusion upon the evidence to be adduced was not a legitimate expectation; the only legitimate expectation of any plaintiff was to receive justice and justice could only be achieved by assisting the Judge and accepting his ruling; the appeal would be allowed.”

circumstances are the clients who finish with a hefty bill and very little extra to show for it.

Nevertheless, the sea-change in the approach of the courts to the conduct of litigation which culminated in the CPR has undoubtedly led to the resurrection of the preliminary issue as a useful tool in speeding up litigation in appropriate cases. This goes hand-in-hand with a greater emphasis on mediation<sup>3</sup> and Alternative Dispute Resolution (ADR). Indeed the CPR “White Book” which consolidates the rules, the practice directions and pre-action protocols provides expressly for the compliance by potential parties to litigation with specific procedures designed to avoid or shorten litigation.<sup>4</sup> In *Dyson and Field v Leeds City Council* (unreported 22<sup>nd</sup> November 2000) the Court of Appeal (Ward LJ) emphasised that it had powers to take a strong view with any party reluctant to engage in mediation by imposing eventual orders for indemnity costs or by ordering that a higher rate of interest be awarded on damages assessed. Even during the course of a case the judge will actively encourage settlement or mediation even in the face of some resistance by the parties. Furthermore the allocation questionnaire presupposes the possibility of settlement by asking if the parties require a stay of the action for that purpose.

However, champions of the benefits of preliminary issues have not just emerged in the last decade. In 1876<sup>5</sup> Jessel MR reluctantly acknowledged in a case involving the proper construction of a disputed partnership deed that there had been a substantial saving in costs because the question of construction had been dealt with by the Court before the main action as pleaded. Again in 1958 both the menace of over pleading and the benefits of taking preliminary points were addressed by their Lordships in the case of *Gold v Patman & Fotheringham Limited*.<sup>6</sup> Per Lord Justice Romer: “I only wish to say once again, what I have said on more than one occasion before, that is that I wish litigants would take advantage of the facilities which are afforded of having a preliminary point of law decided. That could very well have been done in this case. As it turned out before this Court, the matter had depended upon the construction of the contractual documents. If the defendants had taken that point and asked for that point to be decided, if they lost on it, it would still have been open to them to raise all their other defences at the trial,

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<sup>3</sup> Compare Takao Tateishi, “Mediation as a Pre-stage to Arbitration” in JSE Bulletin No.41, p17.

<sup>4</sup> CPR Rule 1.4 provides, “1.4(1) The court must further the overriding objective by actively managing cases. 1.4(2) Active case management includes....(e) encouraging the parties to use an ADR procedure if the court considers that appropriate and facilitating the use of such procedure.”

<sup>5</sup> *Pooley v Driver* [1876] CHD at p494.

<sup>6</sup> [1958]1 Lloyd’s Rep. at p600.

and, for my part, I wish they had done so. It seems to me that this was a case *par excellence* in which the facilities should have been used. So I agree entirely with what my Lord says.”<sup>7</sup> <sup>8</sup>

## **Steele v Steele**

Mr Justice Neuberger identified 9 considerations to assist in deciding whether or not in any particular case a preliminary issue was appropriate. These considerations with respect to the learned judge are something of an over embellishment and occasionally tautologous. I propose to deal with them in turn:

### **1. Could the determination of the preliminary issue dispose of the whole case or at least one aspect of the case?**

A typical example of this would be the operation of a time bar as a matter of construction of a particular clause or on the factual side whether a particular notice of commencement of proceedings had been served by a particular agreed time bar date. Clearly in either case, if the time bar was held to be operative other substantive issues would not need to be adjudicated upon. A more contentious issue would be the existence of a contract which may involve simply construing two or three faxes or may involve lengthy written exchanges and oral evidence. The former situation may be an appropriate case for a preliminary issue, the latter would not.

### **2. Could the determination of the preliminary issue significantly cut down the cost and time involved in pre-trial preparation and in connection with the trial itself?**

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<sup>7</sup> Lord Justice Hodson: “The appeal will be allowed with costs, and with regard to the cost below, the order is that the defendants obtain judgment against the plaintiff with half their costs. This is a course which the Court does not often take, because when a defendant has an action brought against him he is entitled to put up such defences as are available to him, *but, in this case, there was, I think, an opportunity for the defendants to take a clear-cut point of law which depended on the construction of the document and upon which this case has ultimately turned, and, if that course had been taken, a very large expenditure of money would have been saved.* On all the issues of fact which were raised by the defendants by calling evidence to provide or disprove certain facts, the learned Judge in the Court below found against them. For these reasons, I think that this is a case in which the Court is justified in taking an unusual course and not giving the successful party the whole of the fruits of his victory in the Court below.”

<sup>8</sup> Lord Justice Sellers: “I agree. I think the point of law stood out here on the construction of the contract, and it could have been done with very little expense.”

Costs will more likely be saved where the preliminary issue involves a straightforward question of law. Clearly where there is a question of fact, costs may become more of a problem. To take the second scenario of the existence of a contract outlined in 1 above, there is much less likelihood of a saving in costs.

3. **If the preliminary issue was an issue of law how much effort, if any, was involved in identifying the relevant facts for the purpose of the preliminary issue? The greater the effort the more questionable the value of ordering a preliminary issue.**
4. **If the preliminary issue was one of law, to what extent was it to be determined on agreed facts? The more facts that were in dispute, the greater the risks that the law could not be safely determined until disputes of fact were resolved.**

3 and 4 are in effect the two sides of the same coin. In practice, many preliminary issues of law are decided on the basis of agreed or assumed facts. Where a question of law arises out of a complex factual matrix with the facts themselves being in dispute a final trial is more likely to be an appropriate forum.

5. **Whether the determination of the preliminary issue could unreasonably fetter either or both of the parties or the Court in achieving a just result at trial.**

This factor would have been a good reason for the Court and parties to resist the lure of considering a preliminary point in the *Berge Sisar*.<sup>9</sup> This decision was reached in my submission on the basis of an inadequate investigation of the facts resulting in prejudice being suffered by the owners as well as by the end user, Dow, who were not even represented. It is always necessary for the parties and the Court to be clear in their own minds the result they are hoping to achieve by disposing of a preliminary issue.

6. **To what extent was there a risk of the determination of the preliminary issue increasing costs and/or delaying the trial? In that regard, the Court could take into account the possibility that the determination of the preliminary issue might result in a settlement.**

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<sup>9</sup> *Berge Sisar* [1998] 2 Lloyd's Rep. 475 (CA).

This is a curious catch 22 consideration. Surely only an incompetent Court and legal representation would devise a preliminary issue which failed to resolve at least one important issue between the parties. Given that that issue would have to be resolved at a final trial in any event, there should not be excessive overlap of argument or presentation. Insofar as delay is the result of congestion in the Court lists or in the schedules of arbitrators that does not *per se* detract from the merit of a preliminary issue, but would be more a reflection of the inadequate facilities of the Court or availability of a Tribunal. Speculation as to whether a case would settle or not depending on the result of the preliminary issue is almost unfathomable but one must assume that where parties agree to the hearing of a preliminary issue they both take the view that its resolution will affect the chances of ultimate success of one or other of the parties.

- 7. The extent to which the determination of the preliminary issue was relevant. The more likely it was that the issue would have to be determined by the Court the more appropriate it was to have it as a preliminary issue.**

It is difficult to conceive of an issue worthy of the name which was irrelevant or of a legal issue which would not have to be tried by the court. In effect, unless the issue falls within (1) or (2) above, this consideration will not arise.

- 8. To what extent was there a risk that the determination of the preliminary issue, if apparently helpful in terms of saving costs and time could lead to an application for the pleadings to be amended to avoid the consequences of the determination?**

The most obvious example of this is a preliminary issue on a time-bar which if resolved against the claimant may lead to an application for an extension or in a case involving the construction of a clause a claim for rectification. However in either case it would be surprising if the party's lawyers had not already anticipated these alternative cases in their pleadings. Furthermore both examples may well lend themselves to a hearing to resolve both preliminary issues. It is submitted that in practice this complication would rarely arise.

- 9. Was it just and right to order a preliminary issue?**

Or more colloquially would such an order be consistent with a fair trial? This factor



differs little from (5) above. A preliminary issue may turn out to be of doubtful benefit but apart from the possibility of wasted costs and delay in the proceedings it would seem unlikely that it would prejudice the parties.

In summary if the case for a preliminary issue meets the first five criteria there is a good chance that it is the right direction to take. Let us take a live example, *The Owners of the Ship "Seafarer 1" v The Owners of the Ship "Fedra" June 2000* (unreported).

On 21 May 1998 the bow of the "FEDRA", laden with a cargo of cement in bulk, struck the starboard side of "SEAFARER 1" abreast of number 5 hold, causing extensive damage to the way of her shell plating with severe damage to "FEDRA," particularly to the starboard side of her bow area and port bow area, destroyed her bulbous bow, her forecandle store with the forepeak tank penetrated and her starboard anchor lost.

It was alleged that as a consequence of the collision mechanism, sea water entering the starboard side of "FEDRA"'s upper wing tank water ballast discharge outlet in way of number 3 and number 4 holds, entered the vessel's number 4 hold and contaminated the cargo causing it to solidify. Permanent repairs to "FEDRA" included removal of the damaged cargo from the number 4 hold, the cost of which rendered the vessel a constructive total loss.

The owners of "SEAFARER 1" made an application to the High Court for the issue of the damage to the number 4 hold to be dealt with by way of a preliminary issue on the grounds that the damage to the number 4 hold was a consequence of the negligent condition of the vessel, the proximate cause of the ingress of the water being due to the heavily corroded bottom plate of the hat box of the ballast tank whereas, the owners of "FEDRA" contended that the proximate cause was the shock wave of the collision dislodging the rust in the area of heavy corrosion. The claim of "FEDRA" was put forward in the sum of US\$5,853,545 including 216 days detention amounting to US\$1,225,220 plus ancillary expenses with a total of over US\$2,000,000 claimed in respect of the damage to the number 4 hold plus the contention that the vessel was a constructive total loss whereas her bow damage repairs represented less than 50% of her total market value.

For the owners of "SEAFARER 1" (represented by Penningtons) it was therefore of importance, unusually before issues of liability were heard, to quantify the respective ships' claims realistically to enable a compromise settlement of liability to be achieved taking account of the economic consequences of any apportionment. Accordingly, in

June 2000 the court ordered a hearing of the preliminary issue of causation of the damage to the number 4 hold. The hearing therefore does not require any investigation of blame with the witness evidence that would necessarily involve but only an expert analysis of the collision mechanism and its corresponding impact (if any) on the number 4 hold.

This bold decision to hear the issue of causation first is the reverse of the normal order to hear issues of liability first. It demonstrates how keeping an open mind in matters of procedure can optimise the handling of a case whether it is in court or arbitration.

Preliminary issues must now be seen as complementing the increasing enthusiasm for mediation and ADR to the extent that when those methods have failed or are inappropriate there may still be a path to an early resolution of the dispute. In the 1990 Lloyd's Law Reports there was one case of preliminary issue and one appeal; then one in 1991 and 1992 (an appeal). 1998 saw 5 most after the CPR came into force. Of the 100 or so cases reported in the year 2000 Lloyd's Law Reports about 10 may be said to involve preliminary issues. Although no authoritative guide to the extent of its current usage, it is some evidence of its increased popularity - vintage wine in old bottles. ■

# **MARINE LIABILITY ACT OF CANADA - SHORT COMPARISON OF MARITIME LIABILITY REGIMES IN CANADA AND THE UNITED STATES**

*A. Barry Oland and Simon Barker\**

## **INTRODUCTION**

On May 10<sup>th</sup> 2001, the *Marine Liability Act*<sup>1</sup> of Canada (the “MLA”) received Royal Assent. The statute comes into force on August 8, 2001. The Act has as its objective, consolidation of the major components of Canada’s existing maritime liability regimes in a single statutory package. It also adds important new provisions relating to apportionment of liability for torts governed by Canadian maritime law, and liability for passengers and their luggage. The MLA represents several years of cooperative effort between the Department of Transport and the Canadian Maritime Law Association. There are six principal parts of the MLA.

For Japanese shipowners, operators, charterers and marine insurance companies trading to North America, there may be a tendency to group the liability regimes of the United States and Canada together. In fact, they are different. Canada, which follows the British model, recently brought its international maritime law up-to-date. This short paper will describe Canada’s MLA and will compare briefly its provisions with United States maritime law.

## **PART 1 - PERSONAL INJURIES AND FATALITIES**

### **Canada**

Because of recent decisions of the Supreme Court of Canada, the right to claim for maritime wrongful death or personal injury arising in marine accidents (except for workplace accidents), now is based solely on Canadian maritime law and not the law of any Province of Canada. Canadian maritime law is an independent body of Federal law uniform throughout Canada and not the law of any Province. This definition means that there is no contest between Federal and Provincial jurisdiction over maritime claims. The

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<sup>1</sup> *Marine Liability Act*, Statutes of Canada 2001, Chapter 6.

Federal Court of Canada has nationwide jurisdiction over all maritime claims. Maritime lawyers in Canada can appear in any Court facility of the Federal Court of Canada. This makes resolution of personal injury claims easier in Canada than in the United States.

Part 1 of the MLA incorporates provisions previously set out in Part XIV of the *Canada Shipping Act* relating to fatalities. Part I is revised to recognize the effect of Supreme Court of Canada decisions and to be consistent with other Federal legislation and with Provincial fatal injury and survival of action legislation. Specific provision is now made to permit relatives of deceased, or injured persons to claim for loss of care, guidance and companionship, and for personal injury or death arising under Canadian maritime law.

In Part I, there is an expanded definition of “dependent” which takes a wider and more contemporary view of family relationships. Of importance of insurers is the time limitation of two years under section 14 of the MLA. Under the previous legislation the time limit was one year.

The law relating to recovery of damages by dependents of deceased persons is very different in Canada when compared to the United States. In summary, in Canada, the amount of damages recoverable by relatives of a deceased person is significantly less than in the United States.

In Canada, almost all maritime injuries or fatalities in workplace related situations are the subject of Provincial Workers’ Compensation legislation. This is because of *Provincial Workers Compensation Acts* which prohibit suit against the employer. As a result, there is almost no commercial maritime personal injury litigation in Canada.

### **United States**

Personal injury litigation in the United States, in the maritime context, is governed by the *Jones Act*,<sup>2</sup> the *Longshore Harbour Workers Compensation Act*,<sup>3</sup> and the *Death on the High Seas Act*.<sup>4</sup> These statutes are well known to shipowners, vessel operators and P&I clubs trading to the United States. Many papers are available on these subjects. It is sufficient to say that personal injury damage awards in the United States are far higher than those in Canada and the litigation process is far different.

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<sup>2</sup> 46 U.S.C. app. 688.

<sup>3</sup> 33 U.S.C. app. 901 - 950.

<sup>4</sup> 46 U.S.C. app. 761.

## **PART 2 - APPORTIONMENT OF LIABILITY**

### **Canada**

Part 2 of the MLA is new and important Federal Canadian legislation. It implements necessary changes concerning apportionment of fault applicable to all claims governed by Canadian maritime law. This Part has been enacted to avoid the harsh consequences of application of the common law defence of contributory negligence which prevented recovery if a party was in any way responsible for causing the loss, even in the slightest degree.

Section 17(1) of the MLA provides that where loss is caused by the fault or neglect of two or more persons or ships, their liability is proportionate to the degree to which they are respectively at fault or negligent. If it is not possible to determine different degrees of fault or negligence, then the liability is equal.

Section 23 of the MLA provides that no action may be commenced later than two years after the loss or injury arose to enforce a claim or lien against a ship in collision or its owners in respect of any loss to another ship, its cargo or other property on board, or any loss of earnings of that other ship, or for damages for loss of life or personal injury suffered by any person on board that other ship caused by the fault or neglect of a ship whether that ship is wholly or partly at fault or negligent. There is, however, in section 23(2) a provision where a Court having jurisdiction, can extend the time in certain circumstances.

### **United States**

The general rule of apportionment of liability in Federal Maritime jurisdiction cases is one of comparative fault. The United States Supreme Court dealt with apportionment of fault in collision cases in *United States v. Reliable Transfer Co.*<sup>5</sup> Previously in the United States there had been a rule that damages in collision cases were apportioned equally. The Supreme Court of the United States held:

“We hold that when two or more parties have contributed by their fault to cause property damage in maritime collisions or stranding, liability for such damage is to be allocated among parties proportionately to the comparative degree of their fault,

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<sup>5</sup> 421 U.S. 397, 1975 A.N.C. 541.

and that liability for such damage is to be allocated equally only when the parties are equally at fault, or when it is not possible fairly to measure the comparative degree.”

### **PART 3 - LIMITATION OF LIABILITY FOR MARITIME CLAIMS**

#### **Canada**

Part 3 of the MLA contains recent amendments to the *Canada Shipping Act*, which brought into Canadian law the provisions of the 1976 Convention on Limitation of Liability for Maritime Claims and its 1996 Protocol as concluded at London on May 2, 1996. Canada is one of the first nations to bring into force the increased limits of the 1996 Protocol, now contained in Articles 6 and 7 of the Convention. The regime allows shipowners to limit the amount of their financial responsibility for certain types of damages in connection with the operation of a ship. It applies to all maritime claims, with the notable exception of claims for pollution damage which are covered by a separate regime now contained in Part 6 of the MLA. In summary, for a shipowner, Canada provides the certainty of limitation contained in the 1976 LLMC, but with increased limits of the 1996 Protocol.

For vessels not exceeding 300 tons, section 28 of the MLA provides limits of Cdn. \$500,000 for property damage and of Cdn. \$1,000,000 for loss of life or personal injury.

All other amounts follow the 1996 Protocol. A vessel of 30,000 gross tons would have a limitation fund of 12,199,600 SDR's. This is approximately U.S. \$15,235,000 at current exchange rates. It can be seen that the 1996 Protocol limitation amounts are significantly higher than those contained in the 1976 Convention.

The limitation fund for a vessel for “passenger claims” under Article 7(1) is 175,000 SDR's, multiplied by the number of passengers which the ship is authorized to carry according to the ship's certificate.

Of interest to shipowners who use Canadian canals and ports, there is a limitation of liability for the dock or canal operator contained in section 30 of the MLA.

The Admiralty Court (Federal Court of Canada) has exclusive jurisdiction with respect to any matter relating to the constitution and distribution of a limitation fund under Articles 11 - 13 of the Convention.

## **United States**

In 1851, the Congress of the United States passed the *Limitation of Liability Act*.<sup>6</sup> The purpose was to permit a vessel owner to limit its liability to the extent of its interest in the vessel at the end of the voyage. This enabled the owner to shelter itself from unlimited liability for consequences of maritime accidents and disasters unless the loss was caused by the vessel owner's own personal neglect or default. Under U.S. law, the limitation fund can be substantial if the value of the vessel is high at the end of the voyage, or very low if the vessel has been seriously damaged or lost.

The *Limitation of Liability Act* contains section 182 the *Fire Statute* which generally exempts carriers from liability for damage to cargo caused by fire. Section 183 provides that an owner can limit its liability with respect to claims by cargo, for collision, or personal injury, or death:

“done ... or received without the privity and knowledge of such owner to the value of the interest of such owner in the vessel at the end of the voyage.”

Section 185 permits an owner to file a petition for limitation in U.S. District Court within six months after receiving a notice of claim. The owner must either transfer to the Court appointed trustee his interest in the vessel and freight, or deposit with the Court a bond equal to the value of the interest of the owner in the vessel. At times the interest may be zero.

Section 186 deems a bareboat charterer to have the same rights as an owner. Section 188 makes the Act applicable to all vessels of all sizes on “navigable” waters. Some Courts have denied the right of limitation to owners of pleasure vessels, which is not the case in Canada.

The United States still applies the “Privity and Knowledge Test” which is similar in concept to the 1957 Brussels Convention. Privity under the U.S. statute has been defined as:

“Personal participation of the owner in some fault, or act of negligence, causing or contributing to the loss, or some personal knowledge or means of knowledge, of which he is bound to avail himself or a contemplated loss, or a condition of things

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<sup>6</sup> 46 U.S.C. app. 181 - 189.

likely to produce or contribute to the loss, without adopting appropriate means to prevent it.”

For an overview on limitation of liability, see the *Maritime Law Desk Book* published by Charles M. Davis of Seattle, Washington, at pp. 345 - 358. This extensive publication provides one of the most useful compilations of U.S. maritime law on the many issues facing shipowners and insurers today.

For an informative history of U.S. limitation law, see the April, 2001 Edition of the *Journal of Maritime Law and Commerce*, Vol. 32, No. 2, April 2001.

## **PART 4 - LIABILITY FOR CARRIAGE OF PASSENGERS BY WATER**

### **Canada**

Part 4 is also a new part of the MLA. It brings into Canadian law the 1974 Athens Convention relating to the Carriage of Passengers and their Luggage by Sea, as amended by the 1990 Protocol. The Athens Convention is set out in Schedule 2 of the MLA. Canadian maritime law has been brought into harmony with international maritime law to provide a consistent liability regime to protect the rights of passengers carried by water. Previously, there was no Canadian federal legislation to address liability for passengers, or their luggage.

Previously, carriers were free to set terms of, or exclude, liability by contract, or through waiver. The underlying objective of the Athens Convention is to provide for statutory liability of the carrier. Fault or neglect of the carrier is presumed, unless the contrary is proven. This means in practical terms that the passenger does not have to conduct expensive litigation to prove liability against the carrier.

Article 3 of the Athens Convention provides the carrier is liable for the death of, or personal injury suffered by, a passenger and loss or damage of luggage if the incident causing the damage occurred during the course of carriage and was due to the fault or neglect of the carrier, its servants or agents, acting within the scope of their employment. The burden of proving that the incident which caused the loss lies with the claimant, but fault or neglect of the carrier is presumed, unless the contrary is proved.

By Article 7 of the Athens Convention, amended by the 1990 Protocol, the limit of liability of the shipowner per individual passenger is not to exceed 175,000 SDR's per



passenger. This is approximately U.S. \$220,000.00 at today's exchange rates.

By Article 8, the limit of liability for loss of luggage is a maximum of 1,800 SDR's per passenger, per carriage. Loss or damage to a vehicle is limited to 10,000 SDR's per vehicle, per carriage.

Article 18 of the Athens Convention as adapted by the MLA, specifically prohibits the contracting out of liability.

Because limits under the Athens Convention were revised last in 1990, the subject is presently under review by the International Maritime Organization. It is likely that a further Protocol will be enacted to raise the various limits at some point in the future. If that occurs, there is a fast amendment procedure in section 40 of the MLA whereby liability can be changed by an order of the Governor in Council (the Canadian Cabinet) without the necessity of amending the actual statute.

### **United States**

At the present time, there is no federal statute dealing with passenger liability in the United States. Liability and allocation of fault is dealt with on the basis of contract (the passenger ticket). The law of damages for personal injury follows standard personal injury situations in the United States.

“The duty is one of reasonable care under the circumstances, the circumstances requiring more diligence on the part of the shipowner with respect to risks that are not normally encountered by passengers in their shoreside lives”.<sup>7</sup>

Recent decisions of the United States Supreme Court have upheld jurisdiction clauses contained in passenger tickets. As well, passenger tickets often contain a time for commencement of suit which is typically one year and these have been upheld.

## **PART 5 - LIABILITY FOR CARRIAGE OF GOODS BY WATER**

### **Canada**

In May 1993, Canada amended its *Carriage of Goods by Water Act*. These provisions are

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<sup>7</sup> Davis, *Maritime Law Desk Book*, p. 105.

carried over in Part 5 of the MLA. The *Carriage of Goods by Water Act* of Canada was unique as it included both the Hague-Visby Rules and the Hamburg Rules. The Hague-Visby Rules have the force of law in Canada and came into effect on May 6<sup>th</sup>, 1993. The Hamburg Rules have not yet been proclaimed. The legislation provides that the Minister, on or before January 1<sup>st</sup>, 2005, and every five years thereafter, must consider whether the Hague-Visby Rules should be replaced by the Hamburg Rules. In summary, Canada is a pure Hague-Visby country with the benefits and defects of those Rules. For cargo interests, the limitation is 666.67 SDR's per package or 2 SDR's per kilo, whichever is the greater.

For shipowners, P&I Clubs and cargo insurers, an important new provision is section 46 of the MLA dealing with institution of proceedings in Canada. This section described below, allows Canadian jurisdiction to be exercised for court claims or arbitration if the actual, or intended port of loading and discharge under the contract is in Canada. Section 46 is as follows:

*“Institution of Proceedings in Canada*

*46.(1) If a contract for the carriage of goods by water to which the Hamburg Rules do not apply provides for the adjudication or arbitration of claims arising under the contract in a place other than Canada, a claimant may institute judicial or arbitral proceedings in a court or arbitral tribunal in Canada that would be competent to determine the claim if the contract had referred the claim to Canada, where*

- (a) the actual port of loading or discharge, or the intended port of loading or discharge under the contract, is in Canada;*
- (b) the person against whom the claim is made resides or has a place of business, branch or agency in Canada; or*
- (c) the contract was made in Canada.*

*(2) Notwithstanding subsection (1), the parties to a contract referred to in that subsection may, after a claim arises under the contract, designate by agreement the place where the claimant may institute judicial or arbitral proceedings.”*

The effect of section 46 will be to remove the jurisdiction/arbitration clause argument that takes place regularly when claims are brought in Canada which involve shipments between Japan and Canada. It will enable Canadian Courts and arbitration panels to hear many cases which were previously sent to London, New York or other foreign jurisdictions by the vessel owner's P&I Club.

## **United States**

In spite of vigorous attempts by the United States Maritime Law Association to modernize U.S. carriage of goods law, the *Carriage of Goods by Sea Act* of 1936 (COGSA) is still applicable. The Act contains the Hague Rules of 1924 with modifications, principally:

1. a limitation of \$500.00 per package, and for goods not in packages, per customary freight unit; and
2. an application to both inbound and outbound carriage.

The proposed U.S. COGSA 1999 contained a very broad jurisdiction/arbitration clause which met with some opposition. The revised COGSA 2000 contains altered wording on jurisdiction issues that is similar in concept to section 46 of Canada's MLA, which is itself modeled on Articles 21 and 22 of the Hamburg Rules. The U.S. MLA is actively promoting COGSA 2000 in the U.S. Senate.

## **PART 6 - LIABILITY AND COMPENSATION FOR POLLUTION**

### **Canada**

Part XVI of the *Canada Shipping Act* contained provisions addressing civil liability and compensation for pollution; provisions which are based on the Civil Liability Convention 1969 and the Fund Convention 1971. Part XVI was amended in May 1999 to include the new regime for liability and compensation as contained in the 1992 Protocols to the Civil Liability Convention and the Fund Convention. These rules are carried over in Part 6 of the MLA. The rules regarding limitation of liability for pollution damage have not changed in substance.

Sections 47 - 105 of the MLA deal with liability and compensation for pollution. The MLA allows a ship owner to limit its liability for actual or anticipated oil pollution damage provided that the actual or anticipated oil pollution damage did not result from the personal act or omission of the owner, or from intentional recklessness with knowledge that oil pollution damage would probably result.

The maximum liability of an owner of a Convention ship where the ship has a tonnage not exceeding 5,000 tons is 3,000,000 SDR's. Where the Convention ship has a tonnage exceeding 5,000 tons, the maximum liability of an owner is the lesser of the aggregate of

3,000,000 SDR's for the first 5,000 tons and 420 SDR's for each individual ton to a maximum of 59.7 million SDR's.

For a ship that is not a Convention ship, the maximum liability of an owner of a ship with a tonnage not exceeding 300 tons is calculated in accordance with section 28 of the MLA (as mentioned on page 36 of this paper). In the case of a ship exceeding 300 tons, the amount is determined in accordance with Article 6 of the 1976 LLMC and its 1996 Protocol.

### **United States**

In the United States, the *Oil Pollution Act* of 1990 (OPA 90)<sup>8</sup> created a comprehensive prevention, response, liability and compensation regime for dealing with vessel and facility caused oil pollution in U.S. navigable waters. Earlier United States pollution legislation remains in effect unless specifically amended or repealed by OPA 90.

In the case of a pollution incident, a vessel operator may limit liability for tank vessels over 3,000 tons to the higher of U.S. \$1,200 per gross ton, or \$10,000,000. A tank vessel of less than 3,000 tons is limited to the higher of \$1,200 per gross ton, or \$2,000,000. Liability for non-tank vessels is limited to the higher of \$600 per gross ton, or \$600,000.

The most interesting point to consider about OPA 90 is that limited liability is lost in the United States if the spill results from gross negligence, wilful misconduct or a violation of an applicable federal safety regulation, construction or operating regulation, failure to report a spill and lastly, failure to cooperate in connection with removal activities.

In summary, a shipowner's right to limit liability is much easier to lose in the United States than it is in Canada.

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<sup>8</sup> *Oil Pollution Act*, 1990, 33 U.S.C. 1321.